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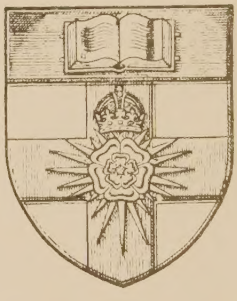

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of the Middle Temple, Barrister-at-Law

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Assistant Editors

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of Gray's Inn, Barrister-at-Law

HENRY SUMMERFIELD, ESQ.
of Gray's Inn, Barrister-at-Law

MISS WENDY SHOCKETT
of Gray's Inn, Barrister-at-Law

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MRS. ELIZABETH IWI
of Gray's Inn, Barrister-at-Law

DAVID IWI, ESQ.
of Gray's Inn, Barrister-at-Law

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RUSSELL *v.* RUSSELL

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Hobhouse, Lord Ashbourne, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), June 29, 30, July 2, 14, 1896, July 16, 1897]

[Reported [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 756, 771; 13 T.L.R. 516; 41 Sol. Jo. 660]

Divorce—Cruelty—Danger to life, limb, or health, bodily or mental, or reasonable apprehension of it.

For conduct by one spouse towards the other to be cruelty within the meaning of the Matrimonial Causes Acts and so entitle the petitioning spouse to a decree of judicial separation [or now of divorce] it must be such that it amounted to a danger to life, limb, or health, bodily or mental, or gave rise to a reasonable apprehension of it. The test is not whether the conduct complained of rendered it absolutely impossible that the duties of married life could be discharged or that the married state could be endured.

So **held** by Lord Watson, Lord Herschell, Lord Macnaghten, Lord Shand, and Lord Davey, Lord Halsbury, L.C., Lord Hobhouse, Lord Ashbourne, and Lord Morris dissentiente.

Restitution of Conjugal Rights—Defence—Cause for withdrawal from cohabitation—Conduct of petitioner short of legal cruelty.

Per Lord Herschell: The court has jurisdiction to refuse a decree for restitution of conjugal rights if the respondent proves conduct by the petitioner which, though it falls short of legal cruelty, constitutes just cause for the respondent withdrawing from cohabitation.

Notes. Considered: *Walker* v. *Walker* (1898), 77 L.T. 715; *Beer* v. *Beer* (1906), 94 L.T. 704; *Foster* v. *Foster*, [1921] All E.R. Rep. 490. Applied: *Statham* v. *Statham*, [1928] All E.R. Rep. 219. Considered: *Horton* v. *Horton*, [1940] 3 All E.R. 380; *Meacher* v. *Meacher*, [1946], 2 All E.R. 307. Applied: *Lauder* v. *Lauder*, [1949] P. 277. Considered: *King* v. *King*, [1952] 2 All E.R. 584; *Benton* v. *Benton*, [1957] 3 All E.R. 544. Referred to: *Jeapes* v. *Jeapes* (1903), 89 L.T. 74; *Baron* v. *Baron* (1908), 24 T.L.R. 273; *Greene* v. *Greene*, [1916] P. 188; *Moss* v. *Moss*, [1916] P. 155; *Fisk* v. *Fisk* (1920), 122 L.T. 803; *Rugg-Gunn* v. *Rugg-Gunn*

and Archer, [1931] P. 147; *Watt (or Thomas)* v. *Thomas*, [1947] 1 All E.R. 582; *Squire* v. *Squire*, [1948] 2 All E.R. 51; *Barker* v. *Barker*, [1949] 1 All E.R. 247; *Edwards* v. *Edwards*, [1949] 2 All E.R. 145; *Richardson* v. *Richardson*, [1949] 2 All E.R. 330; *White* v. *White*, [1949] 2 All E.R. 339; *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; *Foster* v. *Foster*, [1953] 2 All E.R. 518.

As to legal cruelty and restitution of conjugal rights, see 12 HALSBURY'S LAWS (3rd Edn.) 269-278, 283-285, and for cases see 27 DIGEST (Repl.) 293 et seq., 284 et seq. For the present statute relating to divorce, judicial separation, etc., see the Matrimonial Causes Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 388).

Cases referred to :

(1) *Holmes* v. *Holmes* (1757), 2 Lee, 116; 161 E.R. 283; 27 Digest (Repl.) 444, *3750*.

(2) *Burroughs* v. *Burroughs* (1861), 2 Sw. & Tr. 303; 30 L.J.P.M. & A. 186; 4 L.T. 374; 7 Jur.N.S. 610; 9 W.R. 680; 164 E.R. 1012; 27 Digest (Repl.) 287, *2321*.

(3) *Scott* v. *Scott* (1864), 4 Sw. & Tr. 113; 34 L.J.P.M. & A. 23; 12 L.T. 211; 164 E.R. 1458; 27 Digest (Repl.) 284, *2285*.

(4) *Paterson* v. *Paterson* (1850), 3 H.L.Cas. 308; 10 E.R. 120; sub nom. *Paterson* v. *Russell* (*or Paterson*), 15 L.T.O.S. 537, H.L.; 27 Digest (Repl.) 295, *2409*.

(5) *Evans* v. *Evans* (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest (Repl.) 294, *2398*.

(6) *Popkin* v. *Popkin* (1794), 1 Hag. Ecc. 765, n.; 162 E.R. 745; 27 Digest (Repl.) 297, *2423*.

(7) *D'Aguilar* v. *D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, *4256*.

(8) *Saunders* v. *Saunders* (1847), 1 Rob. Eccl. 549; 9 L.T.O.S. 496; 11 Jur. 738; 163 E.R. 1131; 27 Digest (Repl.) 485, *4238*.

(9) *Durant* v. *Durant* (1825), 1 Hag. Ecc. 733; 162 E.R. 734; 27 Digest (Repl.) 396, *3265*.

(10) *Bray* v. *Bray* (1828), 1 Hag. Ecc. 163; 162 E.R. 543; 27 Digest (Repl.) 308, *2553*.

(11) *Neeld* v. *Neeld* (1831), 4 Hag. Ecc. 263; 162 E.R. 1442; 27 Digest (Repl.) 295, *2404*.

(12) *Gale* v. *Gale* (1852), 2 Rob. Eccl. 421; 165 E.R. 1366; 27 Digest (Repl.) 305, *2510*.

(13) *Tomkins* v. *Tomkins* (1858), 1 Sw. & Tr. 168; 31 L.T.O.S. 122; 164 E.R. 678; 27 Digest (Repl.) 294, *2395*.

(14) *Milner* v. *Milner* (1861), 4 Sw. & Tr. 240; 31 L.J.P.M. & A. 159; 164 E.R. 1508; 27 Digest (Repl.) 304, *2508*.

(15) *Prichard* v. *Prichard* (1864), 3 Sw. & Tr. 523; 10 L.T. 789; 10 Jur.N.S. 830; 164 E.R. 1378; sub nom. *Pickard* v. *Pickard*, 33 L.J.P.M. & A. 158; 13 W.R. 188; 27 Digest (Repl.) 307, *2541*.

(16) *Furlonger* v. *Furlonger* (1847), 5 Notes of Cases, 422; 27 Digest (Repl.) 307, *2538*.

(17) *Forth* v. *Forth* (1867), 36 L.J.P. & M. 122; 16 L.T. 574; 15 W.R. 1091; 27 Digest (Repl.) 603, *5638*.

(18) *Cloborn* v. *Cloborn* (1630), Het. 149; 124 E.R. 414; 27 Digest (Repl.) 302, *2476*.

(19) *Westmeath* v. *Westmeath* (1826), 2 Hag. Ecc. Supp. 1; 162 E.R. 992; reversed (1827), 2 Hag. Ecc. Supp. 61; 162 E.R. 1012; on appeal (1829), 2 Hag. Ecc. Supp. 134, 148; 27 Digest (Repl.) 400, *3300*.

(20) *Mackenzie* v. *Mackenzie*, [1895] A.C. 384, H.L.; 27 Digest (Repl.) 366, *3027*.

(21) *Kelly* v. *Kelly* (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 18 W.R. 767; 27 Digest (Repl.) 298, *2434*.

(22) *Harris* v. *Harris* (1813), 2 Hag. Con. 148; 2 Phillim. 111; 16 E.R. 697; 27 Digest (Repl.) 301, *2461.*

(23) *Waring* v. *Waring* (1813), 2 Hag. Con. 153; 2 Phillim. 132; 161 E.R. 699; 27 Digest (Repl.) 309, *2574.*

(24) *Holden* v. *Holden* (1810), 1 Hag. Con. 453; 161 E.R. 614; 27 Digest (Repl.) 300, *2449.*

(25) *Holmes* v. *Holmes* (1755), 2 Lee, 116; 161 E.R. 283; 27 Digest (Repl.) 444, *3750.*

(26) *Milford* v. *Milford* (1866), L.R. 1 P. & D. 295; 36 L.J.P. & M. 30; 15 L.T. 392; affirmed (1868), 37 L.J.P. & M. 77, H.L.; 27 Digest (Repl.) 295, *2402.*

Also referred to in argument:

Montgomery Moir of Leckie v. *Lady Leckie* (1751), 6 Pat. App. 687, H.L.

Oliver v. *Oliver* (1801), 1 Hag. Con. 361; 161 E.R. 581; 27 Digest (Repl.) 301, *2460.*

Dysart v. *Dysart* (1847), 1 Rob. Eccl. 470; 5 Notes of Cases, 194; 11 Jur. 490; 163 E.R. 1105; 27 Digest (Repl.) 298, *2426.*

Curtis v. *Curtis* (1858), 1 Sw. & Tr. 192; 27 L.J.P. & M. 73; 31 L.T.O.S. 272; 164 E.R. 688; affirmed (1859), 4 Sw. & Tr. 234; 27 Digest (Repl.) 543, *4908.*

Mytton v. *Mytton* (1886), 11 P.D. 141; 57 L.T. 92; 50 J.P. 488; 35 W.R. 368; 27 Digest (Repl.) 299, *2443.*

Barlee v. *Barlee* (1822), 1 Add. 301; 162 E.R. 105; 27 Digest (Repl.) 288, *2329.*

Wallscourt v. *Wallscourt* (1847), 5 Notes of Cases, 121; 8 L.T.O.S. 478; 11 Jur. 134; 27 Digest (Repl.) 309, *2575.*

Appeal by the appellant, Earl Russell, against a decision of the Court of Appeal ([1895] P. 315), so far as that decision set aside a finding of a jury that his wife, the Countess Russell, had been guilty of cruelty towards him and set aside a decree for a judicial separation.

The parties were married on Feb. 6, 1890. On Nov. 28 of the same year the wife filed a petition for judicial separation on the ground of her husband's cruelty. The husband, by his answer, denied the acts of cruelty imputed to him. The wife delivered particulars of the cruelty charged in the petition, in which she imputed to him the commission of an unnatural offence. The case was tried before Butt, J., and a special jury in December, 1891, when the jury found that the husband had not been guilty of cruelty towards the wife, and the petition of the latter was, therefore, dismissed. On Dec. 8, 1891, there appeared in "The Hawk" newspaper an account of an interview between the wife and the editor, and it was alleged that she reiterated her charge against her husband, and intimated that, had an opportunity been afforded her, she could have established it. After the trial of her petition the wife refused to retract or apologise for having made such a charge. In April, 1894, the wife filed a petition for restitution of conjugal rights. The husband, by his answer, alleged that the petition had not been presented bona fide for the purpose of relief, and in a cross-petition for judicial separation said that the wife had been guilty of cruelty towards him in stating on oath that she believed that he had been guilty of the offence in question and in falsely and maliciously stating and publishing in writing that he had been guilty of the offence. The case came on for trial before Pollock, B., and a special jury, when the latter found that the wife had been guilty of cruelty towards the husband in making the charge, of which he was not guilty, and that her conduct and her correspondence subsequent to the first trial was not bona fide. Pollock, B., thereupon refused the wife's application for restitution of conjugal rights and granted to the husband a decree for judicial separation. On an appeal by the wife the Court of Appeal (Lindley and Lopes, L.JJ., Rigby, L.J., dissenting) allowed the appeal and dismissed the husband's cross-petition, but they held that the wife's conduct was such as to debar her from any right to relief upon her petition for restitution of conjugal rights and dismissed that petition. Both the parties appealed to the House of Lords, but the wife

withdrew her appeal, and the only question remaining to be decided was, whether the wife had been guilty of legal cruelty towards the husband in accusing him of an abominable offence, persisting in the charge after a jury had acquitted him of it, and refusing to retract it.

Sir R. Reid, *Q.C.*, *Robson*, *Q.C.*, and *Bargrave Deane* for the husband.
Murphy, *Q.C.*, *Rentoul*, *Q.C.*, *Barnard*, and *H. E. Miller* for the wife.

Their Lordships took time for consideration.

July 16, 1897. **LORD HALSBURY, L.C.**—I think that it is necessary to consider the nature of the jurisdiction which your Lordships are here exercising. It is, since the Matrimonial Causes Act, 1857, that of the spiritual court. The courts to which an appeal lies have to place themselves in the position of the ecclesiastical courts, and, except so far as the law has been altered by statute (a topic which requires separate treatment), to proceed on principles and rules as nearly as may be those on which the ecclesiastical courts acted previous to the passing of the statute.

In dealing with a question like the present, involving the relations of married people towards each other, the spiritual courts always proceeded to act as having full jurisdiction over domestic life. They investigated the whole conduct of the spouses, and they undoubtedly recognised no middle course between an order for renewed cohabitation between them and an order for separation from bed and board. So far I entirely concur with the Court of Appeal. Sir George Lee, in 1755, in *Holmes* v. *Holmes* (1), laid down in express terms that nothing could be offered in lieu of the decree that the wife should live with the husband, but such facts as would entitle her to a divorce in case she had brought a suit against him to be separated for cruelty. The case was appealed to the delegates, consisting of three of Her Majesty's judges, with Foster, J., at their head, and three learned civilians, and affirmed in the year 1757. That decision, so far as I know, in the interval between that date and the passing of the Act of 1857, has never been qualified or questioned, and I am, therefore, of opinion that was the recognised law of the spiritual court down to the passing of the Matrimonial Causes Act; and Sir Cresswell Cresswell, in *Burroughs* v. *Burroughs* (2), and Lord Penzance, in *Scott* v. *Scott* (3), both held that the same rule applied since.

That some general principles actuated the judges who from time to time exercised the jurisdiction with which we are now dealing is true, but, nevertheless, it is necessary to remember that each case was always one which raised a question of fact and degree. In dealing with such questions it is not always possible to disentangle what is decided as matter of law and what is decided as matter of fact, and it certainly cannot be laid down that whenever a divorce was refused that established the proposition that the cruelty charged, or even that of which some evidence was given, was not cruelty in point of law. The judge had in his own mind to determine what and how much was established to his satisfaction, so that he could act upon it, and further, whether the facts deposed to were caused by provocation or were mere exceptional and rare instances of bad temper, or the like; and, in reviewing the numerous cases decided, it is impossible not to be struck with the extreme caution with which each case is expressly decided upon the facts held by the judge to be proved, and the relation of such facts to the whole married life of the parties to the suit. In the view which the ecclesiastical courts took of the sanctity and perpetual obligation of the rights between the spouses it is intelligible enough that they should have sternly enforced the duty of continued cohabitation, except in such cases as, to use the phrase continually recurring, "when the facts show an absolute impossibility that the duties of the married life can be discharged." The phrase "impossibility" may, of course, be criticised, and it may be suggested that in no conceivable set of circumstances could such a phrase be justified; but I think that the argument may be retorted, since the circumstances which in the judgment

of everyone would justify such a decree are not always—and, indeed, not often—those which will make a wife sue for separation. It is the experience of almost everyone that they have known cases where the wife has clung to the husband and prevented his being punished when he has habitually been guilty of the most cruel violence and ill-treatment; but the question is whether, against the will of the suffering spouse, matrimonial duties are possible in any intelligible sense when the conduct of either towards the other must excite feelings of horror and even loathing.

Applying such a phrase as I have quoted, which, as I say, recurs again and again in the opinions of very learned judges, to the ordinary course of domestic life, I think that it is a very apt phrase to express in a short form the principle upon which, as it appears to me, all the cases have been decided. Each case, of course, has disclosed its own circumstances, and in the mixed judgment, where facts have to be found and principles applied, it is not surprising that no legal definition of cruelty should have been laid down. The most common case has, of course, been physical suffering inflicted by a man upon his wife, but if the view contended for on behalf of the wife in the present case were correct it would be almost impossible to suggest that a man could ever sue for separation from his wife for cruelty. And even in what I have described as the commonest cases what infinite degrees there must be in the application of any rule except the rule which I have insisted upon as the one rule laid down expressly or impliedly in all cases. Questions of provocation of cruelty, of frequency in the conduct complained of, must come in review, and be the subject of averment; and, treated as questions of evidence, they were always subject to the calm judgment of a tribunal which knew how to discount the exaggerations of two angry people, and weigh the facts, and consider whether the facts, when so discounted, ought to prevent them from living together.

It appears to me, therefore, in reviewing what is said in the various cases that have been brought to our notice, that we ought carefully to note what facts the judges have assumed to be proved. I think that no better illustration of this can be found than in *Paterson* v. *Paterson* (4), decided in this House. LORD BROUGHAM himself carefully points out what he regards as having been proved. The noble and learned lord, in dealing with the facts, begins by saying (3 H.L. Cas. at p. 333) that, "not merely violence, but things far short of violence would justify the court in pronouncing a separation," and, differing from LORD JEFFREY as to what was proved in the case, he gave as an illustration of what would justify the court in pronouncing a separation—

> "the holding her up to scorn before her own servants; ordering her servants not only to disobey her, but to join in the chorus of hissing against their mistress, his wife, the mother of his children, as the head of his family."

LORD BROUGHAM goes on to add these significant words (ibid.):

> "When LORD JEFFREY puts that as a case I have only to answer it by saying that it is a very good case to support a proposition which I do not deny, and which nobody seriously denies, videlicet, that it is not necessary that there should be personal violence to constitute a ground for divorce."

He then goes on to show (ibid. at pp. 333, 334) what he held to have been proved in the particular case, which consisted in

> "Withdrawing from her society, coldness towards her, leaving her apartment; telling her father that he will on no account ever renew his cohabitation with her, stating that he is wretched in consequence of his marriage—all things very painful to the feelings of the woman, all things very unhappy for the man, but anything rather than those things which LORD JEFFREY supposes in the case put."

It may be that LORD BROUGHAM undervalued some of the evidence in that case; that he minimised the effect of some of the proof offered. It may be even that

some of your Lordships would not agree with some of the conclusions which the noble Lord derived from the evidence. But it appears to me that that is nothing to the purpose. The principle of law that he lays down must be applied to the state of the facts, which he rightly or wrongly assumed to be proved, and nothing can be more emphatic than his negation of the proposition that personal violence, either threatened or inflicted, is an essential condition of the relief claimed by the petitioning spouse.

It is, to my mind, very obvious why no judge has ever yet attempted to propound an exhaustive definition of cruelty. If, as I have said, the spiritual court regarded married life as a whole, it would be absolutely impossible to lay down in the iron framework of a definition that which would constitute such cruelty as would necessarily justify separation; the questions of fact and degree would qualify almost any proposition that could be formulated; for example, a slight blow under great provocation, and on a single occasion during a long life, could hardly be suggested as a ground for separation, though upon that hypothesis, personal violence existed. On the other hand, it is possible to conceive a course of treatment which would make the continuance of the marriage bond, involving the obligation of the continued consortium, more terrible than the severest bodily suffering.

Whether the Court of Appeal were right or wrong in the middle course which their judgment suggests between a decree for restitution and a decree for judicial separation is not perhaps very material here in the actual form of the judgment which your Lordships will be asked to pronounce, since the lapse of the cross-appeal has rendered it unnecessary. But it cannot be doubted that the Act of Parliament under which the Court of Appeal considered themselves justified in arriving at the middle course made no difference in the law of what constituted legal cruelty, and I think that we must look at that question uninfluenced by difference of consequences that would follow if the law has been altered in respect of the remedy which a complaining spouse may obtain.

If one were to review each case in turn and extract from the judgments of the learned judges who have from time to time exercised the jurisdiction in question I think that it would be impossible to reconcile their judgments, even the judgments of the same judge, unless by giving a non-natural sense to the words used—e.g., attributing to an ecclesiastical judge the use of the word cruelty in a special sense in a judgment dealing with the question of cruelty in a cause of divorce a mensa et thoro. But one must read them by the light of a very familiar canon—that one must read a judgment, however general in terms, as having reference to the particular facts with which the judgment is dealing. As no judge has ever affected to define what cruelty is exhaustively, so no judge has, in my view, ever affected to prescribe what individual elements would go to make up cruelty; and in this case, if your Lordships' judgment should be against the appellant, it must go to the extent of saying that there was no evidence to go to the jury which justified them in finding that the course of conduct pursued by the respondent amounted to cruelty. If there was evidence for the jury then POLLOCK, B.'s, direction was right, and if his direction were wrong it would not justify a judgment for the wife unless, there being no evidence for the jury, POLLOCK, B., was wrong in leaving it to them. If the narrow proposition, that the cause of separation must be such as to cause injury to life or limb or health be sound, it is manifest that in many of the cases reported it would be ridiculous to suggest peril of life or limb, and the speculation as to health must become elastic according to the health and strength or feebleness of the particular person towards whom cruelty is exercised. I am not certain that, apart from all other questions which arise in this case, it would not be sufficient to say here that persistent accusations of the character which existed in this case, and made by a wife, might not be held to raise a reasonable apprehension of danger to health. There are few people who are familiar with the administration of the criminal law who will not acknowledge that madness and suicide are not uncommon consequences of persistent accusations of this character.

A It remains to consider whether, in this case, there was evidence for the jury of such cruelty as would have justified the court in pronouncing a decree of separation. It is a painful and a disgusting task to go through the evidence, but I think that I can summarise it sufficiently for what I have to say without entering into minute details. It is, perhaps, sufficient to describe the wife's conduct in this way. She persistently made accusations against her husband which, if believed, would drive B him from human society; she made them where they would be most likely to be spread abroad, and, as, both in criminal and in civil jurisprudence, people are taken to intend the reasonable consequences of their acts, she must have contemplated that all who encountered her husband would regard him with loathing and horror. She did this, as the jury have found, without any belief in her abominable and disgusting accusations, and with a base motive of extracting better pecuniary terms C from the husband whom she thus vilely slandered. I know that it has been said that the husband may safely disregard accusations which have been challenged to proof, and where the proof has signally failed. I regret to say that I cannot acquiesce in that suggestion. It is true that in this House and in every court where this question has been litigated Lord Russell has vindicated himself; but how many people are there who will have had the opportunity of judging from the evidence and giving it D its true weight? How many people are there who take the trouble to investigate any case in which they have no personal concern, much less a case of this repulsive character?

For my own part I believe that an accusation of this kind is an incurable injury to the person against whom it is directed. If the jury were right upon the facts that they have found, can anyone conceive a court enforcing cohabitation with such a E woman? I think that there can be but one answer to that question; and yet, as I have pointed out already, but for the Act of Parliament there can be no doubt, on the authorities, that the court, if deciding to refuse separation, would have been compelled, at all events before the Matrimonial Causes Act, 1884, both to decree cohabitation and enforce it by the imprisonment of the husband who should refuse to comply with the order. As I have already said, it is immaterial for the purposes F of your Lordships' order whether the construction placed upon it by the Court of Appeal be right or wrong; but I must express my dissent from that construction. As the court itself declares, the Act in terms relates only to the consequences of not obeying a decree of restitution when made. It does not, I think, in any way refer to the grounds on which such a decree can be refused. It certainly does not in terms give the court any power to refuse a decree which it did not possess before G the passing of the Act. It attaches certain consequences to the refusal to obey a decree, and gives certain rights to the injured spouse in lieu of the old authority which a court possessed to enforce obedience by attachment and consequent imprisonment. I confess that I am unable to follow the Court of Appeal in saying that since 1884, by necessary implication, the court must have power to refuse a decree for restitution where the result will be to compel the court to treat one H spouse as deserting the other without reasonable cause contrary to the real truth of the case. It seems to me that this is reading into the Act of Parliament provisions which are not there, and giving a construction to provisions that are there which it is very difficult to imagine the legislature to have contemplated, the purport and meaning of the statute apparently being simply to provide a new remedy where a decree for restitution had been granted and where the person I disobeyed the order. I cannot conceive that any alteration of the law was contemplated other than that which was expressly enacted. For these reasons I think that the order appealed from should be reversed and the judgment of POLLOCK, B., restored.

LORD WATSON.—Being in agreement with the majority of your Lordships that the decision of the majority of the Court of Appeal was according to law, I am unable to concur in the opinions which have been expressed by the Lord Chancellor.

The considerations which have led me to this conclusion are fully expressed in the judgment which will be delivered by LORD HERSCHELL, and, therefore, I think it unnecessary to occupy the time of the House in stating them in my own language. I beg leave to move that the order appealed from be affirmed and the appeal dismissed with costs.

LORD HOBHOUSE.—The facts which led up to the still pending litigation between the Earl and Countess Russell in the Divorce Court admit of being stated in a moderate compass.

The parties were married in February, 1890. Soon after the marriage they disagreed, and separated for a while. Then they lived together again till June, 1890, when they separated for the second time. Since that time they have never lived together. On Nov. 28, 1890, the countess presented a petition praying a judicial separation from the earl on the ground of his cruelty. She filed particulars in January, 1891, and there made allegations importing that the earl had been guilty of an odious crime in concert with one Roberts. At the hearing of the petition on Dec. 4 this charge was completely refuted, and it was withdrawn by the countess's counsel. The jury acquitted the earl of all the charges of cruelty, and the petition of the countess was dismissed with costs. On Dec. 8, 1891, there was published in a newspaper called "The Hawk" a statement made by the countess to the editor, the gist of which was that she had in her possession letters from the earl's relations supporting her charge, and that she did not produce them at the trial partly out of regard for his family, partly from misapprehension of the course of the proceedings. On Mar. 8, 1892, the countess commenced a written correspondence with the earl proposing a meeting. They never did meet, except once, accidentally, at a railway station; but the correspondence continued down to Dec. 16, 1892, when the earl refused to continue it, because the countess refused to withdraw charges which he said that she knew to be infamous and false.

The correspondence may be summarised as follows. On the earl's side, he welcomed the overture of the countess as "the first signs of sorrow for the cruel wrong you have done me." He intimated a forgiving temper, but required her to state that she now disbelieved in her charges, and was sorry to have made them. If she would do that, he offered to meet her at the office of his solicitor. He refused then to make her an allowance for which she asked, partly on account of the expense which she had caused him and of claims she was still making, but mainly on account of her practical re-assertion in "The Hawk," and her continuance of, the charges which had been found to be false. To those positions the earl steadily adhered. The countess, on her part, said at first that people had poisoned her mind. But she persistently evaded either retraction or apology. On the contrary, as the correspondence proceeded, she dwelt more and more upon her charges, and upon the evidence in her hands, and upon her determination to bring them into publicity if sufficient provision was not made for her. She alleged that the people who poisoned her mind were the earl's relations, and that she had their letters in her hands, and that she would not apologise till they came forward to explain them. She wrote to the earl's uncle, Mr. Russell, saying that she had kept his letters back at the trial because he, with others, begged her not to repeat what they had said of the earl. She added:

> "But the time has now arrived when I must protect myself and vindicate my character in the eyes of the world. There are two things to be done: Either that you all recognise me publicly, or that I make all the family letters public for the world to draw its own conclusions."

On Dec. 13 she wrote to the earl saying that she had a sworn affidavit about Roberts which would show that no responsibility rested with her; also that she had detectives' reports, meaning detectives by whom the earl was being watched, and

that she ought not to be asked to apologise till the earl had seen those things, and had given a full explanation of all that he had been accused of. She wrote:

> "Before seeing you I quite meant something should be done, and thought the best plan would be to get a newspaper to print all the documents I hold in a pamphlet, and then, if the world thought an apology was due, to publicly apologise. . . . I might word the thing in this way, saying you refused to see me or support me till I apologise; then print everything to show my reasons for believing you guilty; then if the world thought I owed you an apology, to do it most willingly."

On Dec. 19 she wrote to the earl's uncle, Mr. Stanley, to the same effect.

Such was the condition of affairs when the present litigation began. On April 6, 1894, the countess brought a suit in the Divorce Court, praying for restitution of conjugal rights. That was met by the earl's counter-demand for judicial separation on the ground of her cruelty. Soon after the opening of the case the countess's counsel informed the court that he was instructed to say that the countess was satisfied that her charges about Roberts were without foundation, but that her belief in it was excused because she had written materials and letters in her possession. In the course of the evidence, however, it turned out that the countess had not, and never had, any of the materials which, through "The Hawk," she invited the public to believe that she had to convict the earl, and repeatedly insisted on as her justification during the year 1892—not a letter, nor an affidavit, nor a detective's report, nor any incriminating statement from any of the earl's relatives. Her only pretence of justification was a letter of a very shameful character written to her as far back as the year 1890, before the first trial, conveying imputations against the earl which have been denied and disproved. In short the countess's representations of her case for charging the earl with crime, from December, 1891, when she used the editor of "The Hawk," down to January, 1893, when she last wrote to Mr. Stanley, were a series of falsehoods, not abandoned till the present case was in course of trial. Pollock, B., who tried the case, instructed the jury that the countess was entitled to a decree for restitution unless the earl established a case of cruelty against her, and he put to them two questions. The first was whether the countess's conduct amounted to cruelty. The second was whether she had brought her charges since the first trial in good faith. On the question of cruelty he explained to the jury the doctrine of Lord Stowell, in *Evans* v. *Evans* (5), pointing out that the criterion of danger was not alleged to cover all possible cases of cruelty, and that Lord Stowell could not

> "have had in his mind a case where either husband or wife was notoriously, openly, from week to week, from month to month, and from year to year, raising a charge against the other of the commission of a horrible offence, and that almost habitually."

He stated:

> "The complaint against her is that from that time, after the trial, although she had heard the verdict in favour of her husband at the close of the trial, she thenceforth wrote letters, made statements, pursued her husband, practically insisted on the same charge . . . not by one single act or one single letter, but by a continuance and persistence in conduct of that sort."

The jury found that the countess had been guilty of cruelty. On the second question the learned judge asked the jury to say whether the countess did the acts in question honestly believing that she was making a charge that was true, or whether she did them not honestly believing that they were true, but for some ulterior purpose. On this the jury found that in her conduct and correspondence subsequent to the first trial she did not act bona fide. On these findings the court pronounced a decree of judicial separation.

The countess then moved the Court of Appeal to set aside that decree and to enter a decree for her. On this appeal the learned judges differed in opinion. LOPES and LINDLEY, L.JJ., defined cruelty thus: "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it." For brevity's sake, I refer to this definition afterwards as the doctrine of danger. Then, after carefully examining the authorities, the learned judges held that there was no evidence of legal cruelty which ought to have been left to the jury, and, therefore, that the earl was not entitled to a decree for judicial separation. Then came the question whether the countess was entitled to a decree for restitution. The learned judges examined the authorities minutely to ascertain whether in the ecclesiastical courts there was any middle course between granting a decree for restitution or granting one for separation. And they found that, notwithstanding some startling results, there was none, and that such was the settled law down to the Matrimonial Causes Act, 1857. After that Act it was urged that, as a new ground for separation and a new practice had been created, there was now a middle course. But SIR CRESSWELL CRESSWELL held otherwise, saying that it would be very dangerous to introduce a new rule (*Burroughs* v. *Burroughs* (2)). But then the learned lords justices held that, indirectly, the Matrimonial Causes Act, 1884, has given to the court a power to refuse a decree for restitution which it had not got before. In 1857 desertion without cause was introduced as a ground for judicial separation. In 1884 failure to obey a decree for restitution was made equivalent to desertion without cause. It is impossible to say that the earl has deserted his wife without cause. But if a decree of restitution was made, and he failed to comply with it, the law would compel the court to say that. Therefore, they held that they were relieved from the necessity of making such a decree. RIGBY, L.J., held that legal cruelty had been established; but as the rest of the court thought otherwise, the earl's petition for separation was dismissed. The countess's petition for restitution was also dismissed. Both parties appealed from this decision. The appeal of the countess has been withdrawn, so that her claim to restitution has been finally decided in the negative. The earl's appeal now stands for decision.

Such is the outline of the material facts which have caused this litigation, and of the litigation itself. The question is whether the countess has been guilty of such cruelty as, according to the principles and rules on which the ecclesiastical courts acted down to the Act of 1857, which were continued in operation by that Act, requires the court to grant a decree of separation against her. Whether or no her petition for restitution has been rightly dealt with is a point which has not been argued on the present appeal, and I say no more about it except this—that I hardly understand how the indirect effect of legislation on the subject of desertion without cause can stop short at the exact point of refusing a wife's petition for restitution, and, having gone so far, can fail to draw after it the established consequences of such a refusal. Assuming the present decision to be right, it is but an indirect and quite unforeseen effect of new law directed to another object. It may relieve the minds of judges from the terrible responsibility which would have pressed on the ecclesiastical judges in ordering the husband to take back his wife. But the legal question still remains the same as before. Would the ecclesiastical courts in 1857 have been bound to make such an order? For, as shown above, the law has been constant that, unless the husband can demand separation, the wife can demand restitution.

Starting from this point, I cannot persuade myself that any judge would have felt himself so bound by precedent as to compel an innocent husband to take back a wife guilty of falsehood and persecution such as has characterised the conduct of the countess in this case. It appears to me that, though the doctrine of danger has sometimes been laid down by judges in terms more absolute than can be justified when the view is extended beyond the particular case under decision, on the whole they have been cautious not to attempt exhaustive definitions excluding other forms of cruelty which may occur in the infinite variety of human affairs. That

violence and bodily danger are far the most common forms of cruelty accounts for the frequent repetition of the formulæ relating to such things. But we find not only judicial recognition that there may be other forms of cruelty, but judicial dicta and decisions taking a wider range, and quite irreconcilable with the rigid line by which it is now sought to confine the jurisdiction of the court.

The argument for the countess is rested by her counsel on a legal conception of cruelty said to be fixed by decisions of ecclesiastical courts. They must then take the ecclesiastical doctrines as a whole, and submit to be tried by the question whether the ecclesiastical courts would have granted a decree of restitution to the countess; and I go on to examine the authorities bearing on that question. Everybody begins the discussion of this subject by reference to LORD STOWELL's judgment in *Evans* v. *Evans* (5). The doctrine of danger was laid down by him with the caution to be expected from so judicial a mind. The case called for no other doctrine. Violence and danger were alleged by the wife. There were many other charges, some of them very trivial, and all too trivial to found relief upon. LORD STOWELL refuses to define cruelty. He lays down a wider principle than that of danger—namely, "an absolute impossibility that the duties of married life can be discharged;" and he points out that in a state of personal danger no duties can be discharged—that is, such a state falls within the wider category. "What falls short of this is" to be—shut out? No; but "to be admitted with great caution." He intimates that there are cases, though few, in which what merely wounds the mental feelings is to be admitted as cruelty. Such is the cautious way in which the great judge handles this delicate topic. He is very far indeed from laying down the rigid line which is now insisted on. But LORD STOWELL could not find any case in which divorce had been granted except on the doctrine of danger. "The court," he says, "has never been driven off this ground." That is interpreted now as if he had laid down that it was not lawful for the court to take any other ground.

What, then, were the cases which he had in his mind when he intimated that danger was not an indispensable condition for divorce? For an answer to this question we are not left without light from LORD STOWELL himself. In *Popkin* v. *Popkin* (6), during a discussion on the admission of articles, he said (1 Hag. Ecc. at p. 768) that a husband's

> "attempt to debauch his own women servants was a strong act of cruelty, perhaps not alone sufficient to divorce, but which might weigh in conjunction with others as an act of considerable indignity and outrage to his wife's feelings."

In *D'Aguilar* v. *D'Aguilar* (7) the wife alleged that the husband spat upon her. In admitting the article, LORD STOWELL said: "Nothing can be more gross cruelty;" and he refers to a case in which a prohibition had been moved for, and was refused, "the only act of cruelty pleaded being spitting in the face." The same disgusting subject is referred to by DR. LUSHINGTON, in *Saunders* v. *Saunders* (8), thus (1 Rob. Eccl. at pp. 561, 562):

> "LORD STOWELL declares it to be legal cruelty. . . . In truth, however, does such a question require any authority at all? So gross a personal outrage would be insufferable even in the lowest grade of life."

He goes on to say that such an outrage is worse than threats of personal ill-usage. We have, then, two instances of ill-treatment affirmed by LORD STOWELL to be legal cruelty without any reference to the presence of danger. I am speaking of the quality of cruelty, or legal cruelty, which, as it is now asserted, cannot exist without danger. The amount necessary to support a decree for divorce is another question, to which I will address myself presently.

In 1825 *Durant* v. *Durant* (9) was decided. The husband had accused his wife of an intrigue with the children's tutor. SIR JOHN NICHOLL expressed himself thus (1 Hag. Ecc. at p. 770):

"Is there any woman who would not have considered an act of personal violence inflicted in passion, or even deliberately and maliciously, trivial and pardonable in comparison with this accusation—a charge made, not in the haste and error of the moment, but kept up and persevered in to the present time? If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision." A B

This is a clear opinion that such a charge has the quality of legal cruelty, though the circumstances of that case did not compel the judge to decide whether it was enough of itself to warrant a divorce. In 1828 *Bray* v. *Bray* (10) came before the same learned judge. The wife applied for the admission of an article supplying proof that her husband had falsely charged her with incest. The article was admitted, SIR JOHN NICHOLL saying: C

"It is not, I think, possible to conceive cruelty of a more grievous character (except perhaps great personal violence) than the accusation by this husband against his wife."

It does not appear what was the result of the suit; but again the quality of legal cruelty was attributed to a false and foul accusation, without any reference to the D doctrine of danger.

In 1847 DR. LUSHINGTON decided *Saunders* v. *Saunders* (8). This eminent judge is one who has stated the doctrine of danger most emphatically, as in *Neeld* v. *Neeld* (11). Indeed, it was said at the bar that he was the first to state the doctrine without qualification. Perhaps he meant nothing more than that, if violence was the ground assigned for divorce, it must be violence enough to raise the case of E danger. If he meant more, it only shows in a striking way how impossible it is for those who lay down a rigid definition of cruelty to adhere to it when brought face to face with actions which everybody feels to be cruel, but which the definition will not fit. For he emphasises and enlarges on LORD STOWELL'S treatment of spitting as in the category of legal cruelty, and as an outrage worse than threats of personal ill-usage. Yet no danger was there alleged in connection with the act; and the idea F of danger was only arrived at by ulterior speculations of what might happen from a person who had done such a thing.

In 1850 the House dealt with the Scottish case of *Paterson* v. *Paterson* (4). The suit was by the wife for separation. The Lord Ordinary refused it. In his interlocutor he rested the judgment on this ground: G

"In respect the libel is laid upon a series of insults and indignities said to have been offered by the defender to the pursuer unaccompanied with personal violence or any menace thereof,"

and that it is settled by authority that such a libel is not relevant. The Court of Session took a graver view of the allegations, and decided in favour of the wife. This House, in which LORD BROUGHAM was the only law lord who sat, thought that H the Court of Session had misapprehended the facts of the case, and reversed their decision. But it refused to restore the interlocutor of the Lord Ordinary as it stood, because it contained an erroneous recital of the law, and it ordered that recital to be struck out. That was the judicial act of this House—a decision that, at least according to the law of Scotland, it is not necessary for a wife to allege personal violence or any menace thereof in order to obtain divorce. LORD BROUGHAM'S observations I during the argument and in moving judgment show exactly what was in his mind. He states by way of hypothesis a case strongly resembling the present one—namely, that of a man continually falsely and publicly charging his wife with criminal conduct—and he says there is little doubt that the judicial dicta and opinions to which he had referred

"would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured, and rendering

life almost unbearable, the courts of the country would extend the remedy of a divorce a mensa et thoro."

His opinion seems to me to be quite in accordance with the doctrine of *Evans* v. *Evans* (5), and to express what from his other judicial utterances we may infer to have been the kind of case in LORD STOWELL'S mind when he spoke of cases not covered by the rule of danger.

In *Gale* v. *Gale* (12), decided in 1852, the wife alleged that three days after her marriage her husband accused her of incest. SIR J. DODSON admitted the article, saying that the charge is not per se sufficient to constitute legal cruelty, but that it might be coupled with other averments. I take SIR J. DODSON to have meant by "legal cruelty" cruelty sufficient to warrant a divorce. He could hardly mean that there was no quality of cruelty in it such as the ecclesiastical courts would recognise. That would not only be contrary to *Durant* v. *Durant* (9) and *Bray* v. *Bray* (10), but, as I venture to think, contrary to common feeling and common sense, which must enter largely into questions of this nature. But it might be that such an accusation, though false, was made under circumstances palliative of the offence, and that if made in a fit of angry suspicion, if not persisted in or not blazoned forth to the world, or used as an engine of terror against the wife, it would not per se be considered as sufficient cruelty for a divorce. The report is silent as to all such circumstances: it mentions only the fact of a single wrongful accusation.

That is no authority against the separation sought in the present case. In 1858 occurred the first case in which a jury was employed to decide this question: *Tomkins* v. *Tomkins* (13). It was a suit by a wife, alleging personal violence and blows as constituting cruelty. SIR CRESSWELL CRESSWELL told the jury that he must direct them what acts constitute legal cruelty, and they must find whether the acts done were cruelty or not. He points out the difference between the position of a jury, who must decide quickly, and that of a judge, who can give time and thought to his decision, and shows the necessity for great caution and circumspection. On the merits of the case he refers at length to *Evans* v. *Evans* (5), and puts it to the jury that there must be bodily hurt, not trifling or temporary pain, or reasonable apprehension of bodily hurt. Thus SIR CRESSWELL CRESSWELL lays down the law after the Matrimonial Causes Act, 1857, on the same lines as existed before. The doctrine of danger which he laid down was applicable to the case before him, and sufficient for it. But his judgment in *Milner* v. *Milner* (14), which occurred in 1861, shows either that he never looked on that doctrine as sufficient to cover all possible events, or, if he meant to pronounce a rigid rule, that he, like DR. LUSHINGTON, found himself unable to maintain it in the face of gross cruelty, unaccompanied by danger. There the wife sued for divorce on the ground of adultery (which was proved) and cruelty. There was no substantial case of cruelty except for a single incident, on which, according to the report, the whole decision turned. The wife had followed her husband in the street, when he behaved to her in a way that led a bystander to think her a prostitute, and so to insult her. On this SIR CRESSWELL CRESSWELL said:

> "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated."

After referring to the evidence, he adds: "It is a case of the grossest and most abominable cruelty." Not a word is said about danger to the wife. The whole decision is rested on the outrageous insult by the husband.

In *Pickard* v. *Pickard* (15), decided in 1864 by LORD PENZANCE, the court admitted, in another direction, a wider range of considerations as justifying a decree for separation. The suit was by the husband, complaining of the violence and cruelty of his wife. It had been laid down by DR. LUSHINGTON in *Furlonger* v.

Furlonger (16) that, subject to distinctions necessarily founded on difference between the sexes, the same rule of danger must prevail, whichever was the complaining party, and that necessary protection was the foundation of all separation. LORD PENZANCE points out that the man can seldom be afraid of danger from his wife's violence. He says:

> "I do not believe that his wife ever intended, or is likely, to do him serious harm by personal violence. Violence by the husband, and similar conduct by the wife, hardly deserves to be considered in the same identical light. . . . But if the physical effects of violence by the wife are less, the moral results are immeasurably greater. . . . Worse than all, the man is incited to the retaliation of force, perhaps driven to violence in self-defence. And if, holding its hands, this court refuses to relieve from the perils of provocation, what security is there for the safety of the wife herself?"

He decreed for separation on this ground. In *Forth* v. *Forth* (17), decided in 1867, the same learned judge applied the same principles.

It is certain that the doctrine of danger to life and limb means danger to the party complaining, and danger as proved by the acts of the party complained of. And yet in these cases an eminent judge has acted quite independently of this doctrine, and has decreed separation when there was no danger to the husband who asked for it, and no ground laid for suspecting any to the wife who resisted it. This he did, first, because of the greater moral effect of violence by the wife; and secondly, on a broad view of matrimonial relations, and of the possible consequences of continued cohabitation. Whether these considerations do not open a wider range to the discretion of the court than was before contemplated, may be doubted; but they certainly show that, in the opinion of LORD PENZANCE, there existed no such rigid rule as is now contended for, and that proof of danger is not a necessary condition of judicial separation. It was enough for him if the conjugal relations had been so shaken that further quarrels and remote consequential danger to either party might be inferred if cohabitation were resumed. If, then, the court is to speculate on the remote possibilities of exasperating conduct and retaliation by the injured party, when the case, as proved, contains no evidence of such things, such speculations are at least as allowable in the present case as in those before LORD PENZANCE. Indeed, they may find room in every case of bitter quarrel, and thus the supposed doctrine of danger would be reduced to a nullity.

With regard to the above-cited judicial opinions, it has been suggested that opinions expressed on the discussions of articles to the effect that acts not importing danger may be admitted to proof, do not amount to decisions that such acts are legally cruel, because acts not legally cruel may be brought in to aggravate the effect of acts which import danger, and, therefore, are legally cruel. Likewise, when acts not importing danger have been characterised as cruelty, and have been relied on to support decrees for divorce in cases where acts of personal violence have also been committed. It may be that in a question of conjugal conduct many acts not cruel, legally or at all, can be used to make it more probable that disputed allegations of cruel conduct are true. But in the cases cited the judges speak of the acts in question, not as proving that some other cruel act was committed, but as cruel in themselves; and I cannot find any trace of evidence that when speaking of cruelty they were not speaking of legal cruelty.

If an ecclesiastical judge, discussing a purely legal question on the admission of articles or otherwise, says of a man's conduct that it is cruel, it must be assumed that he means cruel in the sense of ecclesiastical law, unless he explains that he means something else. When SIR JOHN NICHOLL says of a false accusation of adultery that acts of personal violence are trivial compared with it, must he not mean that the two things are alike in their cruel nature, but that the false accusation is the more aggravated cruelty? When DR. LUSHINGTON says of spitting that it is worse than threats of personal ill-usage, must he not be taken to put the

two compared offences on a par in quality, and then to say which is the more heinous? In point of fact, the evidence of violence in *Saunders* v. *Saunders* (8) was not very cogent; and it is pretty plain that but for the act of spitting DR. LUSHINGTON would not have decreed a divorce. Of the most important of the charges, he only says that the husband's conduct was very offensive, and that there was some, not aggravated, violence. But when he comes to the spitting, he uses the strong language cited above, and he makes it the main ground of his judgment. Certainly he adds that, "if taken singly," he need not say what the effect would be, and he couples it with the other misconduct. But suppose the husband were in the habit of spitting in his wife's face, and that in public, is it conceivable that either LORD STOWELL or DR. LUSHINGTON would have refused a divorce on that ground alone? Looking at their language, I cannot conceive it. Nor can I conceive that they would not have put into the same category ruinous accusations by a wife, publicly made and repeated for a long time, though known to her to be false. Certainly, if judges have characterised acts as cruel, not meaning that they were cruel for legal purposes, they have used misleading language, such as we ought not to impute to them.

The conclusion which I draw from the authorities is that there is no rigid rule to exclude from the consideration of judge or jury a case where acts, cruel in their nature, are so grave as to destroy the foundations of conjugal life. I do not think that any rule can be laid down less wide than that of LORD STOWELL, "that the causes must be grave and weighty, and such as to show an absolute impossibility" (meaning, of course, a moral impossibility) "that the duties of married life can be discharged." The fact that violence and personal danger are far the most common ground alleged for separation has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But these are only one class of the broader category indicated by LORD STOWELL. It is said that we cannot define "impossibility" of discharging duties. Certainly not; any definition would be either so wide as to be nugatory, or too narrow to fit the ever-varying events of human life. Neither can we define other terms applicable to human conduct, such as "honesty" for instance, or "good faith," or "malice"; or, to come nearer to the present case, "danger," "reasonable apprehension," "cruelty" itself. Such rudimentary terms elude a priori definition; they can be illustrated, but not defined; they must be applied to the circumstances of each case by the judge of fact, which in this case is a jury directed by a judge, and controlled, if erring in principle, by the court above. I do not know any better or other way of deciding controversies on such points.

I fail, too, to share the apprehensions of danger and of litigation which have been urged on us as likely to occur unless the conduct of the Countess Russell is excluded from the category of legal cruelty. I think that the cases other than those of danger will still be few, and will still be admitted with great caution. Such a case as the present is, as far as legal records go, unexampled, and we may hope that it will not soon be imitated. That the conduct of the countess was cruel in its nature, as men deem cruelty, I cannot doubt, nor that it was of singular enormity. Cases were put during the argument where there might be extreme cruelty without personal danger to the victim. One was that the wife of a tradesman might go about to ruin her husband by falsely telling his customers that he adulterated his goods. Another was that the wife of a soldier might destroy his professional position by falsely stating that he was skulking at home when he ought to have been in the field. Would any court, it was asked, venture to compel the husband to receive into conjugal intercourse a disloyal wife who had abused her position and her presumed knowledge of his conduct to inflict the greatest of injuries on him? Such supposed cases are, to say the least, no worse than the present one. They are only illustrations of the impossibility of limiting cruelty by the doctrine of personal danger, and of the necessity of resort to the wider question whether it is conceivable that the duties of the married state can henceforth be discharged.

There are injuries worse than any personal danger. There are false accusations of crime and dishonour, such as have driven men to despair and suicide. Earl Russell appears to be a man of robust fibre, who can bear up against slander. But that cannot alter the nature of his wife's acts, nor can the cruelty or malignity of them depend upon the nerves of her husband. It still remains true that after her injurious charge against him had been disposed of and openly withdrawn by her counsel, she renewed it; gave vent to it in a newspaper; invited people to believe that she possessed written proofs of it, and had received written and oral incriminations of her husband from his nearest relatives; asserted that she had kept back her proofs at their entreaty, and out of compassion for them; and threatened further publication of these things from time to time during many months. All this is persistent falsehood and cruelty, with the object of inflicting pain and terror; and it is not made any better if its ultimate object was to frighten the earl into making a pecuniary settlement satisfactory to the countess.

It must always be borne in mind that the defence of the countess rests wholly on the assertion that her conduct does not fall within a definition laid down by the ecclesiastical courts. It is that position which makes it necessary to examine minutely what the ecclesiastical courts have said and done in the few cases which have presented features of cruelty apart from personal violence. Putting aside *Gale* v. *Gale* (12) as quite uncertain in sound, I cannot find that any one of the acts characterised as legal cruelty in the cases above cited has been alleged by any judge not to bear that character. All this was said and done by LORD STOWELL in *Evans* v. *Evans* (5), *D'Aguilar* v. *D'Aguilar* (7), and *Popkin* v. *Popkin* (6); by SIR JOHN NICHOLL in *Durant* v. *Durant* (9) and *Bray* v. *Bray* (10); by DR. LUSHINGTON in *Saunders* v. *Saunders* (8); by LORD BROUGHAM in *Paterson* v. *Paterson* (4); by SIR CRESSWELL CRESSWELL in *Milner* v. *Milner* (14); and by LORD PENZANCE in *Pickard* v. *Pickard* (15) stands uncontradicted. In it I find ample authority for saying that by the law of the ecclesiastical courts, cruelty has never been confined to cases of personal danger, but has been judged by the wider and more reasonable criterion expressed by LORD STOWELL—namely, whether or no conjugal duties have become impossible between the litigant husband and wife. In my judgment, they have become impossible in this case, so far as impossibility can be predicated of human feeling and action. I think that the conduct of the countess transcends in cruelty and enormity the actual circumstances on which the various judicial opinions above cited have been given, and equals the hypothetical case put by LORD BROUGHAM. Therefore, I conclude that POLLOCK, B., put the case rightly to the jury, and that his judgment founded on their verdict should be restored.

LORD ASHBOURNE.—The decision in this case turns solely upon the question whether the appellant has made out that Lady Russell was guilty of legal cruelty to him. The majority of the Court of Appeal has laid down a definition of legal cruelty in the following terms:

> "There must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it, to constitute legal cruelty."

As far as I can ascertain, no tribunal has before, in the history of our law, taken the grave responsibility of express definition. As might be expected, each of the cases cited has shown special facts of its own, and a wide diversity of circumstances. As might also be expected, danger, and the apprehension of it, are found in the vast majority of cases; but judges have, on the whole, been careful not to lay down any exhaustive definition, although many of them have indicated that great caution would be requisite in seeking to go outside such a clear cause as danger. Thus LORD STOWELL, in *Evans* v. *Evans* (5), pointed out that what fell short of danger "should be admitted with great caution." Again he said:

A "What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied by bodily injury, either actual or menaced."

I am not satisfied that he meant to lay down a definition (an idea he had disavowed) when he spoke of conduct showing "an absolute impossibility that the duties of married life can be discharged." I, on the whole, collect from LORD B STOWELL'S judgment that he regarded danger, or the apprehension of danger, as what might be anticipated, as a rule, to be found in cases where cruelty was charged, and that if any charges outside those clear limits were alleged, they should be regarded as exceptional and "admitted with great caution."

The words of this great judge in subsequent cases would support the view that he did not regard himself as having laid down any precise or exhaustive definition of C cruelty in *Evans* v. *Evans* (5). Thus, in *Popkin* v. *Popkin* (6) he said (1 Hag. Ecc. at p. 768) that a husband's attempt to

> "debauch his own woman servants was a strong act of cruelty, perhaps not alone sufficient to divorce, but one which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings."

The word "perhaps" shows how carefully he shrank from any exhaustive definition, D and also indicated the "great caution" which he felt should be applied in reference to charges of cruelty other than danger, or the apprehension of it. Again, in *D'Aguilar* v. *D'Aguilar* (7) he admitted an article with the allegation that the husband spat on his wife, saying that "nothing can be more gross cruelty." Of course, it has to be borne in mind that an article was admissible if it disclosed relevant facts, and that it was not so essential that each article need contain a E statement sufficient to justify a divorce. A great ecclesiastical judge, however, would not use the words "gross cruelty" without having present to his mind the grave judicial significance that might be attached to them. This would seem the more probable from his referring, without disapproval, to the case in HETLEY [*Cloborn* v. *Cloborn* (18)], where "the only act of cruelty" pleaded was spitting in the face. I am not concerned to discuss this case in HETLEY, or the accuracy of the reference F to it. The important point is to note LORD STOWELL'S view of a case where spitting in the face was the "only act of cruelty." In the later case of *Saunders* v. *Saunders* (8) DR. LUSHINGTON refers to *D'Aguilar* v. *D'Aguilar* (7), and the charge of spitting in the face: "LORD STOWELL declares it to be legal cruelty. . . . Does such a question require any authority at all?"

The judgments of SIR JOHN NICHOLL in the different cases cited are not entirely G consistent, and would go to show that he had not present to his mind that there was, or could be, any clear, distinct, or exhaustive definition of cruelty. In the case of *Westmeath* v. *Westmeath* (19) he said (2 Hag. Ecc. Supp. at p. 72): "There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury." But there he had been commenting on cases where those elements were present. In *Durant* v. *Durant* (9), so much referred to, where a false and un- H founded charge of misconduct had been brought against a blameless wife, SIR JOHN NICHOLL said (1 Hag. Ecc. at p. 769):

> "Here is not cruelty which would support a sentence propter sævitiam, but here is an act which might be pleaded as such in conjunction with other circumstances."

I But again he said in the same case:

> "If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without a remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision."

These last words prepare one for his decision, three years later, in *Bray* v. *Bray* (10), where, in admitting an article that a husband had falsely charged his wife with incest, he said:

"It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation of this husband against his wife."

I think it manifest that this learned judge, having regard to his language in these three cases, cannot be cited as an authority who would have accepted the definition of the Court of Appeal in this case.

Paterson v. *Paterson* (4) is of the highest significance in this controversy, having regard to the directness of the decision and the fact that it was the judgment of this House. Speaking with great deference, I do not think (as I have said in a former case decided by your Lordships, *Mackenzie* v. *Mackenzie* (20)) that I should myself have arrived at the same conclusion as LORD BROUGHAM on the facts, but I feel bound to acknowledge the force of the decision of this House on the question of law decided. He laid down in the most absolute terms :

"That the ground of the remedy is confined to personal violence is not the law of England, and certainly not the law of Scotland. The law is nearly, if not altogether, the same in the two countries. It is true that the law of England either requires actual injury to the person, or threat of such injury."

LORD BROUGHAM, in the order of your Lordships' House, inserted the most distinct repudiation of the view of the Lord Ordinary, that nothing but personal violence, or the menace of it, would suffice as a ground of divorce. It is not suggested that in this respect there is any difference between the law of England and the law of Scotland. Putting it at the lowest, no one can rely upon this decision of your Lordships' House as giving any warrant for adopting the absolute and unqualified definition found in the judgment of LOPES, L.J.

The two decisions of SIR CRESSWELL CRESSWELL, so much cited, after the Act of 1857, do not appear entirely to harmonise, and can only be reconciled on the ground that he confined himself in each to its special facts, and was not thinking in either of laying down any general principles or attempting the difficulty from which so many other great judges had shrunk, of formulating a definition. In *Tomkins* v. *Tomkins* (13), which was a case where considerations of personal violence and menace and their degree were present, this learned judge, in instructing the jury, said : "Danger of life or limb or health has continued, in substance, the rule upon which the courts have acted." His judgment in *Milner* v. *Milner* (14) shows that he could not have intended in the earlier case to have laid down any general rule that would stand the test of being applied to all facts. It was a suit for divorce on the ground of adultery and cruelty. The charge of cruelty turned upon the fact that the wife had followed the husband in the street, when he behaved to her in such a way that led bystanders to think her a prostitute and to insult her. The words of SIR CRESSWELL CRESSWELL as to this were clear and emphatic :

"A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. . . . It is a case of the grossest and most abominable cruelty."

It is manifest the judge who used these words was not prepared for the definition of the Court of Appeal. LORD PENZANCE, in *Pickard* v. *Pickard* (15), somewhat extended the area of consideration in holding that the court should guard against "perils of provocation." *Kelly* v. *Kelly* (21) shows that the jurisdiction was not limited to personal violence, and the relief would be given where conduct undermined health.

All this goes to show the necessary elasticity of the term "cruelty," and how impossible it is to lay down any safe or sufficient definition of cruelty. Can relief be made in all cases dependent upon health? Is a person whose health suffers from the strain of persecution, malevolence, and worry to be given relief, and another person be denied it under circumstances of greater malignity and atrocity, merely because his constitution was better and his courage more robust?

I adopt to the fullest extent the judgment of LORD STOWELL in *Evans* v. *Evans* (5), and think (i) that there must be "grave and weighty causes" for a finding of cruelty; (ii) that "what merely wounds the mental feelings is in few cases to be admitted;" (iii) that what falls short of personal danger "is with great caution to be admitted." He indicated what, according to the general experience of mankind, would be the general rule, taking care to use words which would not exclude from special consideration exceptional cases when there was "no bodily injury, either actual or menaced," but using warning words as to the necessity in such cases of "great caution."

Are the facts of this case special and exceptional, and such as should be recognised as cruelty, even after the greatest caution? What are these facts? The cruelty alleged and proved consists of false charges of abominable and infamous criminal offences put forward in the most deliberate way in judicial proceedings by the wife, withdrawn by her counsel in open court, re-asserted by her with a view to publication in the Press, and put forward and persisted in by her in a long correspondence under circumstances which a jury has found not to be bonâ fide. She might have let the withdrawal stand, and then I should not concur in the charge being subsequently treated as cruelty. But in "The Hawk" and in correspondence prolonged over years she has put forward this odious charge, when it is not suggested that she believed in it, and when a jury has found that she was not acting bonâ fide. Accepting, as we are bound to do, the findings of the jury, the books do not disclose a cause "more grave and weighty," a charge more ruinous, an accusation more calculated to destroy his life, his prospects, and his friendships, and make the husband an outcast and a pariah. In the words of LORD STOWELL, is it not equal to the "strong act of cruelty" in *Popkin* v. *Popkin* (6)? In the language of the same great judge, is it not equal to the "gross cruelty" of *D'Aguilar* v. *D'Aguilar* (7)? To use the words of SIR JOHN NICHOLL, in *Bray* v. *Bray* (10), can anyone conceive cruelty of a more "grievous character"? In the words of SIR CRESSWELL CRESSWELL, in *Milner* v. *Milner* (14), is it not "a case of the grossest and most abominable cruelty"? In attempting to lay down a definition, the Court of Appeal have departed from the cautious example of LORD STOWELL, while in its terms they have departed from the judgment of LORD BROUGHAM. To my mind, the general rule and practice with its necessary qualifications have been wisely laid down by LORD STOWELL, and in the records of our courts the "great caution" which he inculcated has been applied. It is, I venture to think, dangerous now for the first time to attempt to frame a definition of cruelty, and it may in some cases lead to the exclusion of "grave and weighty causes," and, therefore, to much hardship to some who with all due caution might be admitted to relief. In my opinion, the judgment of the Court of Appeal was wrong, and I concur with the Lord Chancellor that the appeal should be allowed.

LORD HERSCHELL.—The appellant in this case seeks a judicial separation from his wife on the ground of her cruelty. It must be taken on the findings of the jury, that the wife alleged, without cause, that the appellant had been guilty of an abominable offence, and that she persisted in asserting it without an honest belief in its truth. The sole question is whether this amounts to cruelty in point of law so as to entitle the appellant to a judicial separation.

The Matrimonial Causes Act, 1857, under which the existing Divorce Court obtained its jurisdiction, provides by s. 22 that in all suits and proceedings other than proceedings to dissolve any marriage the court shall proceed and act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief [see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, s. 103 (1)]. The question, therefore, to be solved is: What were the principles and rules upon which the ecclesiastical courts acted in granting a divorce a mensa et thoro on the ground of cruelty prior to the year 1858? [The Act of 1857 came into

force on Jan. 1, 1858.] It was conceded by the learned counsel for the husband, A
and is, indeed, beyond controversy, that it was not every act of cruelty, in the ordinary and popular sense of that word, which amounted to sævitia, entitling the party aggrieved to a divorce, but that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which that relief could not be obtained. When once this is conceded, it obviously becomes necessary to ascertain what was meant by sævitia, or cruelty, in the ecclesiastical courts, when regarded B
as a ground for divorce. It was contended that it is impossible exhaustively to define "cruelty." Whether this be so or not, it is manifestly necessary to determine what elements were treated as essential to the constitution of the sævitia, or cruelty, which entitled to a divorce.

It has been usual, whenever this question has arisen for consideration, since the year 1790, to commence with a reference to the statement of the law to be found C
in LORD STOWELL'S judgment in *Evans* v. *Evans* (5), decided in that year. He said (1 Hag. Con. at p. 37):

> "What is cruelty? In the present case it is hardly necessary for me to define it, because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they D
> affect the health and even the life of the party. This, however, must be understood—that it is the duty of the courts to keep the rule extremely strict. The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged. In a state of personal danger no duties can be discharged, for the duty of self-preservation must take place before the duties of marriage, which are secondary both in E
> commencement and obligation; but what falls short of this is with great caution to be admitted."

The learned judge then discusses the effect of words which wound the mental feelings, whether natural or acquired, and afterwards proceeds thus (ibid. at pp. 39, 40):

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> "They only show what is not cruelty. . . . But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever from CLARKE and the other books of practice is a good general outline of the common law upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the court has proceeded G
> to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof being given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait till the hurt is H
> actually done."

It has been contended that the test of cruelty which LORD STOWELL here supplies is whether the circumstances are such as to show an absolute impossibility that the duties of married life can be discharged, and that the condition of personal danger produced by violence or threats is given only as an illustration, and is but one I
of many circumstances which would equally satisfy the test. I shall have presently to discuss the value of the suggested test. But I remark, in the meantime, that I am unable thus to interpret LORD STOWELL'S language. If the view contended for be correct, what does he mean by speaking of the danger to life, limb, or health, as the ground for a separation as a "doctrine repeatedly applied by the court," or by the assertion that the "court has never been driven off this ground"? The language used obviously implies that attempts had been made to induce the court on some other ground than this to afford relief for alleged cruelty. Why had

A the court refused to be driven off this ground if it was but one of several which were comprehended within the broad general rule said to be enunciated as the test of cruelty?

The next authoritative exposition on the subject of cruelty is to be found in *Westmeath* v. *Westmeath* (19). In his judgment in this case, in 1826, SIR CHRISTOPHER ROBINSON spoke of danger to life, limb, or health, as "the ordinary B criteria of legal cruelty in these courts." And in a later part of the same judgment he used this language: "On an attentive comparison of all the cases that have been alluded to, I think I may affirm that the ecclesiastical courts have hitherto been uniformly strict in requiring proof of actual injury or of real apprehension of injury as it may affect the safety or health of the person to justify a divorce C on the ground of cruelty." It is scarcely possible to imagine language more explicit than this; and the words of SIR JOHN NICHOLL, when, in the following year, he had to consider *Westmeath* v. *Westmeath* (19), on appeal, are not less so. He sets himself to inquire what is "the law that applies" to a charge of cruelty, and propounds the question thus: "What constitutes cruelty in the view of the law?" After quoting from LORD STOWELL'S judgment in *Evans* v. *Evans* (5), he proceeds:

D "So in *Harris* v. *Harris* (22)—'There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party.' Again, in *Waring* v. *Waring* (23) the usual principles require that such complaints should be supported by proof of violence and ill-treatment endangering, or, at least, threatening, the life, or person, or health of the complainant. The same doctrine is held in the case of *Holden* v. E *Holden* (24)."

After quoting some passages from the judgment in that case, he adds:

"These, then, are the principles by which these courts have been governed, and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury."

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It is to be observed that these observations of SIR JOHN NICHOLL are not merely interposed in the discussion of the facts of the particular case. Before dealing with these he considers what is the law he is to apply, and seeks an answer to the question what is the nature of the cruelty which will justify a decree of divorce.

Again, in *Neeld* v. *Neeld* (11), a few years later (1831), DR. LUSHINGTON had to G decide whether, assuming the facts stated in the libel to be true, a case of cruelty was established. He said (4 Hag. Ecc. at pp. 265 and 271):

"The main test which I must apply is whether the facts with which Mr. Neeld is now charged are of the nature and description to satisfy my mind that cohabitation can no longer subsist between the parties without personal danger to Lady Caroline Neeld. . . . In these suits the species of facts most H generally adduced are, first, personal ill-treatment, which is of different kinds, such blows, or bodily injury of any kind; secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness a fear of personal injury. For causes less stringent than these the court has no power to interfere and separate husband and wife; it is necessity alone which has conferred on the ecclesiastical courts that power, and in regard to self protection alone I must the exercise of that power be guided. . . . Short of personal violence or reasonable apprehension of it, I have no power to interfere."

Trying the case by these tests the learned judge refused relief, although the libel disclosed conduct on the part of the husband towards his wife of no small outrage and indignity.

I turn now to the authorities which are supposed to favour a less stringent exercise of the jurisdiction of the courts. In some of these cases the question which had to be decided was the admission of articles, and it must be borne in mind that

it was the practice in the ecclesiastical courts to plead evidence. Each article did not necessarily contain a statement of facts sufficient to warrant the decree asked for. It was admissible if it disclosed relevant facts bearing on the charge which was the foundation of the suit. And it would seem that any act of cruelty, in the popular sense of that term, would be admissible as throwing light on and proper to be considered in connection with more serious charges. It is clear, therefore, that the decision that an article was admissible as containing a statement of facts relevant to a charge of cruelty can by no means be regarded as deciding that the facts so stated would of themselves have justified a divorce. It is further to be observed that, especially in dealing with the admission of articles, the judges have not unfrequently, when speaking of acts as "cruel," used that word in its popular sense, and not as indicating that the acts were cruel in the legal acceptation of the term, that is to say, such as would entitle to a divorce. An instance of this is to be found in *Popkin* v. *Popkin* (6), where the libel charged the husband with habitually frequenting brothels and attempts to debauch his women servants in his own house. LORD STOWELL said (1 Hag. Ecc. at p. 768):

> "The attempt to debauch his own women servants was a strong act of cruelty, perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings."

Here it is obvious that LORD STOWELL must have used the word "cruelty" in its popular and not in its legal sense, for it would be nonsense to speak of cruelty in the latter sense as "perhaps not alone sufficient to divorce."

Some observations of LORD STOWELL in *D'Aguilar* v. *D'Aguilar* (7) have been much relied on. In the course of a discussion as to the admissibility of the articles in that case, he is reported to have spoken as follows (1 Hag. Ecc. at p. 776):

> "The article proceeds to state minute acts. I think they may be better stated in a general way; they throw levity on the business when pleaded, and are more proper to come from the witnesses. As to spitting at her, nothing can be more gross cruelty, and there is a case in HETLEY [*Cloborn* v. *Cloborn* (18)] in which a prohibition was denied, the only act of cruelty pleaded being spitting on the face, and that was adjudged sufficient."

It is to be remembered that the learned judge was here dealing only with the admissibility of the articles. They contained ample statements of acts of undoubted cruelty. When he says that spitting at the wife was "gross cruelty," he was, I am satisfied, using that word in its popular and not in its technical sense. It was quite unnecessary for him to consider whether the act would of itself warrant a divorce; all that he had to decide was whether it was a relevant statement. It is impossible to suppose that the learned judge intended, in the year 1794 (the date of the decision in *D'Aguilar* v. *D'Aguilar* (7)), in using the language he did, to depart from the ground from which, only four years before, he said the court had never been driven, and this, too, without making any reference to his former exposition of the law, or giving any reason for a change of view, or for taking a new departure.

I cannot but doubt whether the report can be regarded as accurate, for, if it be so, the observation attributed to the learned judge with reference to *Cloborn* v. *Cloborn* (18) is very inaccurate. The only act of cruelty pleaded was not "spitting on the face." The complaint was "that he gave her a box on the ear and spat in her face, and whirled her about and called her a damned whore." It is not easy to disentangle the opinion of the court from the arguments of counsel. But it is clear that the prohibition was not denied, because "spitting on the face" was adjudged a sufficient allegation of cruelty. The ground on which the prohibition was claimed was that the husband "chastised his wife for a reasonable cause by the law of the land, as he might, which they denied, and said that they had jurisdiction

A in these matters de sævitia." The result is stated thus: "But the plaintiff they advised to tender a justification, and, if they refused it, then to move for a prohibition." In the course of the report the following passage occurs: "We cannot examine what is cruelty or not. And certainly the matter alleged is cruelty, for spitting in the face is punishable by the Star Chamber." The reason is noteworthy. It can hardly be contended that this is a test of cruelty sufficient in law to warrant B a divorce. And the observation that it was for the ecclesiastical court, and not for the courts of common law, on an application for a prohibition, to determine what was cruelty appears perfectly sound.

It is true that in *Saunders* v. *Saunders* (8), in 1847, where the husband was charged with spitting in his wife's face, DR. LUSHINGTON, after referring to the doubts which had been cast in the course of the argument on the authority of C *Cloborn* v. *Cloborn* (18), said that there could be no more competent judge on such a question than LORD STOWELL. But DR. LUSHINGTON did not decide the case on the authority of LORD STOWELL'S supposed decision or dictum in *D'Aguilar* v. *D'Aguilar* (7). He said (1 Rob. Ecc. at p. 562):

> "I will look at such behaviour, however, even with more technical strictness. D Is it possible to imagine that when a husband has proved himself so utterly insensible to all those feelings which he ought to entertain towards his wife, so brutal, so unmanly, that he would, when his passion was excited, restrain himself within the bounds of the law, that his wife would be safe under his control? Threats of personal ill-usage have been deemed sufficient to justify a separation. I am of opinion that such an outrage as this is more than equivalent to a E threat, for it proves a malignity of feeling which would require only opportunity to show itself in acts involving personal danger, but never surpassing in cowardly baseness."

It is needless to discuss this view of the facts, but it is a clear recognition that "technical strictness" required that the court should be satisfied that personal danger to the petitioner was involved before it could grant a divorce. It was only F to be expected that this view should be taken by a judge who had, a few years before, in *Neeld* v. *Neeld* (11), so clearly and unequivocally defined the conditions requisite to justify a divorce.

Another dictum much relied on is found in the report of *Bray* v. *Bray* (10), which came before SIR JOHN NICHOLL in 1828. That, again, was a question of the admission of articles. The learned judge said (1 Hag. Ecc. at p. 167): G

> "The third article is intended to establish not merely a declaration of the husband, but a solemn affirmation on oath of a part of the charge brought against him—viz., asserting, before and after the birth of the child, that that child was not his, but the fruit of an incestuous connection between Mrs. Bray and her uncle. Though that may be admitted in the husband's answer, the wife is H not bound to depend on the chance of that admission. It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife."

I may observe that your Lordships were furnished with the proceedings in the I case, and that the articles contained charges of undoubted cruelty. It is clear to my mind that SIR JOHN NICHOLL here used the word "cruelty" in its popular and not in its technical sense. I have formed this opinion not merely because the former is the sense in which the word is usually and properly used, when the question in controversy is the admission of articles, but also from the considerations to which I will now advert.

Three years earlier the same learned judge had, in *Durant* v. *Durant* (9), to consider what conduct would revive condoned adultery. The husband in that case had ordered his doors to be shut against his wife, a mother with twelve living children,

and made and persisted for years in an utterly unfounded charge of adultery against her. After intimating that he was inclined to hold that cruelty would revive condoned adultery, the learned judge said (1 Hag. Ecc. at p. 769):

> "Here is not cruelty which would support a sentence propter sævitiam, but here is an act which might be pleaded as such in conjunction with other circumstances."

He thus draws a sharp distinction between acts which may be pleaded as cruelty in conjunction with other circumstances and those which are of themselves sufficient to support a sentence, and he places an utterly unfounded charge of adultery persistently made in the former category. Reliance has been placed on a passage in the same judgment, where the learned judge used the following language (ibid. at p. 770):

> "Is there any woman who would not have considered an act of personal violence inflicted in passion, or even deliberately and maliciously, trivial and pardonable in comparison with this accusation—a charge made not in the haste and error of the moment, but kept up and persevered in to the present time? If the case turned upon this point, I cannot say how I might feel compelled to decide; but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision."

This passage, however, had reference to the question whether the acts of the husband, even though not amounting to cruelty which would warrant a divorce, were sufficient to revive the adultery which had been condoned. This was the point on which the learned judge reserved his opinion, and not on the question whether the acts would justify a sentence of divorce, on which, as I have shown, he had distinctly expressed an opinion in the negative.

It was only the year before Sir John Nicholl's observations in *Bray* v. *Bray* (10) that he gave the elaborate exposition of the law of cruelty in *Westmeath* v. *Westmeath* (19), from which I have already quoted. He cannot have intended, in the following year, by the language under discussion, to indicate a different view of the law. Moreover, it seems clear that he was not so understood by those who were conversant with the practice of the ecclesiastical courts, and with the distinction between the acts which might be pleaded as cruelty in the articles and those which would support a divorce. For in *Gale* v. *Gale* (12), decided in 1852, the counsel who were supporting the libel argued that where substantial acts of cruelty were alleged, as in that case, it was allowable to plead also matters which wound the feelings, and that a false charge of incest was a grievous aggravation of cruelty. Sir John Dodson, in giving judgment, said,

> "Undoubtedly the charge of having committed incest is not, per se, sufficient to constitute legal cruelty, but coupled with other averments of a substantial character, I think, on the authority of the cases cited, that charge may form part of a libel."

Much importance has been attributed, and I cannot but think undue importance, to some remarks made by Lord Brougham in delivering his opinion in this House in *Paterson* v. *Paterson* (4). It will be well, first, to notice what was decided in that case. The Lord Ordinary had embodied in his interlocutor the view that nothing but personal violence or the menace thereof would suffice as a ground for divorce. This was decided to be an erroneous statement of the law. Beyond this nothing was determined, except that the petitioner had not established a case of cruelty, although it was shown that her husband shortly after the marriage had withdrawn from her society, and avoided her, was constantly to be found in his sister's company, declared that he would never renew cohabitation with his wife, refused to allow her family to associate with her, and threatened them with violence if they attempted to do so. But in the course of his speech Lord Brougham, after saying

A that there was no case which went further than Lord Stowell went in the passage I have quoted from *Evans* v. *Evans* (5), proceeded to say (3 H.L. Cas. at p. 328):

> "but, nevertheless, there is so much dictum, there are so many opinions or inclinations of opinion ventilated which have a tendency to go further, that if a case were to arise such as the ingenuity of some of the learned judges in Scotland
B in this case supposed, I have very little doubt that we should find the rule considerably extended, and that that which now only rests upon opinions more or less distinctly mooted and ventilated would assume the form ultimately of a decision—namely, that if the husband, without any violence or threat of violence to the wife, if the husband without any maltreatment endangering life or health, or tending or leading to an apprehension of danger to life or health,
C were to use mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless, charges of this kind made before her family, her children, her relations, her friends, her servants, insulting her in the face of the world and of her servants, calling upon those servants to join in those insults, and to treat her with contumely and with scorn, if such a case were to be made out, or even short of such a case, which would make the
D marriage state impossible to be endured, which would make life itself almost impossible to be endured, then I think the probability is very high that the consistory courts of this country would so far relax the rigour of their negative rule, at present somewhat vague, as to extend the remedy of a divorce a mensa et thoro to a case such as that."

E I may observe, in passing, that I can hardly conceive conduct more likely to affect the health of a woman than that described by Lord Brougham.

The language I have quoted is, it has been urged, a declaration by the noble and learned Lord that the true test in point of law, is not whether there is injury or danger of injury to person or health, but whether it is possible, under the circumstances, that the marriage state can be endured. It seems to me, on the contrary,
F to be a clear recognition of the fact that, ever since the ecclesiastical courts had exercised the jurisdiction of divorce, down to the year 1850 (when Lord Brougham was speaking), the test of danger to person or health had always been applied. And it is no more than a speculation by Lord Brougham, who cannot be regarded as specially an authority on the ecclesiastical law, as to whether the courts would not, in the case he put, relax the rigour of the rule on which they had theretofore
G acted. In truth I cannot regard those remarks as of any weight at all towards the elucidation of the question: What is the nature of the acts which warrant a divorce on the ground of cruelty? I should have thought, indeed, that the marriage state might have been truly said not to be "endurable" to use Lord Brougham's word, and the discharge of marriage duties impossible, if those be the tests, under the treatment to which the appellant, in the case with which Lord Brougham was
H dealing, subjected his wife, and yet her petition for relief was of no avail.

One argument I ought to notice before I review the authorities. The court, it was said, could only refuse restitution of conjugal rights on grounds which would justify a decree of divorce, and it was further said that it would be monstrous to pronounce a decree for restitution and enforce it by imprisonment in such a case as this, and that, therefore, there must exist sufficient ground for a divorce. I
I find myself unable to accept this as a guide to the determination of the question whether cruelty entitling to a divorce has been established. I think that the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous. I need seek no better illustration of this than *Holmes* v. *Holmes* (25), decided in 1755, which is relied on for the proposition that the courts can only refuse restitution on grounds which would justify a divorce. Conduct of a most revolting character on the part of the husband was held to afford no answer to his claim for a restitution of conjugal rights. Indeed, if the broadest definition of cruelty which has been contended for in this case were accepted, it

would still be, to my mind, unsatisfactory that a husband who, though stopping short of cruelty in that sense, had by insult and outrage driven his wife to leave him, should, without repentance for the past or any assurance of amendment for the future, be able to invoke the assistance of the court and call for the strong arm of the law to force his wife, under pain of imprisonment, to resume cohabitation. One would think that the court might well refuse to afford its assistance to one who acted thus. And, notwithstanding the decision to which I have referred, there are not wanting dicta of eminent judges, and notably of LORD STOWELL, that "something short of legal cruelty" might bar a suit for restitution. However that may be, the matter is of less importance than it formerly was, as the legislature has interposed, and even if the court is still bound to make a decree for restitution, it is no longer bound to enforce it, as before.

Upon a review of the authorities prior to the time when the Matrimonial Causes Act, 1857, came into operation [Jan. 1, 1858], I think that it may confidently be asserted that in not a single case was a divorce on the ground of cruelty granted, unless there had been bodily hurt or injury to health, or a reasonable apprehension of one or other of these. And it may with equal confidence be asserted that no other test was ever applied when it had to be determined whether a sentence of divorce on the ground of cruelty should be pronounced. I can find no case in which the impossibility that the duties of married life could be discharged was treated as the criterion. If it be the true criterion, it is scarcely conceivable that circumstances should not have occurred for its application during the period, more than a century, covered by reported cases. Indeed, if in the present case a separation ought to be decreed because, under the circumstances, the discharge of the duties of married life must be regarded as impossible, would their discharge not be impossible in just the same sense where a husband persisted in charging his wife with adultery without cause, or falsely accused her of incest? And yet we have an emphatic declaration by eminent judges in both these cases that such conduct would not warrant a divorce on the ground of cruelty.

So far I have dealt only with the authorities prior to 1858. These are the really important ones. The court for matrimonial causes is governed and controlled by a distinct statutory injunction. It can only act and give relief on principles and rules as nearly as may be conformable to the "principles and rules" on which the ecclesiastical courts had "theretofore acted and given relief." But the principle or rule that a judicial separation can only be granted on the ground of cruelty where there has been injury to body or health, or the reasonable apprehension of it, has been frequently recognised and acted upon since 1858. The law has never been enunciated in other terms, and no other test has been suggested as the correct one. The Matrimonial Causes Act, 1857, came into operation on Jan. 1, 1858. On May 5 following, in *Tomkins* v. *Tomkins* (13), SIR CRESSWELL CRESSWELL, in the course of the argument, said (1 Sw. & Tr. at p. 169):

> "I rather apprehend that in such a case as this I shall be bound to direct the jury what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not. Here I imagine the issue is cruelty or no cruelty, and I shall have to inform the jury what cruelty is."

When the learned judge came to sum up he said (ibid. at p. 170):

> "It will be my duty to endeavour to point out what the law on such questions is, as now, for the first time, juries have to deal with these matters. LORD STOWELL'S judgment in *Evans* v. *Evans* (5) is the great authority on questions of legal cruelty."

After reading passages from that judgment ending with that with which I have concluded my quotation, the learned judge proceeded thus (ibid. at pp. 171, 172):

> "Danger of life and limb or health has continued in substance the rule upon which the courts have acted; the phrase has sometimes been varied. SIR

A JOHN NICHOLL has used the expression 'injury to person or health,' which I am inclined to take in conjunction with LORD STOWELL'S expression, for there might be a great deal of suffering and brutal usage without coming strictly within the terms of the latter. There must, however, be bodily hurt, not trifling or temporary pain, or a reasonable apprehension of bodily hurt. It will be for you to determine whether the husband has so treated his wife, and so B manifested his feelings towards her, as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured health."

This is a clear and, I apprehend, an accurate statement of the law administered by the ecclesiastical courts. It has been suggested that it was not a complete exposition of the law, but merely such a statement as was necessary, having regard to the facts proved in the particular case. I am unable so to regard it. It purports C to inform the jury what legal cruelty is. The learned judge speaks of danger of life or limb or health, as "the rule on which the courts have acted." There is surely —I say it with all respect—a fallacy in speaking of the law laid down as sufficient for the purposes of the particular case. If acts which did not involve danger to person or health would have entitled the jury to find that cruelty had been estab- D lished, if the real question was whether the circumstances were such as to render the discharge of marriage duties impossible, the judge was, I think, bound so to direct the jury. Moreover, so far as I can discover, SIR CRESSWELL CRESSWELL never gave any jury a different direction from that to be found in *Tomkins* v. *Tomkins* (13), or expounded the law otherwise. Nor has your Lordships' attention been called to any different exposition of the law on the part of his successors. How E deeply rooted the notion was that personal safety was the only ground for the court's interference is shown by *Pickard* v. *Pickard* (15), and *Forth* v. *Forth* (17), where LORD PENZANCE granted a judicial separation on the petition of the husband on the ground that the husband was likely to be incited to acts of violence by his wife's conduct, and that if he refused to relieve from the perils of provocation, there would be no security for the safety of the wife.

F I may refer, as one of the latest cases on the subject where the law is to be found laid down, to the judgment of LORD PENZANCE in *Milford* v. *Milford* (26). In spite of profligate conduct on the part of the husband, the knowledge of which he seems to have ostentatiously obtruded upon his wife, the learned judge refused a decree, saying (L.R. 1 P. & D. at p. 299):

G "The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it, the court, as LORD STOWELL once said, has never been driven off this ground; nor do the cases cited, whatever general expressions may have fallen from the court, affect to decide that anything short of this will be sufficient to found a decree upon cruelty. The H ground of the court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread."

With one possible exception, not a single case has been cited since 1858, any more than before that date, in which a decree has been granted on any other ground. The case to which I refer is *Milner* v. *Milner* (14), which came before SIR CRESSWELL I CRESSWELL in 1861. The husband had taken his wife by the shoulders, pushed her against a wall, and thrust his umbrella against her person, in consequence of which passers-by took her for a prostitute. The learned judge granted a divorce. The husband had previousy committed acts of violence towards his wife, though not for some years. It is to be observed that the respondent did not appear, and, therefore, no argument was addressed to the court against the prayer of this petition, and that the counsel for the petitioner argued that the insult to the petitioner was of so gross a character as to render further cohabitation outrageous to the feelings of the wife, and, therefore, likely to be injurious to her health. Whether the learned judge

adopted this view, or thought that, having regard to the previous conduct of the husband, the wife's safety was endangered, it is impossible to say. He did not enter upon any discussion of the law, and beyond saying that the respondent had been guilty of as great an indignity as if he had spat in his wife's face gave no reasons for his judgment. Such a decision obviously cannot be regarded as having any important bearing upon the question what were the principles and rules upon which the ecclesiastical courts acted. It is much more significant that it is the only case which the research of counsel has been able to produce in which it can be even plausibly contended that relief has been given on a ground other than danger to person or health.

I am certainly not indisposed to arrive at the conclusion that the husband in the present case has established a case for a judicial separation. But, in laying down a proposition of law on such a subject as that with which your Lordships are dealing, it is necessary to keep in view the consequences, and not to contemplate only its operation in the particular case. The only criterion of cruelty which I have heard suggested as warranting a judgment for the husband is whether the discharge of the duties of married life has become impossible owing to the conduct of the wife. How is the word "impossible" to be interpreted in the proposition thus stated? Obviously not as confined to physical impossibility, or it would not cover the present case. If it be extended to what is sometimes called "moral" impossibility, a proposition could scarcely be conceived more elastic. It would afford no sort of guide, but would, in my opinion, unsettle the law, and throw it into hopeless confusion. Views as to what is possible or impossible in this sense would differ most widely. Though in some instances most men would, no doubt, concur in their opinion, yet, speaking generally, the determination of the case would depend entirely upon the particular judge or jury before whom it might chance to come.

Not a few would think that the discharge of the duties of married life was impossible whenever love had been replaced by hatred, when insulting and galling language was constantly used, when in short the ordinary marital relations no longer prevailed. The opinion may be held by many that it would be well that in all such cases a judicial separation should be granted, that relief should be always given where the prospect of happiness, so long as the parties cohabited, appeared hopeless. But these are considerations for the legislature, and not for the courts. If divorce à mensa et thoro is to be extended beyond the limits within which it has hitherto been confined, the change must, in my opinion, be made by legislation. Our duty on the present occasion is to administer, and not to make the law. I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development evolves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterised the last century, in this respect there has been no alteration, no new development. I think it is impossible to do otherwise than proceed upon the old lines. I cannot bring myself to say that, if we were to yield to the husband's contention in this case, we should be acting and giving relief on principles and rules conformable to the principles and rules on which the ecclesiastical courts formerly acted. And this we are by statute enjoined to do. For these reasons, I am of opinion that the judgment of the Court of Appeal should be affirmed.

LORD MACNAGHTEN concurred in the judgment of LORD HERSCHELL.

LORD MORRIS concurred in the judgment of LORD ASHBOURNE.

LORD SHAND.—Two alternative views have been presented by the parties as to the principle or rule which should be applied in the decision of this case, in answering the question whether the wife has been guilty of such cruelty as the law holds to be sufficient to entitle the husband to a decree of separation. The great importance

of the case as affecting the rights of husband and wife in their marital relations lies in the determination of the question which of these alternatives is to be adopted, not merely as between the parties to this suit, but as fixing the criterion by which future cases must be decided. It is maintained by the husband that the question to be put and decided in such cases on the issue of cruelty is whether the conduct of the husband or wife complained of has been such as to make continued cohabitation impossible. The alternative maintained by the wife is that the conduct complained of must be such as to have caused danger, or a reasonable apprehension of danger, to life, limb, or health.

Outside of these two views, or within them, as presenting two extremes, no third criterion or rule has been suggested either in the argument or in the judgments of the Court of Appeal or in the opinions of your Lordships. The view which has been taken by Lord Ashbourne and Lord Morris, that a case like the present, in which the cruelty may be described in popular language as "gross cruelty" or cruelty of a "most grievous character," and so may be treated in an exceptional manner apart from any rule or criterion, appears to me to give no third test, unless it be that of the "circumstances of the case," which with great deference, would not supply any guide for the decision of future cases; for I do not see what can be the line which would distinguish between cases of cruelty and cases of gross cruelty. In deciding which criterion of the two suggested by the parties is to be taken as expressing the law as it now exists, the courts of law are by the Act of 1857 required to proceed on principles and rules as nearly as may be those on which the ecclesiastical courts acted previous to the passing of that statute. The difficulty in the decision of the question is sufficiently shown by the close division of opinion, not only of the judges who have hitherto dealt with it, but also by your Lordships' House.

After the most anxious consideration, and while I should have been far from unwilling, if I could do so with safety to the law to be applied in other cases, to hold that Lady Russell's scandalous and atrocious conduct entitled her husband to the decree he asks, I have come to the conclusion that Lord Russell has failed to establish such cruelty as the law recognises as sufficient. It appears to me that the result of the authorities, so fully considered in the opinion which has been delivered by Lord Herschell, is that the rule or principle for which the respondent contends, and to which effect has been given in the judgment of the Court of Appeal, is that on which the ecclesiastical courts acted previous to the statute, and is now the law, and that, however truly it may be said that the wife here has been guilty of cruelty in a popular or wide sense of the term, it has not been shown that there has been cruelty in the sense which the law requires as a ground of divorce or separation.

It would be idle repetition again to go through the stream of authorities on the subject, and to analyse or criticise the various forms of expression used with reference to the meaning to be given to the term "cruelty" as applicable to the particular and varying circumstances of so many cases. In many cases, and particularly those in which questions arose as to the admission of articles for proof, it appears to me that the word is used in the opinions or judgments in a popular sense, but that where the criterion came to be stated in the determination of the merits of the cases, having regard to the facts in evidence, that criterion was danger or apprehension of danger to life or health, which it must be observed, with reference to much of the argument for the husband in the present case, is a much more comprehensive term than physical violence, and a term which has, I think, been found sufficient to cover all the cases in which hitherto relief has been granted. It is true that in many cases learned judges have used expressions that the conduct of the husband or wife complained of has made domestic life intolerable or impossible. On examination of the cases, however, it will, I think, be found that these words are used, if not in all, yet in most instances where it has been shown that danger or apprehension of danger to health has been proved as a ground for action. In such cases every one will be agreed that it is quite correct and true to say that continued cohabitation has become impossible. If I am right in so thinking, this is very far

indeed from making "the continued cohabitation of husband and wife impossible" (with all the vagueness which must attend the application of so loose a criterion to the facts of each particular case) a safe or satisfactory standard in the determination of the question of cruelty. A

It is, indeed, only because I desired to add a few words to what has been already said on this subject that I have ventured to trouble your Lordships with any observations. Questions of divorce or separation are now frequently tried before B juries. Suppose the presiding judge, in the direction which he gives, to tell the jury that the test which they are to apply in reaching their verdict must be: Has the conduct of the wife or husband been such as to make continued cohabitation unbearable or impossible? I should certainly not be surprised if the jury should ask for some direction much more precise and definite, and without such a direction I should say that the law would be involved in much confusion and uncertainty. C Is each of the jury, according to his own views of the principles which should guide the conduct of married persons, and of the particular conduct proved, to determine for himself whether cohabitation has or has not become impossible? Such a guide is given if the judge is able to say that future cohabitation must be with safety to the husband or wife complaining, and that a reasonable apprehension of danger to life or health cannot consist with the idea of safety. D

But if this criterion is not to be supplied, what is to take its place? A judge must, I think, be prepared either in directing a jury, or in making up his own mind where the decision rests with him, to formulate in some way the elements which, in his view, are sufficient to bring the case up to one in which it can be predicated that further joint domestic life has become impossible; and the fatal defect in the argument on behalf of the husband in the present case appears to me to be that it E entirely fails to provide any test or criterion to be applied in the solution of that question. If the husband's argument be well founded, it would not be necessary to aver or to show that any apprehension of danger to health existed. What is there to take the place of this? Is it to be enough that great mental distress and pain will be suffered, or that the spouse complained of has acted so as to destroy all affection, and to create even a horror of future intercourse? The present is a F flagrant, probably an unprecedented, case, where so foul and loathsome a charge has been made and persisted in without belief in its truth on the part of the wife; but many cases might be figured and must occur in which circumstances far short of this would, in the opinion of many jurymen, make future cohabitation intolerable. A husband or wife might never cease to introduce and press subjects of conversation, G knowing this would necessarily cause extreme irritation and mental distress—might never cease to use reproaches for past moral misconduct with the same result—might constantly use language opprobrious and insulting, or continuously make unfounded charges of moral misconduct or even criminal offences of a serious character, though much less grave than the wife in this case made. In such cases, if it should be shown that injury to health results, or reasonable apprehension of H such injury exists, the law will give a remedy, for that is a criterion to which an appeal can be made and one which admits of application. Without such a criterion there must be the utmost uncertainty, for it must be left to the judge or jury to form their own notion of what conduct will or will not make continued domestic life impossible, with the single qualification, itself admitting of great diversity of views, that the conduct complained of must be of a grave, weighty, and serious I character.

These considerations seem to me fully to account for and to justify the observation of Lord Stowell in *Evans* v. *Evans* (5), so often quoted, when he said with reference to the criterion of injury or apprehended injury to health: "The court has never been driven off this ground." It has been argued that the issue of impossibility of continued domestic life without any guide or criterion of the proof necessary to establish this, is not unlike issues which raise questions of honesty, or malice, or the like, which are constantly tried. The case of malice is not a very

happy illustration by way of parallel, for there is perhaps no term in the law which has given rise to more diversity of opinion or more litigation from the loose way in which it has been used, sometimes in its ordinary and popular meaning of hatred or ill-will and a desire to injure as a motive, which is easily understood without any direction, and at other times in a much wider sense. But when the term is used to describe anything short of malicious motive, it is certainly necessary for the judge to define the particular meaning to be ascribed to it in its legal sense in the particular case. In an issue of fraud, again, there is no difficulty, such as occurs in reference to impossibility of cohabitation. Everyone at once understands the meaning of a false and fraudulent representation. No other words of definition would be better than these words themselves—and an intention to deceive successfully carried out is a term clear in itself which admits of no better elucidation than the words supply —whatever may be the difficulty in particular cases of saying whether the fraudulent motive and deceit have been in fact proved.

Holding, then, as I do, that the majority of the Court of Appeal were right in applying the test or criterion which they did to the facts of the case, I agree in thinking the husband's case fails. It is true that the conduct of the wife cannot be condemned in terms too strong. The persistence in gross charges of foul immorality, the truth of which she did not believe, charges which were calculated so deeply to wound her husband's feelings and to degrade him in the eyes of the world, was cruelty—I should even say gross cruelty, in a wide and popular sense of the words. It has not, however, been shown that her conduct was such as the law holds to be sufficient to entitle the husband to a decree of divorce or separation, for it cannot be said that injury to, or apprehended injury to, his health has resulted. It has been decided that, in consequence of the wife's conduct, she has now forfeited all right to restitution of legal rights, and cannot, therefore, require that cohabitation should be resumed, and this decree has become final. If the wife could have insisted on cohabitation it might have been said that the probability of such charges being repeated in the husband's presence by the wife might lead to his doing violence to her in his anger; but, the risk of this having been removed, there is no reason for granting a decree of separation on this ground, which was suggested in the course of the husband's argument. I am, on the whole, of opinion that the decision of the Court of Appeal ought to be affirmed, and that, if it should be thought desirable that a different rule or principle of law from that which has, I think, hitherto prevailed should in future receive effect, the change must be brought about by legislation, which in any view should give some other criterion of cruelty than that which now exists, or should make something short of cruelty, in the sense which the law has attached to that term in questions between husband and wife, a ground for granting a decree of divorce, or at least of separation.

LORD DAVEY.—The only act of cruelty upon which the appellant relies as entitling him to a judicial separation is the publication of a libel upon him imputing to him an infamous crime without any belief in the truth of the imputation. It must be admitted that this is a gross outrage by one person upon another, and an abominable action of a wife towards a husband. But the question is whether it constitutes what has been called legal cruelty such as will by itself entitle the appellant to demand a judicial separation.

In answering this question it is important to bear in mind the legal proposition or definition of legal cruelty for which counsel for the appellant contend, and the conditions under which the court has to approach the consideration of the question, and test the soundness of the appellant's proposition. To take the latter point first. The court is not entitled to adopt its own view of what degree or kind of cruelty, or what description of behaviour or conduct by one spouse towards another, should be a ground of judicial separation. But by s. 22 of the Matrimonial Causes Act, 1857, it is thrown back upon the principles acted on by the ecclesiastical courts in the exercise of their jurisdiction before the Act; and in order to constitute a

ground for judicial separation the behaviour or conduct complained of must be of such a description as before the Act would have entitled the complaining spouse to a divorce a mensa et thoro in the ecclesiastical courts. The reported decisions of these courts have been cited to us or commented on with great ability by counsel on both sides of the Bar. The general idea which I think underlies all those decisions is that, while declining to lay down any hard-and-fast definition of legal cruelty, the courts acted on the principle of giving protection to the complaining spouse against actual or apprehended violence, physical ill-treatment, or injury to health.

What, then, is the proposition for which the appellant contends? The proposition was that cruelty is such wilful infliction of bodily or mental pain as is calculated to render matrimonial relations unendurable. And the learned counsel added that there are no legal limitations as to the character of the cruelty, though it must be gross in degree. It must be remembered that these cases are now tried by a jury; and, therefore, the proposition is that whatever conduct, in the opinion of a jury properly directed, causes bodily or mental pain such as is calculated to render matrimonial relations unendurable, is legal cruelty. I will not weary your Lordships by going through or analysing the cases cited. I only desire to say that many of the cases cited were upon admission of articles in which allegations were held admissible as aggravation or as evidence of intention, though not alone or in themselves affording substantive ground for relief.

I agree generally with the opinion expressed by LORD HERSCHELL on the effect and result of the authorities cited. In my opinion, the proposition goes far beyond anything which had been laid down by the learned judges of the ecclesiastical court before the Act of 1857, and appears to me to be very far-reaching in its possible application. I express no opinion whether the court ought or ought not, as a matter of policy, to give relief on that principle. My only duty is to say whether the appellant's contention is conformable to the principles on which the ecclesiastical courts formerly acted and gave relief. I am constrained to say that, in my opinion, it is not, and I see no reason to differ from the reasons given by the majority of the judges in the Court of Appeal. There is no question here of personal violence, and in the circumstances of the case I see no evidence of any apprehended injury to the appellant's physical or mental health against which he requires protection. To use the words of LORD STOWELL,

> "The respondent's conduct is a high moral offence in the marriage state undoubtedly, not innocent, surely, in any state of life, but still it is not that cruelty against which the law can relieve."

Appeal dismissed.

Solicitors: *Vandercom, Hardy, Oatway & Doulton; Valpy, Chaplin & Peckham.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

SALOMON *v.* SALOMON & CO., LTD.

SALOMON & CO., LTD. *v.* SALOMON

B [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Davey), June 15, 22, 29, November 16, 1896]

[Reported [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89]

Company—Legal position—Legal entity separate and distinct from its members
C *—"One-man" company—Legality—Irrelevance of motive for promotion—Company not agent of, or trustee for shareholders.*

A company which has complied with the requirements relating to the incorporation of companies contained in the Companies Acts is a legal entity separate and distinct from the individual members of the company. It matters not that all the shares in the company are held by one person, excepting one
D share each held by the persons who, as required by the Acts, have subscribed their names to the memorandum of association to enable the company legally to be formed, nor does it matter that those persons are merely the nominees of the principal shareholder. Once a company has been legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and the motives of those who promote the company (e.g., E to enable them to trade with the benefit of limited liability) are absolutely irrelevant in discussing what those rights and liabilities are. A company is not the agent of the shareholders to carry on their business for them, nor is it the trustee for them of their property.

Decision of the Court of Appeal, [1895] 2 Ch. 323, reversed.

F **Notes.** The Companies Act, 1862, was repealed by the Companies (Consolidation) Act, 1908. The statute now in force is the Companies Act, 1948 (3 HALSBURY'S STATUTES (2nd Edn.) 452). Where provisions of the 1862 Act are mentioned in their Lordships' opinions (infra) the corresponding sections of the Act of 1948 are indicated. Two or more persons can now form a private company.

G Considered: *Re Wragg*, post; [1897] 1 Ch. 796; *Re Hirth, Ex parte Trustee*, [1899] 1 Q.B. 612; *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; *Gramophone and Typewriter, Ltd.* v. *Stanley*, [1906] 2 K.B. 856; *A.-G. for Dominion of Canada* v. *Standard Trust Co. of New York*, [1911] A.C. 498. Applied: *Booth* v. *Helliwell*, [1914] 3 K.B. 252; *British Thomson-Houston Co., Ltd.* v. *Sterling Accessories, Ltd., Same* v. *Crowther and Osborn, Ltd.*, [1924] All E.R. Rep. 294. Considered: *Smith, Stone and Knight, Ltd.* v. *Birmingham Corpn.*, [1939] 4 All
H E.R. 116. Applied: *Lee* v. *Lee's Air Farming, Ltd.*, [1960] 3 All E.R. 420. Referred to: *Seligman* v. *Prince*, [1895] 2 Ch. 617; *Munkittrick* v. *Perryman and Hands* (1896), 74 L.T. 149; *Hadley* v. *Hadley* (1897), 77 L.T. 131; *R.* v. *Grubb*, [1914-15] All E.R. Rep. 667; *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*, [1916-17] All E.R. Rep. 191; *Re Express Engineering Works*, [1920] 1 Ch. 466; *I.R. Comrs.* v. *Sansom*, [1921] 2 K.B. 492; *Re Fasey,*
I *Ex parte Trustees*, [1923] 2 Ch. 1; *Parker and Cooper, Ltd.* v. *Reading*, [1926] All E.R. Rep. 323; *Thomas* v. *Evans, Jones* v. *South-West Lancashire Coal-Owners' Association* (1926), 42 T.L.R. 401; *Colville Estate, Ltd.* v. *I.R. Comrs.*, [1930] All E.R. Rep. 770; *E.B.M. Co.* v. *Dominion Bank*, [1937] 3 All E.R. 555; *R.* v. *South Wales Traffic Licensing Authority, Ex parte Ebbw Vale U.D.C.*, [1951] 1 All E.R. 806; *Bank Voor Handel en Scheepvaart* v. *Slatford*, [1951] 2 All E.R. 779; *Pegler* v. *Craven*, [1952] 1 All E.R. 685.

As to the legal position of a company, see 6 HALSBURY'S LAWS (3rd Edn.) 11; and for cases see 9 DIGEST (Repl.) 28 et seq.

Cases referred to:

(1) *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; 39 L.T. 269; 27 W.R. 65; sub nom. *New Sombrero Phosphate Co.* v. *Erlanger*, 48 L.J.Ch. 73, H.L.; 9 Digest (Repl.) 41, *75.*

(2) *Re Baglan Hall Colliery Co.* (1870), 5 Ch.App. 346; 39 L.J.Ch. 591; 23 L.T. 60; 18 W.R. 499, L.J.; 9 Digest (Repl.) 90, *399.*

(3) *North-West Transportation Co.* v. *Beatty* (1887), 12 App. Cas. 589; 56 L.J.P.C. 102; 57 L.T. 426; 36 W.R. 647; 3 T.L.R. 789, P.C.; 9 Digest (Repl.) 485, *3188.*

Also referred to in argument:

Re National Debenture and Assets Corpn., [1891] 2 Ch. 505; 60 L.J.Ch. 533; 64 L.T. 512; 39 W.R. 707; 7 T.L.R. 485, C.A.; 9 Digest (Repl.) 81, *338.*

Re G. Newman & Co., [1895] 1 Ch. 674; 64 L.J.Ch. 407; 72 L.T. 697; 43 W.R. 483; 11 T.L.R. 292; 39 Sol. Jo. 346; 2 Mans. 267; 12 R. 228, C.A.; 9 Digest (Repl.) 179, *1158.*

Farrar v. Farrars, Ltd. (1888), 40 Ch.D. 395; 58 L.J.Ch. 185; 60 L.T. 121; 37 W.R. 196; 5 T.L.R. 164, C.A.; 9 Digest (Repl.) 29, *9.*

Re Ambrose Lake Tin and Copper Mining Co., Ex parte Taylor, Ex parte Moss (1880), 14 Ch.D. 390; 49 L.J.Ch. 457; 42 L.T. 604; 28 W.R. 783, C.A.; 9 Digest (Repl.) 54, *168.*

Re British Seamless Paper Box Co. (1881), 17 Ch.D. 467; 50 L.J.Ch. 497; 44 L.T. 498; 29 W.R. 690, C.A.; 9 Digest (Repl.) 515, *3390.*

R. v. *Arnaud* (1846), 9 Q.B. 806; 16 L.J.Q.B. 50; 8 L.T.O.S. 212; 10 J.P. 821; 11 Jur. 279; 115 E.R. 1485; 13 Digest (Repl.) 286, *1055.*

Re Cowen, Ex parte Cowen (1867), 2 Ch.App. 563; 16 L.T. 469; 15 W.R. 859, L.JJ.; 5 Digest (Repl.) 1201, *9668.*

Re Smith, Ex parte Hepburn (1890), 25 Q.B.D. 536; 59 L.J.Q.B. 554; 63 L.T. 621; 38 W.R. 744; 6 T.L.R. 422; 7 Morr. 246, C.A.; 5 Digest (Repl.) 1025, *8293.*

Adam v. *Newbigging* (1888), 13 App. Cas. 308; 57 L.J.Ch. 1066; 59 L.T. 267; 37 W.R. 97, H.L.; 35 Digest 77, *754.*

Clarke v. *Dickson* (1858), E.B. & E. 148; 27 L.J.Q.B. 223; 31 L.T.O.S. 97; 4 Jur.N.S. 832; 120 E.R. 463; 35 Digest 76, *742.*

Western Bank of Scotland v. *Addie*, *Addie* v. *Western Bank of Scotland* (1867), L.R. 1 Sc. & Div. 145, H.L.; 9 Digest (Repl.) 119, *617.*

Cross-Appeals from a decision of the Court of Appeal (LINDLEY, LOPES, and KAY, L.JJ.), reported [1895] 2 Ch. 323, affirming an order of VAUGHAN WILLIAMS, J.

The appellant, Aron Salomon, had for some thirty years prior to 1892 carried on business as a leather merchant and hide factor and wholesale and export boot manufacturer under the style of A. Salomon & Co. A limited company was formed in 1892 to carry on the business, the subscribers to the memorandum of association being the appellant, his wife and daughter, and his four sons. The nominal capital of the company was £40,000, divided into £1 shares; 20,007 shares were issued, of which the appellant held 20,001, the other signatories of the memorandum of association holding one share each. The appellant's business was sold to the company for £38,782, of which £16,000 was to be paid in cash or debentures, and at the first meeting of the directors, who consisted of the appellant and two of his sons, it was resolved to pay the appellant £6,000 in cash and £10,000 in debentures. These debentures were afterwards mortgaged by the appellant to one Edmund Broderip as a security for an advance of £5,000, but eventually they were cancelled, and £10,000 fresh debentures were issued to Edmund Broderip. In October, 1893, an order was made for the winding-up of the company, at which date the company was indebted to unsecured creditors other than Aron Salomon to the amount of £7,773. An action was brought by the liquidator of the company against the appellant, which was tried before VAUGHAN WILLIAMS, J., who declared that the

company were entitled to be indemnified by the appellant to the amount of £7,733. This decision was affirmed by the Court of Appeal as above mentioned. The company brought a cross-appeal against an order of the Court of Appeal on a counterclaim filed by the company asking for rescission of the contract.

Cohen, *Q.C.*, *Buckley*, *Q.C.*, *McCall*, *Q.C.*, and *Muir Mackenzie* for the appellant. *Farwell*, *Q.C.*, and *Theobald* for the respondent company.

Their Lordships took time for consideration.

Nov. 16, 1896. **LORD HALSBURY, L.C.**—The important question in this case, and I am not certain that it is not the only question, is whether the respondent company was a company at all—whether, in truth, that artificial creation of the legislature had been validly constituted in this instance; and, in order to determine that question, it is necessary to look at what the statute itself has determined in that respect. I have no right to add to the requirements of the statute, nor to take from the requirements thus enacted. The sole guide must be the statute itself.

That there were seven actual living persons who held shares in the company has not been doubted [see Companies Act, 1948, s. 1, which provides for the formation of a company by seven persons]. As to the proportionate amounts held by each I will deal with them presently; but it is important to observe that this first condition of the statute is satisfied, and it follows as a consequence that it would not be competent to anyone, and certainly not to these persons themselves, to deny that they were shareholders. I must pause here to point out that the statute enacts nothing as to the extent or degree of interest which may be held by each of the seven, or as to the proportion of interest or influence possessed by one or the majority of the shareholders over the others. One share is enough. Still less is it possible to contend that the motive of becoming shareholders, or of making them shareholders, is a field of inquiry which the statute itself recognises as legitimate. If they are shareholders they are shareholders for all purposes, and, even if the statute was silent as to the recognition of trusts, I should be prepared to hold that if six of them were the cestuis que trust of the seventh, whatever might be their rights inter se, the statute would have made them shareholders to all intents and purposes with their respective rights and liabilities.

Dealing with them in their relation to the company, the only relation which I believe the law would sanction would be that they were corporators of the corporate body. I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence, quite apart from the motives or conduct of individual corporators. In saying this I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to show that a fraud had been committed upon the officer intrusted with the duty of giving the certificate, and that by some proceeding in the nature scire facias you could not prove the fact that the company had no legal existence. But, short of such proof, it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

I will, for the sake of argument, assume the proposition that the Court of Appeal lays down, that the formation of the company was a mere scheme to enable Aron Salomon to carry on business in the name of the company. I am wholly unable to follow the proposition that this was contrary to the true intent and meaning of the Companies Act. I can only find the true intent and meaning of the Act from the Act itself, and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas

or schemes of those who brought it into existence. I observe that VAUGHAN WILLIAMS, J., held that the business was Mr. Salomon's business and no one else's, and that he chose to employ as agent a limited company, and he proceeded to argue that he was employing that limited company as agent, and that he was bound to indemnify that agent—the company. I confess it seems to me that that very learned judge becomes involved by this argument in a very singular contradiction. Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon; if it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not. LINDLEY, L.J., on the other hand, affirms that there were seven members of the company, but, he says, it is manifest that six of them were members simply in order to enable the seventh himself to carry on business with limited liability, so that the object of the whole arrangement was to do the very thing which the legislature intended not to be done.

It is obvious to inquire where is that intention of the legislature manifested in the statute? Even if we were at liberty to insert words to manifest that intention, I should have great difficulty in ascertaining what the exact intention thus imputed to the legislature is or was. In this particular case it is the members of one family that represent all the shares; but if the supposed intention is not limited to so narrow a proposition as this, that the seven members must not be members of one family, to what extent may influence or authority or intentional purchase of a majority among the shareholders be carried so as to bring it within the supposed prohibition? It is, of course, easy to say that it was contrary to the intention of the legislature—a proposition which, by reason of its generality, it is difficult to bring to the test; but when one seeks to put as an affirmative proposition what the thing is which the legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

As one mode of testing the proposition it would be pertinent to ask whether two or three, or, indeed, all seven, may constitute the whole of the shareholders. Whether they must be all independent of each other in the sense of each having an independent beneficial interest—and this is a question that cannot be answered by the reply that it is a matter of degree. If the legislature intended to prohibit something, you ought to know what that something is. All it has said is that one share is sufficient to constitute a shareholder, though the shares may be 100,000 in number. Where am I to get from the statute itself a limitation of that provision that that shareholder must be an independent and beneficially interested person? I find all through the judgment of the Court of Appeal a repetition of the same proposition to which I have already adverted—that the business was the business of Aron Salomon, and that the company is variously described as a myth and a fiction. LOPES, L.J., says:

> "The Act contemplated the incorporation of seven independent bona fide members, who had a mind and a will of their own, and were not the mere puppets of an individual who, adopting the machinery of the Act, carried on his old business in the same way as before, when he was a sole trader."

The words "seven independent bona fide members with a mind and will of their own and not the puppets of an individual" are by construction to be read into the Act. LOPES, L.J., also said that the company was a mere nominis umbra. KAY, L.J., says:

> "The statutes were intended to allow seven or more persons bona fide associated for the purpose of trade to limit their liability under certain conditions and to become a corporation. But they were not intended to legalise a pretended association for the purpose of enabling an individual to carry on his own business with limited liability in the name of a joint-stock company."

The learned judges appear to me not to have been absolutely certain in their own minds whether to treat the company as a real thing or not. If it was a real thing, if it had a legal existence, and if, consequently, the law attributed to it certain rights and liabilities in its constitution as a company, it appears to me to follow as a consequence that it is impossible to deny the validity of the transactions into which it has entered. VAUGHAN WILLIAMS, J., appears to me to have disposed of the argument that the company, which for this purpose he assumed to be a legal entity, was defrauded into the purchase of Aron Salomon's business, because, assuming that the price paid for the business was an exorbitant one as to which I am myself not satisfied, but assuming that it was, the learned judge most cogently observes that when all the shareholders are perfectly cognisant of the conditions under which the company is formed and the conditions of the purchase, it is impossible to contend that the company is being defrauded. The proposition laid down in *Erlanger* v. *New Sombrero Phosphate Co.* (1)—I quote the headnote—is, that

> "Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it."

But if every member of the company, every shareholder, knows exactly what is the true state of the facts, which for this purpose must be assumed to be the case here, VAUGHAN WILLIAMS, J.'s, conclusion seems to me to be inevitable—that no case of fraud upon the company could here be established.

If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of. The truth is that the learned judges have never allowed in their own minds the proposition that the company has a real existence. They have been struck by what they have considered the inexpediency of permitting one man to be, in influence and authority, the whole company, and assuming that such a thing could not have been intended by the legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law, and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

I have dealt with this matter upon the narrow hypothesis propounded by the learned judges below, but it is, I think, only justice to the appellant to say that I see nothing whatever to justify the imputations which are implied in some of the observations made by more than one of the learned judges. The appellant, in my opinion, is not shown to have done, or to have intended to do, anything dishonest or unworthy, but to have suffered a great misfortune without any fault of his own. The result is that I move your Lordships that the judgment appealed from be reversed, but as this is a pauper case I regret to say it can only be with such costs in this House as are appropriate to that condition of things, and that this appeal be dismissed with costs to the same extent.

LORD WATSON.—This appeal raises some questions of practical importance, depending upon the construction of the Companies Acts, which do not appear to have been settled by previous decisions. As I am not prepared to accept without reservation all the conclusions of fact which found favour with the courts below, I shall, before adverting to the law, state what I conceive to be the material facts established by the evidence before us.

The appellant, Aron Salomon, for many years carried on business, on his own account, as a leather merchant and wholesale boot manufacturer. With the design

of transferring his business to a joint-stock company, which was to consist exclusively of himself and members of his own family, he, on July 20, 1892, entered into a preliminary agreement with one Adolph Anholt, as trustee for the future company, settling the terms upon which the transfer was to be made by him, one of its conditions being that, in part payment, he was to receive £10,000 in debentures of the company. A memorandum of association was then executed by the appellant, his wife, a daughter, and four sons, each of them subscribing for one share, in which the leading object for which the company was formed was stated to be the adoption and carrying into effect, with such modifications (if any) as might be agreed on, of the provisional agreement of July 20. The memorandum was registered on July 28, 1892, and the effect of registration, if otherwise valid, was to incorporate the company, under the name of "Aron Salomon & Co., Ltd.," with liability limited by shares, and having a nominal capital of £40,000 divided into 40,000 shares of £1 each.

The company adopted the agreement of July 20, subject to certain modifications which are not material; and an agreement to that effect was executed between them and the appellant on Aug. 2, 1892. Within a month or two after that date the whole stipulations of the agreement were fulfilled by both parties. In terms thereof, 100 debentures, for £100 each, were issued to the appellant, who, upon the security of these documents, obtained an advance of £5,000 from Edmund Broderip. In February, 1893, the original debentures were returned to the company and cancelled, and in lieu thereof, with the consent of the appellant as beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip, in order to secure the repayment of his loan, with interest at 8 per cent. In September, 1892, the appellant applied for and obtained an allotment of 20,000 shares; and from that date until an order was made for its compulsory liquidation, the share register of the company remained unaltered, 20,001 shares being held by the appellant and six shares by his wife and family. It was all along the intention of these persons to retain the business in their own hands, and not to permit any outsider to acquire an interest in it.

Default having been made in the payment of interest upon his debentures, Mr. Broderip, in September, 1893, instituted an action in order to enforce his security against the assets of the company. Thereafter a liquidation order was made and a liquidator appointed, at the instance of unsecured creditors of the company. It has now been ascertained that, if the amount realised from the assets of the company were, in the first place, applied in extinction of Mr. Broderip's debt and interest, there would remain a balance of about £1,055, which is claimed by the applicant as beneficial owner of the debentures. In the event of his claim being sustained there will be no funds left for payment of the unsecured creditors, whose debts amount to £7,333 8s. 6d. The liquidator lodged a defence in the name of the company, to the debenture suit, in which he counterclaimed against the appellant (i) to have the agreements of July 20 and Aug. 2, 1892, rescinded, (ii) to have the debentures already mentioned delivered up and cancelled, (iii) repayment of all sums paid by the company to the appellant under these agreements, and (iv) a lien for these sums upon the business and assets. The averments made in support of these claims were to the effect that the price paid by the company exceeded the real value of the business and assets by upwards of £8,200; that the arrangements made by the appellant for the formation of the company were a fraud upon the creditors of the company; that no board of directors of the company was ever appointed, and that in any case such board consisted entirely of the appellant, and there never was an independent board.

The case went to proof before VAUGHAN WILLIAMS, J., when the liquidator was examined as a witness on behalf of the company, while evidence was given for the appellant by himself and by his son, Emanuel Salomon, one of the members of the company, who had been employed in the business for nearly twenty years. The evidence shows that before its transfer to the new company the business had been

prosperous, and had yielded to the appellant annual profits sufficient to maintain himself and family and to add to his capital. It also shows that, at the date of the transfer, the business was perfectly solvent. The liquidator, whose testimony was chiefly directed toward proving that the price paid by the company was excessive, admitted in cross-examination that the business when transferred to the company was in a sound condition, and that there was a substantial surplus. No evidence was led tending to support the allegation that no board of directors was ever appointed, or that the board consisted entirely of the appellant. The non-success and ultimate insolvency of the business, after it came into the hands of the company, was attributed by the witness Emanuel Salomon to a succession of strikes in the boot trade, and there is not a tittle of evidence tending to modify or contradict his statement. I think it also appears from the evidence that all the members of the company were fully cognisant of the terms of the agreements of July 20 and Aug. 2, 1892, and that they were willing to accept and did accept those terms. The case was heard before the learned judge who, at the close of the argument, announced that he was not prepared to grant the relief craved by the company. He at the same time suggested that a different remedy might be open to the company, and, on the motion of their counsel, he allowed the counterclaim to be amended.

In conformity with the suggestion thus made by the Bench, a new and alternative claim was added for (i) a declaration that the appellant is liable to indemnify the company against the whole of their unsecured debts, (ii) judgment against him for £7,733 8s. 3d., being the amount of these debts, and (iii) a lien for that amount upon all sums which might be payable to the appellant by the company, in respect of his debentures or otherwise, until the judgment was satisfied. There were also added averments to the effect that the company was formed by the appellant and that the debentures for £10,000 were issued in order that he might carry on the business and take all the profits without risk to himself, and also that the company was the "mere nominee and agent" of the appellant. The allegations of the company, in so far as they have any relation to the amended claim, their pith consisting in the averments made on amendment, were meant to convey a charge of fraud, and it is unfortunate that they are framed in such loose and general terms. A relevant charge of fraud ought to disclose the specific facts necessitating the inference that a fraud was perpetrated upon some person specified. Whether it was a fraud upon the company and its members, or upon persons who had dealings with the company, is not indicated, although there may be very different considerations applicable to those two cases.

The res gestæ which might imply that it was the appellant, and not the company, who actually carried on its business are not set forth. Any person who holds a preponderating share in the stock of a limited company has necessarily the intention of taking the lion's share of its profits, without any risk beyond loss of the money which he has paid for or is liable to pay upon his shares, and the fact of his acquiring and holding debentures secured upon the assets of the company does not diminish that risk. What is meant by the assertion that the company "was the mere nominee or agent" of the appellant, I cannot gather from the record, and I am not sure I understand precisely in what sense it was interpreted by the learned judges whose decisions we have to consider. No additional proof was given after the amendment of the counterclaim. The oral testimony has very little, if any, bearing upon the second claim; and any material facts relating to the fraudulent objects which the appellant is said to have had in view, and the alleged position of the company as his nominee or agent, must be mere matter of inference derived from the agreements of July 20 and Aug. 2, 1892, the memorandum and articles of association, and the minute-book of the company.

On re-hearing the case VAUGHAN WILLIAMS, J., without disposing of the original claim, gave the company decree of indemnity in terms of their amended claim. I do not profess my ability to follow accurately the whole chain of reasoning by which

the learned judge arrived at that conclusion, but he appears to have proceeded mainly upon the ground that the appellant was in truth the company, the other members being either his trustees or mere "dummies," and, consequently, that the appellant carried on what was truly his own business under cover of the name of the company, which was nothing more than an alias for Aron Salomon. On appeal from his decision the Court of Appeal made an order finding it unnecessary to deal with the original claim, and dismissing the appeal in so far as it related to the amended claim. The ratio upon which that affirmance proceeded, as embodied in the order, was: "This court, being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement, were a mere scheme to enable him to carry on business in the name of the company, with limited liability, contrary to the intent and meaning of the Companies Act, 1862, and, further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures. . . ."

The opinions delivered by the lords justices are strictly in keeping with the reasons assigned in their order. LINDLEY, L.J., after observing "that the incorporation of the company cannot be disputed," refers to the scheme of the formation of the company, and says, "the object of the whole arrangement is to do the very thing which the legislature intended not to be done"; and he adds that "Mr. Salomon's scheme is a device to defraud creditors." Assuming that the company was well incorporated in terms of the Act of 1862, an assumption upon which the decisions appealed from appear to me to throw considerable doubt, I think it expedient before considering the amended claim, to deal with the original claim for rescission, which was strongly pressed upon us by counsel for the company, under their cross-appeal. Upon that branch of the case there does not appear to me to be much room for doubt. With the exception that the word "exorbitant" appears to me to be too strong an epithet I entirely agree with VAUGHAN WILLIAMS, J., when he says:

> "I do not think that when you have a private company, and all the shareholders in the company are perfectly cognisant of the conditions under which the company is formed, and the conditions of the purchase by the company, you can possibly say that purchasing at an exorbitant price (and I have no doubt whatever that the purchase here was at an exorbitant price) is a fraud upon those shareholders or upon the company."

The learned judge goes on to say that the circumstances might have amounted to fraud if there had been an intention on the part of the original shareholders "to allot further shares at a later period to future allottees." Upon that point I do not find it necessary to express any opinion, because it is not raised by the facts of the case, and, in my view, these considerations are of no relevancy in a question as to rescission between the company and the appellant.

Counsel for the company argued that the agreement of Aug. 2 ought to be set aside, upon the principle followed by this House in *Erlanger* v. *New Sombrero Phosphate Co.* (1). In that case the vendor, who got up the company, with the view of selling his adventure to it, attracted shareholders by a prospectus which was essentially false. The directors, who were virtually his nominees, purchased from him without being aware of the real facts; and on their assurance that, in so far as they knew, all was right the shareholders sanctioned the transaction. The fraud by which the company and its shareholders had been misled was directly traceable to the vendor; and the transaction was set aside at the instance of the liquidator, the Lord Chancellor (EARL CAIRNS) expressing a doubt whether, even in those circumstances, the remedy was not too late, after a liquidation order. But in the present case the agreement of July 20 was, in the full knowledge of the facts, approved and adopted by the company itself, if there was a company, and by all the shareholders who ever were or were likely to be members of the company.

In my opinion, therefore, *Erlanger* v. *New Sombrero Phosphate Co.* (1) has no application, and the original claim of the liquidator is not maintainable.

The lords justices, in disposing of the amended claim, have expressly found that the formation of the company, with limited liability, and the issue of £10,000 worth of its debentures to the appellant, were "contrary to the true intent and meaning of the Companies Act, 1862." I have had great difficulty in endeavouring to interpret that finding. I am unable to comprehend how a company, which has been formed contrary to the true intent and meaning of a statute, and (in the language of LINDLEY, L.J.) does the very thing which the legislature intended not to be done, can yet be held to have been legally incorporated in terms of the statute. "Intention of the legislature" is a common, but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication. Accordingly, if the words "intent and meaning," as they occur in the finding of the Court of Appeal, are used in their proper legal sense, it follows, in my opinion, that the company has not been well incorporated; that, there being no legal corporation, there can be no liquidation under the Companies Acts, and that the counterclaim preferred by its liquidator must fail. In that case its creditors would not be left without a remedy, because its members, as joint traders without limitation of their liability, would be jointly and severally responsible for the debts incurred by them in the name of the company. I can conceive that there might be a limited company formed and registered by a person who had the sole interest in it, the other subscribing members being persons who were his aliases, and having no real existence; and in that case also (which does not occur here) there would be no legal company, and the real owner of the concern would be liable for its debts to the full extent of his means.

The provisions of the Act of 1862 which seem to me to have any bearing upon this point lie within a very narrow compass. Section 6 [Companies Act, 1948, s. 1] provides that any seven or more persons, associated for a lawful purpose, such as the manufacture and sale of boots, may, by subscribing their names to a memorandum of association and otherwise complying with the provisions of the Act in respect of registration, form a company with or without limited liability; and s. 8 [s. 2 (4) (b) of the Act of 1948], which prescribes the essentials of the memorandum in the case of a company limited by shares, inter alia, enacts that "no subscriber shall take less than one share." The first of these enactments does not require that the persons subscribing shall not be related to each other, and the second plainly imports that the holding of a single share affords a sufficient qualification for membership; and I can find no other rule laid down or even suggested in the Act. Nor does the statute, either expressly or by implication impose any limit upon the number of shares which a single member may subscribe for or take by allotment. At the date of registration all the requirements of the Act had been complied with, and, as matters then stood, there does not appear to have been any room for the pleas now advanced by the liquidator. The company was still free to modify or reject the agreement of July 20, and the fraud of which the appellant has been held guilty by the Court of Appeal, though it may have existed in animo, had not been carried into execution by the acceptance of the agreement, the issue of debentures to the appellant under the terms of it, and by his receiving an allotment of shares which increased his interest in the company to $\frac{20001}{20007}$ of its actual capital.

I have already intimated my opinion that the acceptance of the agreement is binding on the company; and neither that acceptance, nor the preponderating share of the appellant, nor his payment in debentures, being forbidden by the Act, I do not think that any of those things could subsequently render the registration

of the company invalid. But I am willing to assume that proceedings which are permitted by the Act may be so used by the members of a limited company as to constitute a fraud upon others, to whom they in consequence incur personal liability. In this case the fraud is found to have been committed by the appellant against the creditors of the company, but it is clear that, if so, though he may have been its originator and the only person who took benefit from it, he could not have done any of those things which, taken together, are said to constitute his fraud without the consent and privity of the other shareholders. It seems doubtful whether a liquidator, as representing and in the name of the company, can sue its members for redress against a fraud which was committed by the company itself and by all its shareholders.

However, I do not think it necessary to dwell upon that point, because I am not satisfied that the charge of fraud against creditors has any foundation in fact. The memorandum of association gave notice that the main object for which the company was formed was to adopt, and carry into effect, with or without modifications, the agreement of July 20, 1892, under the terms of which the debentures for £10,000 were subsequently given to the appellant in part payment of the price. By the articles of association—art. 62 (e)—the directors were empowered to issue mortgage or other debentures or bonds for any debts due, or to become due, to the company, and it is not alleged or proved that there was any failure to comply with s. 43 or the other clauses of Part III of the Act [Companies Act, 1948, Part III, ss. 110 et seq.] which relate to the protection of creditors. The unpaid creditors of the company, whose unfortunate position has been attributed to the fraud of the appellant, if they had thought fit to avail themselves of the means of protecting their interests which the Act provides, could have informed themselves of the terms of purchase by the company, of the issue of debentures to the appellant, and of the amount of shares held by each member. In my opinion the statute casts upon them the duty of making inquiry in regard to these matters. Whatever may be the moral duty of a limited company and its shareholders, when the trade of the company is not thriving, the law does not lay any obligation upon them to warn those members of the public who deal with them on credit that they run the risk of not being paid. One of the learned judges asserts, and I see no reason to question the accuracy of his statement, that creditors never think of examining the register of debentures. But the apathy of a creditor cannot justify an imputation of fraud against a limited company or its members, who have provided all the means of information which the Act of 1862 requires. And, in my opinion, a creditor who will not take the trouble to use the means which the statute provides for enabling him to protect himself must bear the consequences of his own negligence.

For these reasons I have come to the conclusion that the orders appealed from ought to be reversed, with costs to the appellant here and in both courts below. His costs in this House must, of course, be taxed in accordance with the rule applicable to pauper litigants.

LORD HERSCHELL.—By an order of the High Court, which was affirmed by the Court of Appeal, it was declared that the respondent company, or the liquidator of that company, was entitled to be indemnified by the appellant against the sum of £7,733 8s. 3d., and it was ordered that the respondent company should recover that sum against the appellant. On July 28, 1892, the respondent company was incorporated with a capital of £40,000, divided into 40,000 shares of £1 each. One of the objects for which the company was incorporated was to carry out an agreement, with such modifications therein as might be agreed to, of July 20, 1892, which had been entered into between the appellant and a trustee for a company intended to be formed for the acquisition by the company of the business then carried on by the appellant. The company was in fact formed for the purpose of taking over the appellant's business of leather merchant and boot manufacturer, which he had

carried on for many years. The business had been a prosperous one, and, as the learned judge who tried the action found, was solvent at the time when the company was incorporated. The memorandum of association of the company was subscribed by the appellant, his wife and daughter, and his four sons, each subscribing for one share. The appellant afterwards had 20,000 shares allotted to him. For these he paid £1 per share out of the purchase money which, by agreement, he was to receive for the transfer of his business to the company.

The company afterwards became insolvent and went into liquidation. In an action brought by a debenture-holder on behalf of himself and all the other debenture-holders, including the appellant, the respondent company set up by way of counterclaim that the company was formed by the appellant, and the debentures were issued in order that he might carry on the said business and take all the profits without risk to himself, that the company was the mere nominee and agent of the appellant, and that the company or the liquidator thereof was entitled to be indemnified by him against all the debts owing by the company to creditors other than the appellant. This counterclaim was not in the pleading as originally delivered; it was inserted by way of amendment at the suggestion of VAUGHAN WILLIAMS, J., before whom the action came on for trial. The learned judge thought the liquidator entitled to the relief asked for and made the order complained of. He was of opinion that the company was only an alias for Salomon: that, the intention being that he should take the profits without running the risk of the debts, the company was merely an agent for him, and, having incurred liabilities at his instance, was, like any other agent under such circumstances, entitled to be indemnified by him against them.

On appeal the decision of VAUGHAN WILLIAMS, J., was affirmed by the Court of Appeal, that court "being of opinion that the formation of the company, the agreement of August, 1892, and the issue of debentures to Aron Salomon pursuant to such agreement were a mere scheme to enable him to carry on business in the name of the company with limited liability contrary to the true intent and meaning of the Companies Act, 1862, and further, to enable him to obtain a preference over other creditors of the company by procuring a first charge on the assets of the company by means of such debentures." The learned judges in the Court of Appeal dissented from the view taken by VAUGHAN WILLIAMS, J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and cestui que trust, but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.

It is to be observed that both courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and, therefore, as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company were entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Ltd., is but an alias for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders, but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that, if the business were profitable, he would be entitled substantially to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the

company, or give it rights as against its members which it would not otherwise possess. A

The Court of Appeal based their judgment on the proposition that the formation of the company, and all that followed it, was a mere scheme to enable the appellant to carry on business in the name of the company, with limited liability, contrary to the true intent and meaning of the Companies Act, 1862. The conclusion which they drew from this premise was, that the company was a trustee and Salomon their cestui que trust. I cannot think that the conclusion follows even if the premise be sound. It seems to me that the logical result would be that the company had not been validly constituted, and, therefore, had no legal existence. B

But, apart from this, it is necessary to examine the proposition on which the court have rested their judgment, as its effect would be far reaching. Many industrial and banking concerns of the highest standing and credit have, in recent years, been, to use a common expression, converted into joint stock companies, and often into what are called "private" companies, where the whole of the shares are held by the former partners. It appears to me that all these might be pronounced "schemes to enable" them "to carry on business in the name of the company, with limited liability," in the very sense in which those words are used in the judgment of the Court of Appeal. The profits of the concern carried on by the company will go to the persons whose business it was before the transfer, and in the same proportions as before, the only difference being that the liability of those who take the profits will no longer be unlimited. The very object of the creation of the company, and the transfer to it of the business, is that, whereas the liability of the partners for debts incurred was without limit, the liability of the members for the debts incurred by the company shall be limited. In no other respect is it intended that there shall be any difference; the conduct of the business and the division of the profits are intended to be the same as before. If the judgment of the Court of Appeal be pushed to its logical conclusion all these companies must, I think, be held to be trustees for the partners who transferred the business to them, and those partners must be declared liable, without limit, to discharge the debts of the company. For this is the effect of the judgment as regards the respondent company. The position of the members of a company is just the same whether they are declared liable to pay the debts incurred by the company, or by way of indemnity to furnish the company with the means of paying them. I do not think that the learned judges in the court below have contemplated the application of their judgment to such cases as I have been considering, but I can see no solid distinction between those cases and the present one. C D E F G

It is said that the respondent company is a "one-man" company, and that in this respect it differs from such companies as those to which I have referred. But it has often happened that a business transferred to a joint stock company has been the property of three or four persons only, and that the other subscribers of the memorandum have been clerks or other persons who possessed little or no interest in the concern. I am unable to see how it can be lawful for three or four or six persons to form a company for the purpose of employing their capital in trading, with the benefit of limited liability, and not for one person to do so, provided in each case the requirements of the statute have been complied with, and the company has been validly constituted. How does it concern the creditor whether the capital of the company is owned by seven persons in equal shares, with the right to an equal share of the profits, or whether it is almost entirely owned by one person who takes practically the whole of the profits? The creditor has notice that he is dealing with a company the liability of the members of which is limited, and the register of shareholders informs him how the shares are held, and that they are substantially in the hands of one person, if this be the fact. H I

The creditors in the present case gave credit to and contracted with a limited company; the effect of the decision is to give them the benefit as regards one of the shareholders, of unlimited liability. I have said that the liability of persons

carrying on business can only be limited provided the requirements of the statute be complied with, and this leads naturally to the inquiry what are those requirements? The Court of Appeal has declared that the formation of the respondent company, and the agreement to take over the business of the appellant, were a scheme "contrary to the true intent and meaning of the Companies Act." I know of no means of ascertaining what is the intent and meaning of the Companies Act except by examining its provisions and finding what regulations it has imposed as a condition of trading with limited liability. The memorandum must state the amount of the capital of the company and the number of shares into which it is divided, and no subscriber is to take less than one share [Companies Act, 1948, s. 2 (4) (a) (b)]. The shares may, however, be of as small a nominal value as those who form the company please; the statute prescribes no minimum, and though there must be seven shareholders, it is enough if each of them holds one share, however small its denomination.

The legislature, therefore, clearly sanctions a scheme by which all the shares, except six, are owned by a single individual, and these six are of a value little more than nominal. It was said that in the present case the six shareholders other than the appellant were mere dummies, his nominees, and held their shares in trust for him. I will assume that this was so. In my opinion, it makes no difference. The statute forbids the entry in the register of any trust [s. 117 of Act of 1948], and it certainly contains no enactment that each of the seven persons subscribing the memorandum must be beneficially entitled to the share or shares for which he subscribes. The persons who subscribe the memorandum or who have agreed to become members of the company, and whose names are on the register, are alone regarded as, and, in fact, are, the shareholders. They are subject to all the liability which attaches to the holding of the share. They can be compelled to make any payment which the ownership of a share involves. Whether they are beneficial owners or bare trustees is a matter with which neither the company nor creditors have anything to do; it concerns only them and their cestuis que trust if they have any.

If, then, in the present case all the requirements of the statute were complied with and a company was effectually constituted, and this is the hypothesis of the judgment appealed from, what warrant is there for saying that what was done was contrary to the true intent and meaning of the Companies Act? It may be that a company constituted like that under consideration was not in the contemplation of the legislature at the time when the Act authorising limited liability was passed; that if what is possible under the enactments as they stand had been foreseen, a minimum sum would have been fixed as the least denomination of share permissible, and it would have been made a condition that each of the seven persons should have a substantial interest in the company. But we have to interpret the law, not to make it; and it must be remembered that no one need trust a limited liability company unless he so please, and that before he does so he can ascertain, if he so please, what is the capital of the company, and how it is held.

I have hitherto made no reference to the debentures which the appellant received in part payment of the purchase money of the business which he transferred to the company. These are referred to in the judgment as part of the scheme which is pronounced contrary to the true intent and meaning of the Companies Act. But if apart from this the conclusion that the appellant is bound to indemnify the company against its debts cannot be sustained, I do not see how the circumstance that he received these debentures can avail the respondent company. The issue of debentures to the vendor of a business as part of the price is certainly open to great abuse, and has often worked grave mischief. It may well be that some check should be placed upon the practice, and that at all events, ample notice to all who may have dealings with the company should be secured. But as the law at present stands there is certainly nothing unlawful in the creation of such debentures. For these reasons I have come to the conclusion that the appeal should be allowed. It was contended on behalf of the company that the agreement between them and

the appellant ought at all events, to be set aside on the ground of fraud. In my opinion, no such case has been made out, and I do not think that the respondent company are entitled to any such relief.

LORD MACNAGHTEN.—I cannot help thinking that the appellant, Aron Salomon, has been dealt with somewhat hardly in this case. Mr. Salomon, who is now suing as a pauper, was a wealthy man in July, 1892. He was a boot and shoe manufacturer, trading on his own sole account under the firm of "A. Salomon & Co.," in High Street, Whitechapel, where he had extensive warehouses and a large establishment. He had been in the trade over thirty years. He had lived in the same neighbourhood all along, and for many years past he had occupied the same premises. So far things had gone very well with him. Beginning with little or no capital he had gradually built up a thriving business, and he was undoubtedly in good credit and repute. It is impossible to say exactly what the value of the business was. But there was a substantial surplus of assets over liabilities. And it seems to me to be pretty clear that, if Mr. Salomon had been minded to dispose of his business in the market as a going concern, he might fairly have counted upon retiring with at least £10,000 in his pocket. Mr. Salomon, however, did not want to part with the business. He had a wife and a family consisting of five sons and a daughter. Four of the sons were working with their father. The eldest, who was about thirty years of age, was practically the manager. But the sons were not partners; they were only servants. Not unnaturally, perhaps, they were dissatisfied with their position. They kept pressing their father to give them a share in the concern. "They troubled me," says Mr. Salomon, "all the while." So at length Mr. Salomon did what hundreds of others have done under similar circumstances; he turned his business into a limited company. He wanted, he says, to extend the business and make provision for his family. In those words, I think, he fairly describes the principal motives which influenced his action.

All the usual formalities were gone through; all the requirements of the Companies Act, 1862, were duly observed. There was a contract with a trustee in the usual form for the sale of the business to a company about to be formed. There was a memorandum of association duly signed and registered, stating that the company was formed to carry that contract into effect, and fixing the capital at £40,000 in 40,000 shares of £1 each. There were articles of association providing the usual machinery for conducting the business. The first directors were to be nominated by the majority of the subscribers to the memorandum of association. The directors, when appointed, were authorised to exercise all such powers of the company as were not by statute or by the articles required to be exercised in general meeting; and there was express power to borrow on debentures, with the limitation that the borrowing was not to exceed £10,000 without the sanction of a general meeting. The company was intended from the first to be a private company; it remained a private company to the end. No prospectus was issued; no invitation to take shares was ever addressed to the public. The subscribers to the memorandum were Mr. Salomon, his wife, and five of his children who were grown up. The subscribers met and appointed Mr. Salomon and his two elder sons directors.

The directors then proceeded to carry out the proposed transfer. By an agreement dated Aug. 2, 1892, the company adopted the preliminary contract, and in accordance with it the business was taken over by the company as from June 1, 1892. The price fixed by the contract was duly paid. The price on paper was extravagant. It amounted to over £39,000, a sum which represented the sanguine expectations of a fond owner rather than anything that can be called a businesslike or reasonable estimate of value. That, no doubt, is a circumstance which, at first sight, calls for observation, but when the facts of the case and the position of the parties are considered, it is difficult to see what bearing it has on the question before your Lordships. The purchase money was paid in this way. As money came in sums amounting to £20,000 were paid to Mr. Salomon, and then immediately returned

to the company in exchange for fully-paid shares. The sum of £10,000 was paid in debentures for the like amount. The balance, with the exception of about £1,000, which Mr. Salomon seems to have received and retained went in discharge of the debts and liabilities of the business at the time of the transfer, which were thus entirely wiped off. In the result, therefore, Mr. Salomon received for his business about £1,000 in cash, £10,000 in debentures and half the nominal capital of the company in fully-paid shares for what they were worth. No other shares were issued except the seven shares taken by the subscribers to the memorandum, who, of course, knew all the circumstances, and had, therefore, no ground for complaint on the score of over-valuation.

The company had a brief career; it fell upon evil days. Shortly after it was started there seems to have come a period of great depression in the boot and shoe trade. There were strikes of workmen too, and in view of that danger, contracts with public bodies, which were the principal source of Mr. Salomon's profit, were split up and divided between different firms. The attempts made to push the business on behalf of the new company crammed its warehouses with unsaleable stock. Mr. Salomon seems to have done what he could; both he and his wife lent the company money, and then he got his debentures cancelled and re-issued to a Mr. Broderip, who advanced him £5,000, which he immediately handed over to the company on loan. The temporary relief only hastened ruin. Mr. Broderip's interest was not paid when it became due. He took proceedings at once and got a receiver appointed. Then, of course, came liquidation and a forced sale of the company's assets. They realised enough to pay Mr. Broderip, but not enough to pay the debentures in full, and the unsecured creditors were consequently left out in the cold. In this state of things the liquidator met Mr. Broderip's claim by a counterclaim, to which he made Mr. Salomon defendant. He disputed the validity of the debentures on the ground of fraud. On the same ground he claimed rescission of the agreement for the transfer of the business, cancellation of the debentures, and repayment by Mr. Salomon of the balance of the purchase money. In the alternative he claimed payment of £20,000 on Mr. Salomon's shares, alleging that nothing had been paid on them.

When the trial came on before VAUGHAN WILLIAMS, J., the validity of Mr. Broderip's claim was admitted, and it was not disputed that the 20,000 shares were fully paid up. The case presented by the liquidator broke down completely. But the learned judge suggested that the company had a right of indemnity against Mr. Salomon. The signatories of the memorandum of association were, he said, mere nominees of Mr. Salomon, mere dummies. The company was Mr. Salomon in another form. He used the name of the company as an alias. He employed the company as his agent; so the company, he thought, was entitled to indemnity against its principal. The counterclaim was, accordingly, amended to raise this point, and on the amendment being made the learned judge pronounced an order in accordance with the view he had expressed.

The order of the learned judge appears to me to be founded on a misconception of the scope and effect of the Companies Act, 1862. In order to form a company limited by shares, the Act requires that a memorandum of association should be signed by seven persons, who are each to take one share at least. If those conditions are complied with, what can it matter whether the signatories are relations or strangers? There is nothing in the Act requiring that the subscribers to the memorandum should be independent or unconnected, or that they or any one of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, as one of the learned lords justices seems to think, or that there should be anything like a balance of power in the constitution of the company. In almost every company that is formed, the statutory number is eked out by clerks or friends, who sign their names at the request of the promoter or promoters without intending to take any further part or interest in the matter.

When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate "capable forthwith" to use the words of the enactments, "of exercising all the functions of an incorporated company" [Companies Act, 1948, s. 13 (2)]. Those are strong words. The company attains maturity on its birth. There is no period of minority; no interval of incapacity. I cannot understand how a body corporate thus made "capable" by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum, and, though it may be that after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability.

Mr. Salomon appealed, but his appeal was dismissed with costs, though the appellate court did not entirely accept the view of the court below. The decision of the Court of Appeal proceeds on a declaration of opinion embodied in the order which has been already read. I must say that I, too, have great difficulty in understanding this declaration. If it only means that Mr. Salomon availed himself to the full of the advantages offered by the Companies Act, 1862, what is there wrong in that? Leave out the words "contrary to the true intent and meaning of the Companies Act, 1862," and bear in mind that "the creditors of the company" are not the creditors of Mr. Salomon, and the declaration is perfectly innocent. It has no sting in it. In an early case (*Re Baglan Hall Colliery Co.* (2)) which in some of its aspects is not unlike the present, the owners of a colliery (to quote the language of GIFFARD, L.J., in the Court of Appeal) "went on working the colliery not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability." The lord justice adds: "It was the policy of the Companies Act to enable this to be done." And so he reversed the decision of MALINS, V.-C., who had expressed an opinion that if the laws of the country sanctioned such a proceeding they were "in a most lamentable state," and had fixed the former owners with liability for the amount of the shares they took in exchange for their property.

Among the principal reasons which induce persons to form private companies as is stated very clearly by MR. PALMER in his treatise on the subject, are the desire to avoid the risk of bankruptcy, and the increased facility afforded for borrowing money. By means of a private company, as MR. PALMER observes, a trade can be carried on with limited liability and without exposing the persons interested in it in the event of failure to the harsh provisions of the bankruptcy law. A company too can raise money on debentures which an ordinary trader cannot do; any member of a company acting in good faith is as much entitled to take and hold the company's debentures as any outside creditor. Every creditor is entitled to get and to hold the best security the law allows him to take. If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say that I can find nothing in the evidence to support such an imputation. The purpose for which Mr. Salomon and the other subscribers to the memorandum were associated was "lawful." The fact that Mr. Salomon raised £5,000 for the company on debentures that belonged to him seems to me strong evidence of his good faith and of his confidence in the company.

The unsecured creditors of A. Salomon & Co., Ltd., may be entitled to sympathy, but they have only themselves to blame for their misfortunes. They trusted the company, I suppose, because they had long dealt with Mr. Salomon and he had always paid his way; but they had full notice that they were no longer dealing with

A an individual, and they must be taken to have been cognisant of the memorandum and of the articles of association. For such a catastrophe as has occurred in this case some would blame the law that allows such a thing as a floating charge. But a floating charge is too convenient a form of security to be lightly abolished. I have long thought, and I believe some of your Lordships also think, that the B ordinary trade creditors of a trading company ought to have a preferential claim on the assets in liquidation in respect of debts incurred within a certain limited time before the winding-up. But that is not the law at present. Everybody knows that when there is a winding-up, debenture holders generally step in and sweep off everything. And a great scandal it is.

It has become the fashion to call companies of this class "one-man companies." C That is a taking nickname, but it does not help one much in the way of argument. If it is intended to convey the meaning that a company which is under the absolute control of one person is not a company legally incorporated, although the requirements of the Act of 1862 may have been complied with, it is inaccurate and misleading; if it merely means that there is a predominant partner possessing an overwhelming influence and entitled practically to the whole of the profits, there is D nothing in that that I can see contrary to the true intention of the Act of 1862, or against public policy, or detrimental to the interests of creditors. If the shares are fully paid up it cannot matter whether they are in the hands of one or many. If the shares are not fully paid it is as easy to gauge the solvency of an individual as to estimate the financial ability of a crowd.

One argument was addressed to your Lordships which ought perhaps to be E noticed although it was not the ground of decision in either of the courts below. It was argued that the agreement for the transfer of the business to the company ought to be set aside, because there was no independent board of directors, and the property was transferred at an over-value. There are, it seems to me, two answers to that argument. In the first place, the directors did just what they were authorised to do by the memorandum of association. There was no fraud or misrepresen- F tation and there was nobody deceived. In the second place the company have put it out of their power to restore the property which was transferred to them. It was said that the assets were sold by an order made in the presence of Mr. Salomon, though not with his consent, which declared that the sale was to be without prejudice to the rights claimed by the company by their counterclaim. I cannot see what difference that makes. The reservation in the order seems to me to be simply G nugatory. I am of opinion that the appeal ought to be allowed and the counterclaim of the company dismissed with costs, both here and below.

LORD MORRIS.—I quite concur in the decision which has been announced and in the reasons which have been so fully given for it.

LORD DAVEY.—It is possible, and (I think) probable, that the conclusion to H which I feel constrained to come in this case may not have been contemplated by the legislature, and may be due to some defect in the machinery of the Act. But, after all, the intention of the legislature must be collected from the language of its enactments, and I do not see my way to holding that, if there are seven registered members, the association is not a company formed in compliance with the provisions of the Act, and capable of carrying on business with limited liability I either because the bulk of the shares are held by some only, or even one of the members, and the others are what is called "dummies," holding, it may be, only one share of £1 each, or because there are less than seven persons who are beneficially entitled to the shares. I think that this result follows from the absence of any provision fixing a minimum nominal amount of a share, the provision in s. 8 of the Companies Act, 1862 [s. 2 (4) (b) of Act of 1948] that no subscriber shall take less than one share, and the provision in s. 30 [s. 117 of Act of 1948] that no notice of any trust shall be entered on the register. With regard to the latter provision, it would, in my opinion, be impossible to work the machinery of the

Act on any other principle, and to attempt to do so would lead only to confusion and uncertainty. A

The learned counsel for the respondents (wisely, as I think), did not lay any stress on the members, other than the appellant, being trustees for him of their shares. Their argument was that they were "dummies," and did not hold a substantial interest in the company—i.e., what a jury would say is a substantial interest. In B the language of some of the judges in the court below, any jury, if asked the question, would say the business was Aron Salomon's, and no one else's. It was not argued in this case that there was no association of seven persons to be registered and that the registration, therefore, operated nothing, or that the so-called company was a sham and might be disregarded. And, indeed, it would have been difficult for the learned counsel for the respondents appearing, as they did, at your Lordships' Bar C for the company who had been permitted to litigate in the courts below as actors on their counterclaim, to contend that their clients were non-existent. I do not say that such an argument ought to or would prevail; I only observe that, having regard to the decisions, it is not certain that s. 18 [s. 15 (1) of Act of 1948], making the certificate of the registrar conclusive evidence that all the requisitions of the Act in respect of registration had been complied with, would be an answer to it. D

We start, then, with the assumption that the respondents have a corporate existence with power to sue and be sued, to incur debts and be wound-up, and to act as agents or as trustees, and I suppose, therefore, to hold property. Both the courts below have, however, held that the appellant is liable to indemnify the company against all its debts and liabilities. VAUGHAN WILLIAMS, J., held that the company was an alias for the appellant, who carried on his business through the company as E his agent, and that he was bound to indemnify his own agent, and he arrived at this conclusion on the ground that the other members of the company had no substantial interest in it, and the business in substance was the appellant's. The Court of Appeal thought the relation of the company to the appellant was that of trustee to cestui que trust. The ground on which the learned judges seem to have chiefly relied was that it was an attempt by an individual to carry on his business F with limited liability, which was forbidden by the Act and unlawful. I observe in passing that nothing turns upon there being only one person interested. The argument would have been just as good if there had been six members holding the bulk of the shares and one member with a very small interest, say, one share.

I am at a loss to see how in either view taken in the courts below the conclusion follows from the premises, or in what way the company became an agent or trustee G for the appellant, except in the sense in which every company may loosely and inaccurately be said to be an agent for earning profits for its members, or a trustee of its profits for the members amongst whom they are to be divided. There was certainly no express trust for the appellant, and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer. By an alias is usually understood H a second name for one individual, but here, as one of your Lordships has already observed, we have, ex hypothesi, a duly formed legal persona, with corporate attributes, and capable of incurring legal liabilities. Nor do I think it legitimate to inquire whether the interest of any member is substantial when the Act has declared that no member need hold more than one share, and has not prescribed any minimum amount of a share. If, as was said in the Court of Appeal, the I company was formed for an unlawful purpose, or in order to achieve an object not permitted by the provisions of the Act, the appropriate remedy (if any) would seem to be to set aside the certificate of incorporation, or to treat the company as a nullity, or, if the appellant has committed a fraud or misdemeanour (which I do not think he has), he may be proceeded against civilly or criminally; but how either of these states of circumstances creates the relation of cestui que trust and trustee, or principal and agent, between the appellant and respondents, is not apparent to my understanding.

I am, therefore, of opinion that the order appealed from cannot be supported on the grounds stated by the learned judges. But counsel for the respondent company also relied on the alternative relief claimed by his pleadings, which was quite open to him here, viz., that the contract for purchase of the appellant's business ought to be set aside for fraud. The fraud seems to consist in the alleged exorbitance of the price, and the fact that there was no independent board of directors with whom the appellant could contract. I am of opinion that the fraud was not made out. I do not think the price of the appellant's business (which seems to have been a genuine one, and for some time a prosperous business) was so excessive as to afford grounds for rescission, and as regards the cash portion of the price it must be observed that as the appellant held the bulk of the shares, or (the respondents say) was the only shareholder, the money required for the payment of it came from himself in the form either of calls on his shares or profits which would otherwise be divisible.

Nor was the absence of any independent board material in a case like the present. I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter intra vires by the unanimous agreement of its members. In fact, it is impossible to say who was defrauded. Counsel relied on some dicta in *Erlanger* v. *New Sombrero Phosphate Co.* (1), a case which is often quoted and not unfrequently misunderstood. Of course LORD CAIRNS' observations were directed only to a case such as he had before him, where it was attempted to bind a large body of shareholders by a contract which purported to have been made between the vendor and the directors before the shares were offered for subscription, whereas it appeared that the directors were only the nominees of the vendor, who had accepted his bidding, and exercised no judgment of their own. It has nothing to do with the present case. That a company may contract with the holder of the bulk of its shares, and such contract will be binding, though carried only by the votes of that shareholder, was decided in *North-West Transportation Co.* v. *Beatty* (3).

For these reasons I am of opinion that the appellant's appeal should be allowed and the cross appeal should be dismissed. I agree to the proposed order as to costs.

In the original appeal, order appealed from reversed, with costs below, and such costs in this House as are appropriate in the case of a pauper appeal. In the cross-appeal, order appealed from affirmed, and appeal dismissed with costs to the same extent.

Solicitors: *Ralph Raphael & Co.; S. M. & J. B. Benson.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

ALLEN *v.* FLOOD AND ANOTHER

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Ashbourne, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand, Lord Davey and Lord James of Hereford), December 10, 12, 16, 17, 1895, March 25, 26, 29, 30, April 1, 2, June 3, December 14, 1897] B

[Reported [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149]

Tort—Procurement of unlawful act—Procurement of lawful act by unlawful means—Materiality of motive—Action against trade union—Competency—Procurement by official of dismissal of plaintiffs—No breach of contract by employer. C

An act which in itself is lawful cannot be converted into a legal wrong because it was done with a bad motive.

A person who procures the act of another can be made legally responsible for the consequences of that act if he knowingly and for his own ends induces that other person to commit an actionable wrong, or, when the act induced is within the right of the immediate actor and so is not wrongful so far as he is concerned, if the inducer can be shown to have procured his object by illegal means against the third party, as, e.g., by fraud. But a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or abstain from doing at his own will and pleasure, whatever his motive may be, has no remedy against a further person who, by persuasion or some other means not in themselves unlawful, has brought about the act or omission from which the loss comes, even though that person was actuated by malice against the person injured and his conduct was without justification or excuse. D E F

Accordingly, where the appellant, the representative of a trade union, informed an employer that, unless he discharged the respondents, who were working for him, the members of the union in his employment would immediately cease to work for him, there being no contractual relationship between the employer and his workers which would render it a breach of contract if the union men left the employment, or if the employer dismissed the respondents, without longer notice, G

Held: the respondents were not entitled to maintain an action against the appellant for damages for intimidating and coercing the employer to terminate their employment, it being immaterial whether his motive in approaching the employer was a proper one, namely, to advance the interests of the members of his union, or an improper one, his object being to punish the respondents for acts which they had done some time previously of which the union disapproved. H

Notes. So far as trade unions are concerned it is to be borne in mind that s. 3 of the Trade Disputes Act, 1906 (25 HALSBURY'S STATUTES (2nd Edn.) 1267), provides that an act done in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or is an interference with the trade, business, or employment of some other person. I

Considered: *Ajello* v. *Worsley*, [1898] 1 Ch. 274; *Huttley* v. *Simmons*, [1898] 1 Q.B. 181. Followed: *Taylor* v. *Cambridge Gazette* (1898), 42 Sol. Jo. 832. Distinguished: *Lyons* v. *Wilkins*, [1899] 1 Ch. 255. Applied: *Boots* v. *Grundy* (1900), 82 L.T. 769. Distinguished: *Quinn* v. *Leathem*, [1900-03] All E.R. Rep. 1; *Read* v. *Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1904-7] All E.R. Rep. 211. Con-

sidered: *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.*, [1904-7] All E.R. Rep. 116; *Conway* v. *Wade* (1908), 78 L.J.K.B. 14. Applied: *Santen* v. *Busnach* (1913), 29 T.L.R. 214; *Stott* v. *Gamble*, [1916-17] All E.R. Rep. 724. Considered: *Pratt* v. *British Medical Association*, [1918-19] All E.R. Rep. 104; *Valentine* v. *Hyde*, [1919] 2 Ch. 129. Applied: *Davies* v. *Thomas*, [1920] All E.R. Rep. 438. Considered: *Hodges* v. *Webb*, [1920] All E.R. Rep. 447; *Ware and De Freville* v. *Motor Trade Association*, [1920] All E.R. Rep. 387; *White* v. *Riley*, [1920] All E.R. Rep. 371. Applied: *Sorrell* v. *Smith*, [1925] All E.R. Rep. 1. Considered: *Hardie and Lane, Ltd.* v. *Chilton*, [1928] All E.R. Rep. 36; *Hollywood Silver Fox Farm* v. *Emmett*, [1936] 1 All E.R. 825; *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, [1942] 1 All E.R. 142. Referred to: *Hubbuck* v. *Wilkinson*, post p. 244; *Charnock* v. *Court* (1899), 68 L.J.Ch. 550; *Linaker* v. *Pilcher* (1901), 70 L.J.K.B. 396; *Giblan* v. *National Amalgamated Labourers' Union*, [1903] 2 K.B. 600; *Denaby and Cadeby Main Collieries* v. *Yorkshire Miners' Association*, [1906] A.C. 384; *Wilford* v. *West Riding of Yorkshire County Council*, [1908] 1 K.B. 685; *Wolstenholme* v. *Ariss*, [1920] 2 Ch. 403; *Hampton* v. *West Cannock Colliery Co.*, [1932] 2 K.B. 293; *Place* v. *Searle*, [1932] All E.R. Rep. 84; *Thorne* v. *Motor Trade Association*, [1937] 3 All E.R. 157; *De Stempel* v. *Dunkels*, [1938] 1 All E.R. 238; *British Industrial Plastics, Ltd.* v. *Ferguson*, [1938] 4 All E.R. 504; *Best* v. *Samuel Fox & Co.*, [1950] 2 All E.R. 798; *D. C. Thomson & Co.* v. *Deakin*, [1952] 2 All E.R. 361; *Huntley* v. *Thornton*, [1957] 1 All E.R. 234; *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*, [1959] 2 All E.R. 289.

The nature of torts is discussed at 37 HALSBURY'S LAWS (3rd Edn.) 111 et seq., and, particularly, torts affecting economic interests, ibid., pp. 123-127. As to freedom of trade and trade combinations and strikes, see 38 HALSBURY'S LAWS (3rd Edn.) 8 et seq., 55-70. For cases see 42 DIGEST 967 et seq., and 43 DIGEST 8 et seq., 93-97.

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(1) *R.* v. *Druitt, Lawrence* v. *Adamson* (1867), 16 L.T. 855; 10 Cox, C.C. 592; 43 Digest 112, *1175*.

(2) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 2 Smith, L.C., 12th Edn., 71; 100 E.R. 450; 1 Digest (Repl.) 27, *205*.

(3) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1888), 21 Q.B.D. 544; 57 L.J.Q.B. 541; 59 L.T. 514; 53 J.P. 391; 4 T.L.R. 783; 37 W.R. 286; 6 Asp.M.L.C. 320; affirmed (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 43 Digest 10, *51*.

(4) *Tarleton* v. *M'Gawley* (1794), Peake, 205; 170 E.R. 153, N.P.; 43 Digest 9, *39*.

(5) *Clifford* v. *Brandon* (1809), 2 Camp. 358; 170 E.R. 1183, N.P.; 42 Digest 907, *37*.

(6) *Gregory* v. *Duke of Brunswick* (1844), 6 Man. & G. 953; 7 Scott, N.R. 972; 2 L.T.O.S. 188; 8 Jur. 148; 134 E.R. 1178; on appeal (1846), 3 C.B. 481, Ex. Ch.; (1849), 2 H.L.Cas. 415, H.L.; 42 Digest 972, *32*.

(7) *Carrington* v. *Taylor* (1809), 11 East, 571; 103 E.R. 1126; 2 Digest (Repl.) 295, *39*.

(8) *Keeble* v. *Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, *30*.

(9) *Garret* v. *Taylor* (1620), Cro. Jac. 567; 2 Roll. Rep. 162; 79 E.R. 485; 34 Digest 169, *1317*.

(10) *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, *174*.

(11) *Lumley* v. *Gye* (1853), 2 E. & B. 216; 22 L.J.Q.B. 463; 17 Jur. 827; 1 W.R. 432, 118 E.R. 749; 42 Digest 987, *169*.

(12) *Bromage* v. *Prosser* (1825), 4 B. & C. 247; 1 C. & P. 673; 6 Dow. & Ry.K.B. 296; 3 L.J.O.S.K.B. 203; 107 E.R. 1051; 32 Digest 154, *1857*.

(13) *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121.* A

(14) *Walker* v. *Cronin* (1871), 107 Mass. 555.

(15) *Green* v. *Button* (1835), 2 Cr.M. & R. 707; 1 Gale, 349; Tyr. & Gr. 118; 5 L.J.Ex. 81; 150 E.R. 299; 17 Digest (Repl.) 123, *340.*

(16) *Gunter* v. *Astor* (1819), 4 Moore, C.P. 12; 34 Digest 171, *1338.*

(17) *Hart* v. *Aldridge* (1774), 1 Cowp. 54; 98 E.R. 964; sub nom. *Anon*, Lofft, 493; 34 Digest 167, *1300.* B

(18) *Shepherd* (*Shepard*, *Sheppard*, *Sheperd*) v. *Wakeman* (1662), 1 Keb. 255, 269, 308, 326, 459; 1 Lev. 53; 1 Sid. 79; 83 E.R. 931, 939, 963, 974, 1052; 1 Digest (Repl.) 28, *216.*

(19) *Winsmore* v. *Greenbank* (1745), Willes, 577; 125 E.R. 1330; 27 Digest (Repl.) 88, *673.* C

(20) *Benton* v. *Pratt* (1829), 2 Wend. 385.

(21) *Rice* v. *Manley* (1876), 66 N.Y. 82.

(22) *Bixby* v. *Dunlap* (1876), 22 Amer. 475.

(23) *Angle* v. *Chicago, etc., Rail. Co.* (1893), 151 U.S. 1.

(24) *Bradford Corpn.* v. *Pickles*, [1895] 1 Ch. 145; 64 L.J.Ch. 101; 71 L.T. 793; 59 J.P. 85; 43 W.R. 189; 10 T.L.R. 53, C.A.; affirmed, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 42 Digest 972, *34.* D

(25) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.T. 249; 31 W.R. 668, C.A.; 10 Digest (Repl.) 866, *5696.*

(26) *Gibbs* v. *Pike* (1842), 9 M. & W. 351; 1 Dowl. N.S. 409; 12 L.J.Ex. 257; 6 Jur. 465; 152 E.R. 149; 33 Digest 485, *219.* E

(27) *Jenings* v. *Florence* (1857), 2 C.B.N.S. 467; 26 L.J.C.P. 277; 30 L.T.O.S. 54; 3 Jur.N.S. 774; 140 E.R. 500; 21 Digest (Repl.) 547, *442.*

(28) *Wylie* v. *Birch* (1843), 4 Q.B. 566; 3 Gal. & Dav. 629; 12 L.J.Q.B. 260; 1 L.T.O.S. 169; 7 Jur. 626; 114 E.R. 1011; 21 Digest (Repl.) 629, *1172.*

(29) *R.* v. *Sterling* (1663), 1 Lev. 125; 1 Sid. 174; 83 E.R. 331; sub nom. *A.-G.* v. *Starling*, 1 Keb. 650; 14 Digest (Repl.) 125, *871.* F

(30) *R.* v. *Kinnersley and Moore* (1719), 1 Stra. 193; 93 E.R. 467; 14 Digest (Repl.) 112, *777.*

(31) *Sydserff* v. *R.* (1847), 11 Q.B. 245; 12 Jur. 418; 116 E.R. 467, Ex. Ch.; 15 Digest (Repl.) 1204, *12,232.*

(32) *R.* v. *Fuller* (1797), 1 Bos. & P. 180; 2 Leach, 790; 1 East, P.C. 92; 126 E.R. 847; 15 Digest (Repl.) 781, *7332.* G

(33) *Temperton* v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376 C.A.; 42 Digest 987, *170.*

(34) *Pitt* v. *Donovan* (1813), 1 M. & S. 639; 105 E.R. 238; 32 Digest 206, *2574.*

(35) *Stevenson* v. *Newnham* (1853), 13 C.B. 285; 22 L.J.C.P. 110; 20 L.T.O.S. 279; 17 Jur. 600; 138 E.R. 1208, Ex. Ch.; 42 Digest 972, *33.* H

(36) *Green* v. *London General Omnibus Co., Ltd.* (1859), 7 C.B.N.S. 290; 29 L.J.C.P. 13; 1 L.T. 95; 6 Jur.N.S. 228; 8 W.R. 88; 141 E.R. 828; 26 Digest (Repl.) 486, *1716.*

(37) *Cattle* v. *Stockton Waterworks Co.* (1875), L.R. 10 Q.B. 453; 44 L.J.Q.B. 139; 33 L.T. 475; 39 J.P. 791; 1 Digest (Repl.) 37, *277.* I

(38) *Ibottson* v. *Peat* (1865), 3 H. & C. 644; 159 E.R. 684; sub nom. *Ibbotson* v. *Peat*, 6 New Rep. 124; 34 L.J.Ex. 118; 12 L.T. 313; 29 J.P. 344; 11 Jur.N.S. 394; 13 W.R. 691; 42 Digest 991, *198.*

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A *Jenkinson* v. *Nield* (1892), 8 T.L.R. 540, D.C.; 43 Digest 118, *1228.*

Connor v. *Kent*, *Connor* v. *Ritson*, *Gibson* v. *Lawson*, *Curran* v. *Treleaven*, [1891] 2 Q.B. 545; 61 L.J.M.C. 9; 65 L.T. 573; 55 J.P. 485; 7 T.L.R. 650; 17 Cox, C.C. 354, C.C.R.; 15 Digest (Repl.) 917, *8812.*

Hilton v. *Eckersley* (1856), 6 E. & B. 47; 25 L.J.Q.B. 199; 26 L.T.O.S. 314; 20 J.P. 196; 2 Jur.N.S. 587; 4 W.R. 326; 119 E.R. 789, Ex. Ch.; 43 Digest

B 10, *50.*

Walsby v. *Anley* (1861), 3 E. & E. 516; 30 L.J.M.C. 121; 3 L.T. 666; 7 Jur.N.S. 465; 9 W.R. 271.

Hannam v. *Mockett* (1824), 2 B. & C. 934; 4 Dow. & Ry.K.B. 518; 2 L.J.O.S.K.B. 183; 107 E.R. 629; 2 Digest (Repl.) 295, *41.*

R. v. *Bunn* (1872), 12 Cox, C.C. 316; 14 Digest (Repl.) 128, *892.*

C *R.* v. *Tomlinson*, [1895] 1 Q.B. 706; 64 L.J.M.C. 97; 72 L.T. 155; 43 W.R. 544; 11 T.L.R. 212; 39 Sol. Jo. 247; 18 Cox, C.C. 75; 15 R. 207, C.C.R.; 15 Digest (Repl.) 1123, *11,200.*

O'Neill v. *Longman* (1863), 4 B. & S. 376; 2 New Rep. 427; 32 L.J.M.C. 259; 8 L.T. 657; 27 J.P. 452; 10 Jur.N.S. 74; 11 W.R. 947; 9 Cox, C.C. 360; 122 E.R. 500; 33 Digest 418, *1296.*

D *R.* v. *Walton and Ogden* (1863), Le. & Ca. 288; 1 New Rep. 374; 32 L.J.M.C. 79; 7 L.T. 754; 27 J.P. 165; 9 Jur.N.S. 259; 11 W.R. 348; 9 Cox, C.C. 268, C.C.R.; 15 Digest (Repl.) 1119, *11,138.*

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Harrison v. *Duke of Rutland*, [1893] 1 Q.B. 142; 62 L.J.Q.B. 117; 68 L.T. 35; 57 J.P. 278; 41 W.R. 322; 9 T.L.R. 115; 4 R. 155, C.A.; 25 Digest (Repl.)

F 385, *132.*

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Re Hungerford Market Co. Ex parte Farlow (1831), 2 B. & Ad. 341; 109 E.R. 1169; sub nom. *R.* v. *Hungerford Market Co.*, 9 L.J.O.S.K.B. 255; 11 Digest (Repl.) 294, *1990.*

G *R.* v. *Hungerford Market Co.*, *Ex parte Gosling* (1833), 4 B. & Ad. 596; 1 Nev. & M.K.B. 548; 110 E.R. 580; 11 Digest (Repl.) 290, *1953.*

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H Moo. & S. 627; 131 E.R. 863, H.L.; 21 Digest (Repl.) 618, *1054.*

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I *Oakes* v. *Wood* (1837), 2 M. & W. 791; Murp. & H. 237; 6 L.J.Ex. 200; 1 Jur. 264; 150 E.R. 977; 15 Digest (Repl.) 995, *9791.*

Collins v. *Locke* (1879), 4 App. Cas. 674; 48 L.J.P.C. 68; 41 L.T. 292; 28 W.R. 189, P.C.; 43 Digest 21, *131.*

Western Counties Manure Co. v. *Lawes Chemical Manure Co.* (1874), L.R. 9 Exch. 218; 43 L.J.Ex. 171; 23 W.R. 5; 32 Digest 210, *2602.*

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Thompson v. *Ross* (1859), 5 H. & N. 16; 29 L.J.Ex. 1; 1 L.T. 43; 5 Jur.N.S. 1133; 8 W.R. 44; 157 E.R. 1082; 34 Digest 172, *1357*.

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Blake v. *Lanyon* (1795), 6 Term Rep. 221; 101 E.R. 521; 34 Digest 170, *1331*.

Savile v. *Roberts* (1698), 1 Ld. Raym. 374; 12 Mod. Rep. 208; 5 Mod. Rep. 394; 3 Salk. 16, Carth. 416; Holt, K.B. 150; 91 E.R. 1147; sub nom. *Roberts* v. *Savill*, 5 Mod Rep. 405; 42 Digest 984, *144*.

Young v. *Hichens* (1844), 6 Q.B. 606; 1 Dav. & Mer. 592; 2 L.T.O.S. 420; 115 E.R. 228; 25 Digest (Repl.) 30, *299*. D

Thorley's Cattle Food Co. v. *Massam* (1880), 14 Ch.D. 763; sub nom. *J. W. Thorley's Cattle Food Co.* v. *Massam*, *Massam* v. *J. W. Thorley's Cattle Food Co.*, 42 L.T. 851; 28 W.R. 966, C.A.; 32 Digest 210, *2612*.

M'Pherson v. *Daniels* (1829), 10 B. & C. 263; 5 Man. & Ry.K.B. 251; 8 L.J.O.S.K.B. 14; 109 E.R. 448; 32 Digest 88, *1193*. E

Ferguson v. *Earl of Kinnoull* (1842), 9 Cl. & Fin. 251; 4 State Tr.N.S. 785; 8 E.R. 412, H.L.; 42 Digest 967, *1*.

R. v. *Ward* (1872), L.R. 1 C.C.R. 356; 41 L.J.M.C. 69; 26 L.T. 43; 36 J.P. 453; 20 W.R. 392; 12 Cox, C.C. 123, C.C.R.; 15 Digest (Repl.) 999, *9839*.

R. v. *Oneby* (1727), 2 Stra. 766; 1 Barn. K.B. 17; 2 Ld. Raym. 1485; 17 State Tr. 29; 93 E.R. 835; 15 Digest (Repl.) 930, *8904*. F

R. v. *Dudley and Stephens* (1884), 14 Q.B.D. 273; 54 L.J.M.C. 32; 52 L.T. 107; 49 J.P. 69; 33 W.R. 347; 1 T.L.R. 118; 15 Cox, C.C. 624, C.C.A.; 14 Digest (Repl.) 75, *359*.

Chasemore v. *Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 23 J.P. 596; 5 Jur.N.S. 873; 7 W.R. 685; 11 E.R. 140; 1 Digest (Repl.) 38, *285*. G

Drewe v. *Coulton* (1787), 1 East, 563, n.; 2 Lud. E.C. 245; 102 E.R. 217; 20 Digest (Repl.) 106, *877*.

Harman v. *Tappenden* (1801), 7 East, 555; 3 Esp. 278; 102 E.R. 214; 13 Digest (Repl.) 339, *143*.

Cullen v. *Morris* (1819), 2 Stark. 577, N.P.; 20 Digest (Repl.) 106, *878*. H

Kearney v. *Lloyd* (1889), 26 L.R.Ir. 268; 42 Digest 986, *e*.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported [1895] 2 Q.B. 21, affirming a decision of Kennedy, J., on further consideration of an action, tried by him with a jury, in which the respondents, as plaintiffs, claimed damages from the appellant for "intimidating and coercing" the Glengall Iron Co. to terminate the respondents' employment and not to enter into further contracts to employ them. I

The respondents, Flood and Taylor, were shipwrights, who for several years previous to the month of April, 1894, had been, and then were, pursuing their calling in the port of London, each having served an apprenticeship to that calling with the Glengall Iron Co., under the superintendence of Mr. Edmonds, the foreman of the company's works at their Regent Dock. As apprentices they were taught, as part of the calling of shipwrights, to do both wood and iron work to all kinds of

ships—wooden, composite, and iron. In the northern ports of England the wood and iron work was almost universally done by separate sets of men, and the same practice prevailed in some of the London docks, among them the Glengall Co.'s Regent Dock, where ships of all kinds were docked and repaired. There were, however, other of those docks, among them Mills and Knight's Nelson Dock at Rotherhithe, in which both wood and iron work were usually done by the same shipwrights. There the respondents sometimes found employment. At the Glengall Regent Dock they were also frequently employed, but there, from first to last, they worked at wood work only, and they were so working on the morning of April 13, 1894, on the *Sam Weller*, then in dock for repairs. They were engaged to work by the day, being entitled to leave the employment at the end of any day, and, on the other hand, being subject to the risk that their employers might similarly at any time cease to employ them. A body of iron workers commonly called "boilermakers" were engaged for the iron work, the terms of their employment being the same as those of the respondents. The job on the *Sam Weller* was expected to last about a fortnight, and there was every reason to suppose the respondents would, but for the action of the appellant, have been continued upon it until it was finished. The appellant was by trade a boilermaker, and at the time in question was a member and the London delegate of the Independent Society of Boilermakers and Iron and Steel Shipbuilders, consisting of about 40,000 members. He was not employed on the Glengall Co.'s works. A number of boilermakers, members of the society, were employed by the Glengall Co. on the *Sam Weller*. It appeared that for a period of four months, terminating on April 11, the respondents had been working at the Nelson Dock of Mills and Knight, and that fact became known to a man named Elliott, a member of the Boilermakers' Society, and one of those working in iron work on the *Sam Weller*. On the morning of April 13 the appellant, at the request of Elliott, came to see him at the Regent Dock, and had some conversation with him respecting the respondents. He afterwards had an interview with Mr. Halkett, the managing director of the Glengall Co., in his office. The appellant said that he had received word by some of the boilermakers working in the company's yard that they wanted to see him, and that he had had an interview with them, and they told him that the company had two shipwrights, the respondents, in their employment who were known to have done iron work in Mills and Knight's yard, and that, unless those two men were discharged from their employment that day, all the boilermakers belonging to the society would on that day leave off work. Mr. Halkett said that it was very hard to be interfered with, and that the respondents were not doing iron work in the company's yard. The appellant thereupon said: "We are doing our best to put an end to the practice of doing iron work by shipwrights," adding that it was not from any ill-feeling against the employers, nor against any men in particular, but that his society had made up their minds that, wherever it was known that any shipwrights had been engaged doing iron work, the boilermakers would cease work on the same ship in the same employment. With regard to the respondents, he said that they were known, and wherever they were employed the same action would be taken there as in that place. In consequence of that interview, Mr. Halkett, in Allen's presence, gave instructions that the respondents were to be discharged. On the same day the respondents were discharged, and were not again employed by the Glengall Co.

Dec. 10, 12, 16, 17, 1895.—The case came on for argument before Lord Halsbury, L.C., and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey. At the conclusion of the argument their Lordships stated that they required further argument and also to consult the judges.

Mar. 25, 26, 29, 30, April 1, 2, 1897, the case was re-argued before the same noble and learned Lords, with the addition of Lord Ashbourne and Lord James of Hereford. The judges were summoned, and Hawkins, Mathew, Cave, North, Wills, Grantham, Lawrance, and Wright, JJ., attended, the question being

submitted to them: "Assuming the evidence given by the [respondents'] witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" A

Cohen, Q.C., Robson, Q.C., and *E. Morten* for the appellant.
Lawson Walton, Q.C., and Rufus Isaacs for the respondents.

June 3, 1897. The judges delivered their opinions, HAWKINS, CAVE, NORTH, WILLS, GRANTHAM and LAWRANCE, JJ., answering the question put to them in the affirmative, while MATHEW and WRIGHT, JJ., answered it in the negative. Their Lordships thanked the judges for their opinions, and themselves took time for consideration. B

Dec. 14, 1897. The following opinions were read.

C

LORD HALSBURY, L.C.—In this case the plaintiffs, Flood and Taylor, sued the defendants for having maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced their employers to break contracts and not to enter into contracts with them, whereby the plaintiffs suffered damage.

The first objection made to the plaintiffs' right to recover for the loss which they undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognised by law, or at all events only such a right that everyone else is entitled to deprive them of it if they stop short of physical violence or obstruction. I think the right to employ their labour as they will is a right both recognised by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong. Very early authorities in the law have recognised the right, and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action; the quarry-owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or of actual violence were unlawful means; the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted, it was not the quarry-owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry-owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others. In my view, these are binding authorities to show that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action which, in my view, may be found to be running through the principles of our law. D E F G H

I will deal separately both with the remedy for the infringement of that right, if it has been infringed, and with the means by which it is alleged to have been infringed. Upon this part of the case I wish to quote and make my own the language of BRAMWELL, B., in *R.* v. *Druitt* (1) (10 Cox, C.C. at p. 600): I

> "When the law gave, or rather acknowledged, a right, it provided a punishment or a remedy for the violation of that right. That was a cardinal rule and an obvious one. The old expression that 'there was no wrong without a remedy' might also be interpreted to mean that there was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a

civil action, sometimes by both. Having made those general remarks he would make another, which was also familiar to all Englishmen, namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of habeas corpus, and supplemented by statute, to secure to every man his personal freedom—that he should not be put in prison without lawful cause, and that if he was, he should be brought before a competent magistrate within a given time, and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon, and he laid it down as clear and undoubted law that, if two or more persons agreed that they would by such means co-operate together against that liberty, they would be guilty of an indictable offence."

It is said, indeed, that an action for the infringement of such a right is a novelty; but I do not concur that it is, or that if it were it would be a sufficient argument. The whole history of the action upon the case affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created. So, in *Pasley* v. *Freeman* (2), per ASHURST, J. (3 Term Rep. at p. 63):

"Another argument which has been made use of is, that this is a new case, and that there is no precedent for such an action. Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognised in the law of such new case, it will be just as competent to courts of justice to apply the principle in any case that may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

It is said that the company were acting within their legal rights in discharging the plaintiffs.

So they were, but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him. In treating this question I can desire no more apt exposition of the law than what is contained in BOWEN, L.J.'s admirably reasoned judgment in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) in the Court of Appeal (23 Q.B.D. at p. 614):

"Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving

away of customers by show of violence (*Tarleton* v. *M'Gawley* (4)); the obstruction of actors on the stage by preconcerted hissing (*Clifford* v. *Brandon* (5); *Gregory* v. *Duke of Brunswick* (6)); the disturbance of wildfowl in decoys by the firing of guns (*Carrington* v. *Taylor* (7); and *Keeble* v. *Hickeringill* (8)); the impeding or threatening servant or workmen (*Garret* v. *Taylor* (9)); the inducing persons under personal contracts to break their contracts (*Bowen* v. *Hall* (10); *Lumley* v. *Gye* (11)), are all instances of such forbidden acts."

It will be observed that, in what BOWEN, L.J., says, intimidation, obstruction, or molestation, or intentional procurement of a violation of individual rights, contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs. And so SIR WILLIAM ERLE, in a passage from his treatise, published in 1869, on the law relating to trade unions, quoted by LORD ESHER, M.R., points out:

"Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actors's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or indictment, as the case may be."

BOWEN, L.J., was too keen a reasoner not to observe that the words "without just cause or excuse," which he had used, required exposition to render his reasoning complete, and accordingly he explains in another part of his judgment what his view was of malice. His Lordship thus describes the state of mind which in his view would negative just cause or excuse, *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) (23 Q.B.D. at p. 613):

"Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong: see *Bromage* v. *Prosser* (12); *Capital and Counties Bank* v. *Henty* (13), per LORD BLACKBURN (7 App. Cas. at p. 772)."

I must for my own part disclaim the idea that you can get rid of observations such as these in the learned judge's judgment by saying that they are obiter. It will be observed that BOWEN, L.J., points out that not only contractual rights are comprehended within his view, but other rights, such as the right to carry on the business of an actor and the like.

In the same case, on appeal to this House, it appears to me that the principle upon which that decision was arrived at is an important one as excluding what is here suggested to be lawful. I myself asked in that case ([1892] A.C. at p. 38):

"What legal right is interfered with? What coercion of the mind or will of the person is affected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests."

LORD WATSON pointed out that the withdrawal of agency at first appeared to him to be a matter attended with difficulty, but that on consideration he was satisfied that it could not be regarded as an illegal act. He said (ibid. at p. 43):

A "In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents, and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage."

B He added that it had not been proved and not been suggested that the respondents used either misrepresentation or compulsion for the purpose of obtaining the object of their combination. LORD BRAMWELL begins his judgment by saying (ibid. at p. 44) that the plaintiffs in that case

"did not complain of any trespass, violence, fraud, or breach of contract, nor C of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act, the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them."

LORD MORRIS expressed his intention to adopt entirely the principles laid down by BOWEN, L.J., and LORD MACNAGHTEN adopted LORD BRAMWELL'S opinion. D LORD FIELD justifies his opinion, which he says may be supported upon the principles laid down in *Keeble* v. *Hickeringill* (8) as to which I shall have a word to say hereafter. But he goes on to say ([1892] A.C. at pp. 56, 57) that

"everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was bonâ fide so done. There was not only no malice or indirect object in fact, but the existence of the right to E exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm."

F LORD HANNEN says (ibid. at p. 59) that he considered

"that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one—namely, to injure the plaintiff, whether they, the defendants, should be benefited or not."

He concludes his opinion by saying that it appears to him "that in that case G there was nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers, than their rivals, the plaintiffs, were willing to offer." I have been careful to call attention to the opinions of the noble and learned Lords, not only because I think that a use has been made of the decision in that case which is not justified by anything H in the opinions delivered; but rather because I think that upon the principles I have indicated, if the elements which each noble Lord in turn pointed out did not exist in that case had in fact existed, the decision would have been the other way.

I do not think that *Keeble* v. *Hickeringill* (8) stands alone, though, if it did, considering who decided it, and that certainly in later years it has been much quoted and commented on, and never, until now, so far as I am aware, criticised or I questioned, I should be quite content to rely upon the authority of so profound a lawyer as LORD HOLT, and such an expositor as he was of the spirit of freedom which runs through the English law, but it will be also observed that in this House, LORDS BRAMWELL and FIELD, and in the Court of Appeal BOWEN, L.J., assume it to be good law. It is interesting to observe that that case has been recognised and acted upon in the American courts, where these questions of capital and labour have not infrequently arisen. In *Walker* v. *Cronin* (14) it was held that an action of tort would lie upon a count alleging that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him

to employ many shoemakers; that the defendant, well knowing this, did unlawfully, and without justifiable cause, molest him in carrying on the said business with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abondon it without his consent and against his will, and that thereby he lost their services and the profits, etc., to be derived therefrom, and was put to expense, etc. The second count alleges contracts between the plaintiff and the shoemakers to make stock into shoes, and that the defendant "well knowing this, with the unlawful purpose of preventing him (the plaintiff) from carrying on his business, induced them to return the stock unfinished to the factory, and to neglect and refuse to make it into shoes as they had agreed to do." The third count alleges the defendant enticed and procured a shoemaker in the plaintiffs' service and employment who had agreed to make three cases of shoes to leave the plaintiff's service and employment. There was a demurrer to the declaration, and this demurrer was allowed in the Superior Court, whereupon the plaintiff appealed. WELLS, J., after citing COM. DIG., Action on the Case, A.,

> "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages,"

goes on to review in order *Keeble* v. *Hickeringill* (8); *Tarleton* v. *M'Gawley* (4); *Green* v. *Button* (15); *Gunter* v. *Astor* (16); *Hart* v. *Aldridge* (17); *Shepherd* v. *Wakeman* (18); *Winsmore* v. *Greenbank* (19); and *Lumley* v. *Gye* (11). He overruled the demurrer, and, holding that the declaration sufficiently alleged (i) intentional and wilful acts; (ii) calculated to cause damage to the plaintiff in his lawful business; (iii) done with the unlawful purpose to cause such damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice); and (iv) actual damage and loss resulting, held that each of the three counts disclosed a good cause of action. He continued: "This decision does not apply to a case of interference by way of friendly advice honestly given, nor is it in denial of the right to free expression of opinion. We have no occasion now to consider what would constitute justifiable cause."

Benton v. *Pratt* (20) and *Rice* v. *Manley* (21) were both cases where the defendant through false words caused a third person who had entered into contracts of sale (in the first-named case of cheese, in the second of hogs) void by the Statute of Frauds, to break such contracts. An action was held to lie in each case. In *Bixby* v. *Dunlap* (22) it was held that exemplary damages could be recovered from a defendant who knowingly procured a servant to leave a master whom she had contracted to serve without ever being actually in his employment. *Lumley* v. *Gye* (11) is here taken as having laid down the law on this subject. In *Angle* v. *Chicago, etc., Rail. Co.* (23) it was alleged that the United States had granted lands in the State of Wisconsin in aid of the construction of railways. The State of Wisconsin had granted a portion of these lands to the defendant company for the purpose of constructing a particular railway. It had also granted other lands to another company—the Portage Co.—to construct another and somewhat competing railway. This latter railway was to be completed within a certain time. This could not be done, and the State of Wisconsin enlarged the time for completion. The Portage Co. then employed the plaintiff to complete the line, and he was actively prosecuting the work when the defendant company, conspiring with certain officials of the Portage Co., induced the State of Wisconsin to revoke the concession to the Portage Co., whereby the plaintiff lost his employment. He, accordingly, brought his action. The court held, following *Lumley* v. *Gye* (11) and *Bowen* v. *Hall* (10), that the defendant company were liable to the plaintiff.

I now revert to that part of the case which I admit has to be carefully considered —whether in what the defendant did in order to procure the dismissal of the plaintiffs he came within any of the rules which have been laid down in the cases quoted. To my mind, he was guilty of intimidation and coercion by that intimida-

A tion—though in using that phrase, "of intimidation," I am not using it in the technical sense which the statutes upon the subject have been construed to mean. I will explain in what sense I do understand the words, but in passing I must deprecate the language which has been used to minimise the effect of what Allen said. I observe it is described as "inconvenience." That is not how it is described by the witness. Edmonds, the foreman of the Glengall Co., thus described what B would have been the effect upon the business of the firm. He said:

> "They were rather busy just then with boilermakers; that they employed three times as many boilermakers as shipwrights; and if the boilermakers had knocked off work or struck, it would have stopped the business of the company altogether—entirely—at that time, and that it was a very serious matter to the C firm, and that the discharge of the men was in order to prevent their having to stop the business."

It seems to me very obvious to ask whether the threat to do that which would have such an effect as the witness described is a coercion of the will or not. The men were good workmen and of good character; they were working, even according D to Allen's own view, at their own trade as shipwrights, but they had worked upon a former occasion for a different employer upon an iron ship. I think that the dissatisfaction among the boilermakers at these two men being employed has been greatly exaggerated.

It is important to call attention to the exact question which was left to the jury. KENNEDY, J., said:

E

> "The question that I want you to answer is that, if you find he [the defendant] induced the Glengall Iron Co. by the threat which is suggested by the plaintiffs of calling out all the men on strike and that he continued in that course of conduct if there was any attempt to employ them again, did he do that with the malicious intention which I have endeavoured to explain—that is merely, not for the purpose of forwarding that which he believed to be his interest F as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs and preventing them doing that which they were each of them entitled to do."

It appears to me that that is a direction of which the defendant cannot complain, since it puts what is, to my mind, an alternative more favourable to him. In my G view, his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do. It is alleged, and, to my mind and to the mind of the jury, proved, that the employers were compelled, under pressure of the threats that he used, to discharge the plaintiffs. I have not used the word "intimidated," because I observe the learned judge says there was no intimidation in a legal sense. If what was meant by that was that there was H no threat of violence to person or property, it is true, but the word "intimidation" is not always to be construed as it has been construed under the Combinations of Workmen Act, 1825 (6 Geo. 4, c. 129). The construction of it in that statute flowed from the other words with which the word "intimidate" is associated; and if, instead of the word "intimidate," that which was held out as the inducement to dismiss the plaintiffs was that such a stoppage of the works should be occasioned I as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear of the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as intimidated.

The objection made by the defendant appears to be that the word "malicious" adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was unlawful—the addition of the word "malicious" can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may

become lawful or unlawful according to circumstances. In a decision of this House (*Bradford Corpn.* v. *Pickles* (24)) it has undoubtedly been held that, whatever a man's motives may be, he may dig into his own land and divert subterranean water which, but for his so treating his own land, might have reached his neighbour's land. But that is because the neighbour had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional infliction of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others. But, referring to BOWEN, L.J.'s, observation, which, to my mind, is exactly accurate,

> "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that person's property or trade,"

you must have some just cause or excuse.

The word "malicious" appears to me to negative just cause or excuse, and, without attempting an exhaustive exposition of the word itself, it appears to me that, if I apply the language of BOWEN, L.J., it is enough to show that this was within the meaning of the law "malicious." If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of that which he did. I see that it is suggested by one of your Lordships that the action for malicious prosecution is supposed to be an exception. I am not quite certain that I understand what is the proposition to which it is an exception. If it means that there is no other form of procedure known to the law wherein malice may make the distinction between a lawful and an unlawful act, I am unable to agree. Maliciously procuring a person to be made a bankrupt, maliciously and without reasonable or probable cause presenting a petition to wind-up a company, or maliciously procuring an arrest, are equally cases wherein the state of mind of the person procuring the act may affect the question of the lawfulness or unlawfulness of the act done. Again, in slander or libel the right to preserve one's character or business from attack appears to me quite as vague and general a right as it is suggested is the right to pursue one's occupation unmolested; and it cannot be denied that in both these cases the lawfulness or unlawfulness of what is said or written may depend upon the absence or presence of malice. Doubtless, there are cases in which the mere presence of malice in an act done will not necessarily give a right of action, since no damage may result; and in this case, however malicious Allen's intervention may have been, if the employers had defied Allen's threats, instead of yielding to them, the plaintiffs could not have succeeded in an action, because they would not have been injured: see *Quartz Hill Gold Mining Co.* v. *Eyre* (25); *Gibbs* v. *Pike* (26); *Jenings* v. *Florence* (27). On the same principle an action will not lie against a sheriff for a false return to a writ of execution if the plaintiff has not suffered actual damage in consequence of the false return: see *Wylie* v. *Birch* (28).

I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boilermakers' Union to use what I will call their union for combined action against the individual plaintiffs who belonged to another union. The plaintiffs apparently

proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate of and speaking with the authority of the Boilermakers' Union, and, accordingly, the general secretary of this trades union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or had been proved to authorise the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not, I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious matter for any delegate to take upon himself, and, so far was he from adopting what Allen is sworn to have said, namely, that the union would hunt the two men out of every employment where they are known to be because they had once worked on an iron ship, he emphatically denies the right of his union to do anything of the sort. He says, in terms, "providing that the shipwright after being at the iron work started in some other place, for instance, then I would say we have no right whatever to interfere with him unless he were then beginning iron work again. If he started at woodwork we would not interfere with him in any other place." The learned counsel then puts a question to him (I think somewhat under a misapprehension as to what the judge meant by a question which he put), "You say that may depend on circumstances?" And his answer is: "I do not say they would in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work."

I think it only just to the Boilermakers' Union to point out how emphatically and distinctly their authorised officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen is sworn to have attributed to them, and accordingly no imputation or liability could properly be attributed to the Boilermakers' Union or their authorised officers; but does that relieve Allen from the consequences of what he did? If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that the action of an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual, or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats, so that, if they in truth authorised him, he and they might all have been responsible, while the false statement that he made, though acting upon the employer by the same pressure because it was believed and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false.

I now come to the question raised upon the pleadings that the falsehood of Allen's allegations is not set out. I venture to think that this objection is founded upon an erroneous assumption that the action must be brought for false representations, and that accordingly the false representations must be set out in the statement of claim. I think this is an erroneous assumption, and that the action is what it is—that the defendant maliciously and wrongfully and with intent to injure the plaintiffs intimidated and coerced the Glengall Iron Co. not to enter into contracts with the plaintiffs, whereby the plaintiffs have suffered damage. The objection may be treated as one of form or as one of substance. Treating it as one of form only,

I do not think that it ever was necessary in the pleadings where an unlawful procuring something to be done was the cause of action, to set out the means by which that something was procured. WILLES, C.J., in *Winsmore* v. *Greenbank* (19) said:

> "to set forth all the facts to show how a thing which is charged to be unlawfully done has been done; that would make the pleadings intolerable, and would increase the length and expense unnecessarily, and even in an indictment for conspiracy it is not necessary to state the means employed."

See *R.* v. *Sterling* (29); *R.* v. *Kinnersley and Moore* (30); see also *Sydserff* v. *R.* (31). So also upon an indictment under the Incitement to Mutiny Act, 1797, the preamble of which states:

> "Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite then to mutiny and disobedience, Be it enacted that . . . any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit an act of mutiny . . . should be guilty of felony."

It was held that it was unnecessary in the indictment to do more than charge the defendants with having endeavoured to seduce persons from their allegiance without setting forth any of the words or writings by which that endeavour was made: *R.* v. *Fuller* (32).

If, treating it as matter of substance, the objection would be that without giving notice to the defendant and without any such specified objection being submitted to the jury, it was being imputed to him that he had said what was false, it is almost impossible to suggest that here there could be any such objection to substance. What he said and did by way of inducement, threat or coercion, was in truth the whole question in the case. He gave evidence denying what was imputed to him, and so far from setting up the right on behalf of his union to exercise their right of withdrawing their men if the demand for the discharge of the two plaintiffs were not complied with, he absolutely denied that he had ever done so; and the proper authorities of his union, as I have pointed out already, negatived any authority to make such representations as the other witnesses proved that he did make, or that they had been parties or would consent to be parties to the most offensive of his threats, namely the hunting down of the two shipwrights because they had once worked upon iron ships. This question was before the jury, and the jury could not have answered the question as they did if they had not disbelieved Allen's statement. It seems to me, therefore, that neither in substance nor in form can any objection be made to the topic (for it is but the topic and not the substance of the cause of action) that he was guilty of false representations as fortifying the threats that he was making. It can scarcely be contended that because he had not that authority behind him which he represented, because he was not truly representing either the wishes or the commands of his union, that could furnish him with any excuse. As well might it be contended that the highwayman was not responsible for the coercion he exercised towards his victim if he put a pistol to his head, because it should afterwards turn out that the pistol was unloaded.

I regret that I am compelled to differ so widely with some of your Lordships, but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most

A distinguished judges, going back now for certainly 200 years, and that up to the period when this case reached your Lordships' House, there was an unanimous consensus of opinion, and that of eight judges who have given us the benefit of their opinions, six have concurred in the judgments which your Lordships are now asked to overrule.

B **LORD WATSON.**—This appeal in which the litigants are members of two rival associations of working men, registered under the Trade Unions Act, 1871, raises some important questions, upon which there appears to be room for considerable difference of opinion. The appellant contends that judgment ought to be entered in his favour, inasmuch as the findings of the jury, when rightly interpreted, do C not disclose any cause of action against him, and, alternatively, that, these findings being against the weight of evidence, the case ought to be sent back for new trial.

I have not found it necessary to consider the second of these propositions, having arrived at the conclusion that the first of them is well-founded. The substance of the verdict may be resolved into three findings: first, that the Glengall Iron Co. discharged the respondents from their employment, and did not re-engage them; D secondly, that the company were induced to do so by the appellant; and, thirdly, that the appellant maliciously induced the action of the company. There is no expression in the verdict which can be held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman, does not imply or even suggest the absence of his legal right to do either, as he may E choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word "maliciously," a word which is susceptible of many different meanings. The expression "maliciously induce," as it occurs upon the face of the verdict, is F ambiguous; it is capable of signifying that the appellant knowingly induced an act which of itself constituted a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive, would not have amounted to a civil wrong, and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England G does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary and natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will H not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly, and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases I the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances, from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong, and but for his privilege would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises, and shall not be prompted by a desire to injure the person who is

affected by his act. Accordingly, in a suit brought by that person, it is necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. A

But none of these cases tends to establish that an act which does not amount to a legal wrong, and, therefore, needs no protection, can have privilege attached to it, and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive. BOWEN, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3), laid it down that, in order to constitute legal malice, the act done must, B apart from bad motive, amount to a violation of law. The learned judge, with his accustomed accuracy and felicity, said (23 Q.B.D. at p. 612):

> "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity C resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure,' are words which have accurate meanings well known to the law, but also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and D implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its terms the infringement of some right."

The words which I have quoted are in substantial agreement with the language used by BAYLEY, J., in *Bromage* v. *Prosser* (12), to the effect that, E

> "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

According to the learned judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer to responsibility for its consequences, and the intentional doing of that wrongful act F will make it a malicious wrong in the sense of law. While it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that BAYLEY, J., obviously refers. The root of the principle is that, in any legal question, malice depends not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion, it is alike G consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognisance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive, namely, an intention H to injure the respondents in their trade or calling of shipwrights. At the trial the case for the plaintiffs was conducted, and was submitted to the jury by the learned judge who presided, upon the lines laid down by LORD ESHER, M.R., and LOPES and A. L. SMITH, L.JJ., in *Temperton* v. *Russell* (33). When the present case was before the Court of Appeal the same doctrine was repeated by the Master of the Rolls and LOPES, L.J., and was expounded at great length by LORD ESHER. I RIGBY, L.J., deferred to, but did not express his concurrence in, the authority of *Temperton* v. *Russell* (33), which he accepted as binding upon him. In that state of the law as expounded in the Court of Appeal, it is not surprising to find that KENNEDY, J., while he did not suggest to the jury that the action of the appellant, apart from its motive, constituted a legal wrong, directed them to consider whether the appellant acted "maliciously," and explained that by that word he meant "with the intention and for the purpose of doing an injury" to the plaintiffs in their business. I do not dispute that the law laid down in this case by the

presiding judge, and upheld by the Court of Appeal, would justify the verdict of the jury. It simply comes to this, that, to induce another person to commit an act which is within his legal right, does not in itself afford a cause of action, but that the person who procured his action is guilty of a legal wrong if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. The doctrine clearly runs through LORD ESHER'S judgment. Whether mere "persuasion" or mere "advice" entails liability on the person using them appears to me to be a speculation which it would be unprofitable to discuss, and I shall, therefore, assume that the words refer to the means used by a person who, in the sense of law, "procures" the act of another.

A breach of contract is in itself a legal wrong; and in *Lumley* v. *Gye* (11) it was said by ERLE, J. (2 E. & B. at p. 232):

> "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong."

In the same case it was held by the majority of the learned judges that the defendant was liable in damages, upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying in law, not that the defendant had been actuated by a bad motive, but that he had procured the commission of an act which he knew to be illegal. There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly, and for his own ends, induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is, therefore, not wrongful in so far as he is concerned, it may yet be to the detriment of a third party, and, in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (11), the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.

The question submitted by the House, for the opinion of the learned judges who have favoured us with their assistance, was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The terms in which the query is framed afford an opportunity, of which some of the learned judges have not been slow to avail themselves, of referring to the evidence of the respondents' witnesses in quest of some fact which might impart a legal and not a conventional meaning as to malice as found by the jury. But, according to my apprehension, it was not intended, nor would it be legitimate, in pursuing that investigation, to disregard the pleadings of the respondents, or the course which was followed by their counsel, at the trial of the cause. To deal with the case on any other terms would be to start issues which the respondents themselves never raised until they came to the Bar of this House, and to apply to these issues evidence which was directed, not to these, but to other points. I, therefore, find it necessary to express an opinion upon various questions which were canvassed in the course of the argument addressed to us.

First of all, although the statement of claim set forth that the appellant induced the Glengall Iron Co. to "break and refuse to perform their contract" with the respondents, the allegation is not borne out by their own evidence. Assuming that the Glengall Iron Co., in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement, directed against them. According to the decision of the majority in *Lumley* v. *Gye* (11), already referred to, a person who, by illegal means, that is, means which in themselves are in the nature of civil wrongs, produces the lawful act of another, which act is calculated to injure, and

does injure, a third party, commits a wrong for which he may be made answerable. So long as the word "means" is understood in its natural proper sense, that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Co. to terminate their connection with the respondents, but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Co., who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong, as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically, and irrespectively of its motive, a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* (33) and the present case, it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive. It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at perfect liberty to act upon their own views. That the boilermakers who were employed at the Regent Dockyard, Millwall, did seriously resent the presence among them of the respondents, very plainly appears from the evidence of the respondents themselves, and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so, but they were, in my opinion, entitled to inform the Glengall Iron Co. of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which has been generally accepted by the courts below, they would each and all of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers, who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interests.

I think it right to observe that, if the evidence had, in my opinion, contained statements sufficient to support a charge of coercion, I should have declined in the circumstances of the present case to give effect to it. I entertain little doubt as to the incompetency, but none as to the inexpediency of this House entertaining and deciding an issue of fact which, if not formally abandoned, was not brought forward at the trial or submitted to the jury, and that upon evidence which was not directed to it, for the purpose of patching up a verdict which is impeached in point of law.

The doctrine laid down by the Court of Appeal in this case and in *Temperton* v. *Russell* (33), with regard to the efficacy of evil motives in making—to use the words of Lord Esher—"that unlawful which would otherwise be lawful," is stated in wide and comprehensive terms; but the majority of the consulted judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application, it would lead, in some cases, to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And ex pari ratione, a servant would be liable in damages to a master whom he disliked, if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute.

If that be the state of the law it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority which is mainly relied on as supporting the doctrine of the recent case is *Keeble* v. *Hickeringill* (8), which was decided by the Court of Queen's Bench about two centuries ago. I am very far from suggesting that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is directly in point and its principle has since been recognised and acted upon. In *Keeble* v. *Hickeringill* (8) the plaintiff sued for the disturbance of a decoy upon his property, which he used for the purpose of capturing wild fowl and sending them to market. The defendant, who was an adjoining proprietor, had fired guns upon his own land, not with the view of killing game or wildfowl, but with the sole object of frightening the birds, and either driving them out of his neighbour's decoy pond or preventing them from entering it. The act complained of was, in substance, the making of a noise so close to the lands of the plaintiff as to be a nuisance to him. Upon that aspect of the case I do not find it necessary to express any opinion as to the conduct of the defendant; but this much is clear, that no proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and, if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense.

Holt, C.J., who delivered the opinion of the court, treated the case as one of interference with the plaintiffs' trade, consisting in the capture and sale of wild fowl. He distinguishes it from the case of invading a franchise, which, I apprehend, would, in itself, amount to a legal wrong, and thus states the law applicable to it:

> "When a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, then an action lies in all cases."

I see no reason to doubt that by a "violent act" the learned Chief Justice had in view an act of violence done in such circumstances as to make it amount to a legal wrong; and I see as little reason why, in speaking of a "malicious act," he should not be understood as using the word "malicious" in its proper legal sense, and as referring to other wrongs, not accompanied by violence but done intentionally, and, therefore, in the eye of the law maliciously. The object of an act, that is, the results which will necessarily or naturally follow from the circumstances in which it is committed, may give it a wrongful character, but it ought not to be confounded with the motive of the actor. To discharge a loaded gun is, in many circumstances, a perfectly harmless proceeding; to fire it on the highway, in front

of a restive horse, might be a very different matter. The learned Chief Justice proceeds to give various illustrations of the general rule which he had formulated. He first notices a case in which it had been held that a schoolmaster had no cause of action against a defendant, who had attracted his pupils and injured his school by setting up a rival establishment, a proceeding which was obviously in the ordinary course of competition, and then adds:

> "But suppose Mr. Hickeringill should lie in the way with his gun, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars."

From that observation I see no reason to differ, because, in my opinion, frightening a child with a gun, so that it cannot get to school, is in itself a violent and unlawful act, directed both against the child and its schoolmaster. The learned Chief Justice then refers to three instances in which the defendant would be liable in an action upon the case: (i) where he obstructs a person in charge of a horse, who is taking it to a market for sale, and prevents his reaching the market, thereby depriving the market-owner of his dues; (ii) where, to the detriment of a proprietor, he by threats frightens away his tenants at will; and (iii) when he beats the servant of a taxman, and so hinders him from taking his master's tolls. It must be observed that, apart from any question of motive, all these cases involve the use of means in themselves illegal,—obstruction, coercion by means of threats, and personal assault.

But assuming, what, to my mind, is by no means clear, that *Keeble* v. *Hickeringill* (8) was meant to decide that an evil motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognised in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the court professed that they were guided by the reasoning of HOLT, C.J. That instance is to be found in *Carrington* v. *Taylor* (7), a decision which I venture to think no English court would, at this day, care to repeat. The facts of the case resembled those which occurred in *Keeble* v. *Hickeringill* (8) in this single respect, that the plaintiff was the owner of a decoy for wild fowl. The defendant was the owner of a boat, in which he rowed along the coast, and earned a livelihood by shooting wild fowl for the market, which he was lawfully entitled to do. But some of the shots fired by him in the pursuit of that occupation had the effect of scaring birds which otherwise would or might have entered the plaintiff's decoy; and, in respect of that disturbance he was held liable in damages to the plaintiff. Whatever construction might be put upon the judgment of HOLT, C.J., it does not appear to me to contain a single expression which would justify that result. I am not surprised to find that an eminent judge, with whose opinion as a whole I am unable to concur, has had the courage to express his dissent from the judgment in *Carrington* v. *Taylor* (7), as he failed "to see what wrong the defendant in that case had done." To my mind, the case is of considerable importance, because it shows that, in the year 1809, the Court of King's Bench did not regard *Keeble* v. *Hickeringill* (8) as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action. In the case before them there was no allegation and no evidence of any intent to injure the plaintiff's decoy. The sole motive of the defendant in firing his gun was to earn his livelihood by killing wild fowl for the market. I cannot avoid the conclusion that the learned judges accepted *Keeble* v. *Hickeringill* (8) as an authority to the effect that, apart from any question of motive, the disturbance of a lawful decoy is an illegal invasion of the private right of its proprietor.

A variety of well-known cases, including even *Lumley* v. *Gye* (11), were relied on by the respondents as showing that the so-called principle of *Keeble* v. *Hickeringill* (8) has been from time to time applied by the English courts since the date of

A that judgment. Except in *Carrington* v. *Taylor* (7), which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend, until recent years, when it is first dimly foreshadowed in a dictum which occurs in *Bowen* v. *Hall* (10), and is subsequently developed in *Temperton* v. *Russell* (33) and in the present case. The authorities antecedent to *Bowen* v. *Hall* (10) as
B well as that decision itself, are all cases belonging to one or other of these three classes: (i) Cases of privilege, where the perpetrator of an act, which per se constituted a legal wrong, was protected from its usual consequences in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty; (ii) cases in which the act complained of was in itself a plain violation of private right: and (iii) cases in which an act detrimental to others, but affording
C no remedy against the immediate actor, had been procured by illegal means.

The early case of *Garret* v. *Taylor* (9) furnishes an apt illustration of the third class. According to the report, which is very brief, the plaintiff, a quarryman, complained that the defendant had by threats to "mayhem" and annoy them with litigation, induced or coerced some of his customers to discontinue buying stones from his quarry. Decree passed in absence, and the case was re-heard on an appeal
D brought by the defendant in arrest of judgment upon the ground that the declaration did not disclose any cause of action. The declaration (1 Bac. Ab. 53, 54) discloses facts, which, if true, as they were necessarily assumed to be, did amount to illegal means used in order to influence the action of the plaintiff's customers. One learned judge has assumed that the judgment went on the principle that every
E man "has a right to carry on his trade without disturbance," a proposition not involved in the case, but one to which I should not demur if he meant "illegal" disturbance. The decision really went upon the terms of the declaration, which appear to me to disclose a clear case of the employment of unlawful means. I am not at present prepared to hold that threats of vexatious litigation, which might cause anxious apprehension in the minds of many, will in no circumstances amount
F to unlawful influence; but I entertain no doubt that these, when coupled with serious threats of personal violence, going the length of mutilation or demembration, do, when the party threatened is overcome by and yields to them, constitute legal coercion.

Tarleton v. *M'Gawley* (4) is a case of the same complexion. Two British ships, the *Othello* and the *Bannister*, were lying near to each other off Calabar coast, both
G engaged in the same kind of adventure, that of bartering their cargoes for palm oil and other West African produce. A canoe manned by natives desiring to trade was approaching the *Bannister* for that purpose, when the master of the *Othello* directed against it, and fired a cannon loaded with gunpowder and shot, and killed one of its crew, an outrage which occasioned such a panic among the native tribes that the season's trade of the *Bannister* was lost. The master of the *Othello* was held to
H be responsible for that result, which was the direct and natural consequence of his wrongful and criminal act. The case was just the same as if some person had persisted in firing bullets at all and sundry who were about to enter a particular shop, with the effect of driving away its customers and ruining the shopkeeper's business. Such an act could not be reasonably described as lawful but for the motive by which it was dictated.

I In my opinion, no light is thrown upon the decision of the present question by *Pitt* v. *Donovan* (34), and other cases of that class. The defendant had, in that case, represented, contrary to the fact that the plaintiff was insane at the time when he executed a particular deed. The communication was made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true, and the defendant was in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law, in certain exceptional cases excuses the

perpetration of a wrong by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong.

Lumley v. *Gye* (11) is a weighty authority in this branch of the law, but it does not lend any aid to the respondents' argument. It was an action for damages against a defendant who had induced a professional singer to break her engagement with the plaintiff, to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was overruled, and the defendant found liable. The principle of the decision (from which COLERIDGE, J., alone dissented) was clearly explained by ERLE, J., whose opinion is in complete accordance with the views expressed by the other learned judges who constituted the majority of the court. He said (2 E. & B. at pp. 231, 232):

> "The authorities are numerous and uniform that an action will lie against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the matter arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same. . . . . It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong."

These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided. He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured. None of the learned judges made any reference to *Keeble* v. *Hickeringill* (8), and not a single expression is to be found in their opinions tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal.

In *Bowen* v. *Hall* (10) the wrong complained of was the intentional inducing of a breach of contract, to the detriment of the plaintiff, who was obviously entitled to succeed if *Lumley* v. *Gye* (11) had been well decided. According to the opinion expressed by ERLE, J., and the other judges of the majority in that case, the defendant in *Bowen* v. *Hall* (10) had been guilty of a wrong which was in the sense of law malicious, because he had knowingly procured the commission of an illegal act. The judgment in *Lumley* v. *Gye* (11) was followed by the EARL OF SELBORNE, L.C., and BRETT, L.J., while LORD COLERIDGE, C.J., adhered to the opposite view, which had been taken by COLERIDGE J. BRETT, L.J., in delivering the judgment of LORD SELBORNE and himself, substantially affirms the reasoning of the majority in *Lumley* v. *Gye* (11), but there are one or two sentences in his judgment relating to points with which the learned judges who decided that case did not deal, and which were not raised by the facts either of *Lumley* v. *Gye* (11) or of the case before him. His Lordship said (6 Q.B.D. at p. 338):

> "Merely to persuade a man to break his contract may not be wrongful in law or fact, as in the second case put by COLERIDGE, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law or in fact a wrong act, and, therefore, a wrongful act, and therefore, an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act such as is above described is a wrongful act in law and in fact."

These words are obviously susceptible of two very different constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and, therefore, a legal wrong, or to the procurement of a lawful act. Prima facie they would have appeared to me to refer to the procuring

of an illegal act because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and, in that case, there would be a malicious wrong, as it is defined in *Lumley* v. *Gye* (11). But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act, with intent to injure, is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them, the words can only be regarded as obiter dicta, because no such question was raised by the circumstances of the case.

I do not think it necessary to notice at length *Temperton* v. *Russell* (33) in which substantially the same reasons were assigned by LORD ESHER, M.R., and LOPES, L.J., as in the present case. It is, to my mind, very doubtful whether, in that case, there was any question before the court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the court had to consider were (i) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (ii) that the defendants had maliciously conspired to induce, and had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye* (11). According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye* (11), if, as the court held, there was evidence to prove it.

I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion, with the majority of your Lordships who have heard the appeal, that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the order appealed from be reversed, and judgment entered for the appellant, and that the appellant have his costs of this appeal, and costs in both courts below, including the costs of the trial.

LORD ASHBOURNE (read by LORD MORRIS).—The controversy in this case is between the plaintiffs, who are shipwrights, and members of the Shipwrights' Provident Union, and the defendant, Allen, a member and the London delegate of the Independent Society of Boilermakers and Iron and Steel Shipbuilders. It is not a dispute between employers and employed—between capital and labour—but rather one between the members of one trades union and of another trades union, and on the facts of the case there is little real difference. Was there evidence, fit to be submitted to the jury, of coercion by the defendant of the Glengall Co. to terminate their employment of the plaintiffs? Was there evidence that the defendant intimidated and coerced the Glengall Co. not to enter into new contracts with the plaintiffs? Was there evidence that the defendant maliciously induced the company not to engage the plaintiffs? I am unable myself to see room for doubt that there was ample evidence of such conduct on the part of the defendant, and there is no question that it damaged the plaintiffs. I would infer even from the evidence of the defendant himself that the rules of the Boilermakers' Society, as was clearly testified by their general secretary and chairman, would not support punishing the plaintiffs for their past action by procuring their dismissal from an employment where they were working blamelessly. I would also gather from his evidence that the defendant himself on consideration would not say that such conduct was right. He was asked: "Were the men right or wrong according to your opinion in

declining to act with Flood and Taylor because of something they had done in the past?" and his reply was: "That would be wrong, of course, according to the rules of our society if they left their work, but they did not take such action." A

But the question here is not on the rules of the society, or on the opinions of the defendant on reflection, but whether there was evidence of his alleged conduct for the jury. The question is: Have the plaintiffs a remedy for their loss found to have been caused by the defendant? The plaintiffs had, in my opinion, a clear right to pursue their lawful calling—to have the full benefit of their employment—and the right to enjoy the legitimate, reasonable, and probable expectation of a continuance of their employment. It would be, I think, an unsatisfactory state of the law if it allowed the wilful invader of such a right without lawful cause or justification to escape from the consequences of his action, if it would not hold him liable for maliciously inducing men being denied their accustomed employment, and would not afford to those he had injured legal grounds of action. B C

The law is stated with precision and vigour by SIR WILLIAM ERLE in his work on TRADES UNIONS, p. 12. [HIS LORDSHIP read the passage quoted by the Lord Chancellor at p. 60 ante, and continued]. In my opinion, this is a clear statement of the law, and I have heard no satisfactory attempt to answer or explain it away. It is supported, not only by good sense and by those considerations of justice and fair play one would expect to find in any legal system, but by a mass of powerful authority. HOLT, C.J., in *Keeble* v. *Hickeringill* (8), laid it down with clearness and certainty that "he that hinders another in his trade or livelihood is liable to an action for so doing." In no subsequent decision of any court has doubt been thrown upon the effect of that authority, or a suggestion made that the weighty conclusion of HOLT, C.J., could with advantage to our law be reviewed or pushed aside. The reason it has not been questioned is because, as I conceive, it rested firmly on the great common law principle that every man has a right to carry on his trade without disturbance. *Tarleton* v. *M'Gawley* (4), decided in 1794, strongly supports the view that such a right was the settled law of this country, for it was then held that an action lay against the master of a vessel for purposely firing a cannon at negroes and thereby preventing them from trading with the plaintiff, and it was pointed out that "the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied." D E F

I need not go in detail through *Lumley* v. *Gye* (11) which for nearly half a century has passed into the regular current of legal authority, and was followed by LORD SELBORNE, L.C., and BRETT, L.J., in *Bowen* v. *Hall* (10). In the *Mogul Case* (3) it was apparently accepted as undoubted law that a trader has a right to carry on his business without disturbance except in the way of fair competition. BOWEN, L.J., there says (23 Q.B.D. at p. 614): G

> "No man, whether trader or not can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence; the obstruction of actors on the stage by preconcerted hissing; the disturbance of wildfowl in decoys by the firing of guns; the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts, all are instances of such forbidden acts." H I

It is worthy of note that this great judge refers expressly to *Keeble* v. *Hickeringill* (8) as clear and accepted law, as did LORD BRAMWELL and LORD FIELD in this House. The fact that the plaintiffs could make no claim against the Glengall Co., and that what the company did was, as between them and the plaintiffs, not unlawful, cannot, I think, exonerate the defendant from liability for his own wrongful conduct. On the question of the evidence of "malice" in the defendant, I do not

think I could with advantage add anything to what has been so well and so fully said by the Lord Chancellor.

The last case I desire to refer to is *Temperton* v. *Russell* (33), tried before HENN COLLINS, J., whose direction was confirmed by the Court of Appeal, where LORD ESHER, M.R., gave it as his opinion that there was no real distinction between a malicious inducement to break a contract, and a malicious inducement not to enter into new contracts of service. The consequences to a workman so treated are alike disastrous; he depends for his bread upon his existing and future contracts. To intimidate an employer into breaking a contract with a particular workman, and to coerce or maliciously induce an otherwise willing employer not to give him future employment, alike does that workman serious damage in his trade, and prevents him from earning his wages. The object of the wrong-doer is the same in each case. Here the motive of the defendant was founded on the determination to inflict punishment on the plaintiffs for their past action by driving them out of their employment. In my opinion, there was evidence that the defendant acted without legal excuse or justification in invading the right of the plaintiffs to exercise their calling without hindrance, and there was evidence to go to the jury that the defendant intimidated and coerced or maliciously induced the Glengall Iron Co. not to enter into new contracts with the plaintiffs. I entirely concur in the conclusion of the Lord Chancellor, and think that the appeal should be dismissed.

LORD HERSCHELL.—I do not think that the case can properly be dealt with on the assumption that the finding of the jury involves a finding that the version of what passed given by the plaintiffs' witnesses was the correct one. I do not share the opinion of the learned judge that the point upon which there was a conflict of testimony has a bearing on the question. The question is whether the findings of the jury entitled the plaintiffs to judgment. After a careful and prolonged consideration of the arguments addressed to your Lordships when the case was first presented at the Bar of this House, I arrived at the conclusion that the question must be answered in the negative. I have since carefully reconsidered the matter in view of the opinions expressed by the learned judges who were summoned on the occasion of the second argument, but I have seen no ground for changing my opinion.

It is to be observed, in the first place, that the company in declining to employ the plaintiffs were violating no contract; they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest; they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on the part of the ironworkers. It was not contended at the Bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously. LORD ESHER, M.R., declined in the present case to define what was meant by "maliciously"; he considered this a question to be determined by a jury. But if acts are, or are not, unlawful and actionable, according as this element of malice be present or absent, I think it essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own.

However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished. The danger is, I think, emphasised by the opinions of some of the learned judges. In a case to which I shall refer immediately, LORD ESHER, M.R., included within his definition of malicious acts persuasion used for the purpose "of benefiting the defendant at the expense of the plaintiff." WILLS, J., thinks this "going a great deal too far," and that whether the act complained

of was malicious depends upon whether the defendant has, in pursuing his own interests, "done so by such means and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to." Here it will be seen that malice is not made dependent on motive. The assumed motive is a legitimate one, the pursuit of one's own interests. The malice depends on the means used and the disregard of one's neighbour, and the test of its existence is whether these are such as no honest and fair-minded man ought to resort to. There is here room for infinite differences of opinion. Some, I daresay, applying this test, would consider that a strike by workmen at a time damaging to the employer or a "lock-out" by an employer at a time of special hardship to the workmen were such means and exhibited such a disregard of his neighbour as an honest and fair-minded man ought not to resort to. Others would be of the contrary opinion. The truth is that this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests. Again, CAVE, J., expressed the view that the action of the appellant might have been justified on the principles of trade competition if it had been confined to the time when the men were doing iron work, but that it "was without just cause or excuse, and consequently malicious," inasmuch as the respondents were not at the time engaged upon iron work. On the other hand, it is evident, from the reasoning of some of the learned judges who think the respondents entitled to succeed, that they would not be prepared to adopt this distinction, and would regard the act as "malicious" in either case.

The present case was treated in the court below as governed practically by the previous decisions of the same court in *Bowen* v. *Hall* (10), and *Temperton* v. *Russell* (33). The former of these cases was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised, for the first time in the Court of Appeal, the question whether *Lumley* v. *Gye* (11) was rightly decided. BRETT, L.J., delivered the judgment of the court, in which LORD SELBORNE, L.C., concurred, LORD COLERIDGE, C.J., dissenting. The law was thus laid down in the judgment of the majority of the court (6 Q.B.D. at p. 338):

> "Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second case put by COLERIDGE, J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact."

This case was followed, and the view of the law thus expressed was re-asserted by LORD ESHER, M.R., in *Temperton* v. *Russell* (33).

It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is in law and in fact, a wrong act, and, therefore, a wrongful act. I am not sure that I quite understand what is meant by saying that it is "in fact" a wrong act, as distinguished from its being so in "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law does not certainly profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I cannot agree that all persuasion where the object is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion, which is of constant occurrence in the affairs of life, would not be regarded by any one as reprehensible. The judgment is grounded almost wholly upon the presence of this element, that

A the purpose of the inducement is to injure the plaintiff or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter, which without this element would not be a wrong act, or an act wrongful, and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action.

B In *Temperton* v. *Russell* (33), the further step was taken by the majority of the court—A. L. Smith, L.J., reserving his opinion on the point—of asserting that it was immaterial that the act induced was not the breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff, or to benefit the defendant at the expense of the plaintiff, was present. It C seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this: that in the D one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued, as well as the person who procured it, while in the other case, as no legal right was violated by the person who did the act from which the plaintiff suffered, he would not be liable to be sued in respect of the act done, while the person who induced him to do the act would be liable to an action. I think this was an entirely new departure.

E A study of *Lumley* v. *Gye* (11) has satisfied me that in that case a majority of the court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration, but I do not think that the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defen- F dant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. Indeed, Crompton, J., appears to me to indicate this in express terms. He says (2 E. & B. at p. 224):

> "It must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice interrupts the relation G subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act, for which he is responsible at law."

H He then proceeds to consider whether the same law is applicable to a contract for future service in the case of a theatrical singer. Erle, J., said (ibid. at p. 231):

> "The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant shall unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in pro- I curing that the person hired should break his contract by putting an end to the relation of employer and employed."

Not a word, be it observed, is said about the motive as constituting an element in the wrongful act. This is made, if possible, clearer by the answer which the learned judge gives to the objection that this class of actions for procuring the breach of a contract of hiring rested upon no principle, and ought not to be extended beyond the cases theretofore decided relating to trade, manufacture, or household service. The learned judge said (ibid. at p. 232):

"The answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring the nature of the service contracted for is immaterial."

I think the view of WIGHTMAN, J., was substantially the same. He relies much upon *Winsmore* v. *Greenbank* (19). In relation to that case he says (ibid. at p. 238):

"It was, prima facie, an unlawful act of the wife to live apart from her husband, and it was unlawful, and therefore tortious in the defendant to procure and persuade her to do an unlawful act, and as damage to the plaintiff was thereby occasioned, an action on the case was held maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour. It was undoubtedly, prima facie, an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so."

It is true the learned judge here uses the word "maliciously," but I think he means no more by this than "wilfully and knowing that he was procuring an unlawful act." The essence of the tort was manifestly regarded by the learned judge as the procuring one person to do an unlawful act to the injury of another.

In *Winsmore* v. *Greenbank* (19), upon which the learned judge relied as a strong authority in support of the plaintiff's case, there was not even an allegation of malice. The allegation was that the defendant "unlawfully and unjustly" procured a wife not to return to her husband, whereby he was damnified. WILLES, C.J., in his judgment, said, in answer to objections that were taken to the pleadings (Willes, at p. 583):

"It must be an unlawful procuring, and it need not be shown on the pleadings how it is unlawful. It was said that it was necessary for the plaintiff to add 'by false insinuations,' but it is not material to add whether they were true or false. If they were true, and by means of them the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant."

Upon a review, then, of the judgments in *Lumley* v. *Gye* (11), I am satisfied that the procuring what was described as an unlawful act, namely, a breach of contract, was regarded as the gist of the action. I think the judgment would have been precisely the same if, instead of the word "maliciously," the words "wilfully and with notice of the contract," had been found in the declaration. Every word of the reasoning of the three learned judges would have been equally applicable to that case. I am not concerned now to inquire whether the decision in *Lumley* v. *Gye* (11) was right. I admit the force of the reasons given by the learned judges for holding that an action lies not only against a person who breaks a contract, but against anyone procuring a breach of contract to the detriment of the plaintiff. There are, however, arguments the other way, and I must not be understood as expressing an opinion one way or the other whether such an action can be maintained. It is certainly a general rule of our law that an act prima facie lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect.

It has recently been held in this House in *Bradford Corpn.* v. *Pickles* (24) that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. LORD HALSBURY said ([1895] A.C. at p. 594):

"This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it."

The statement was confined to the class of case then before the House, but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights.

The common law on the subject was emphatically expressed by PARKE, B., in delivering the judgment of the court in *Stevenson* v. *Newnham* (35). In that case the question was whether a declaration was good which averred that the defendant "maliciously" distrained for more rent than was due. It was held that the allegation of malice did not make it good. PARKE, B., said:

> "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

More than one of the learned judges who were summoned refers with approval to the definition of malice by BAYLEY, J., in *Bromage* v. *Prosser* (12) (4 B. & C. at p. 255):

> "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

It will be observed that this definition eliminates motive altogether. It includes only "wrongful" acts intentionally done. I may remark in passing that I am quite unable to see how the definition assists the respondents. It seems to me to tell the other way. In the present case the contention is that the malicious motive makes "wrongful" an act that otherwise would not be so.

It may be convenient here to refer to *Green* v. *General Omnibus Co., Ltd.* (36), which was relied on as showing that a malicious motive may make actionable acts otherwise innocent. In my opinion, it affords no support to such a proposition. Acts were charged in the declaration which manifestly interfered with the plaintiff in the free use of the highway to which he was entitled. The declaration averred that he was obstructed in the use of it. It was demurred to on the ground that a corporation could not be guilty of malice, and that this was of the essence of the cause of action. The decision was only that the declaration was good. It was held that a malicious motive was essential. ERLE, C.J., in delivering the judgment of the court, stated as the grounds of the demurrer that the declaration charged "a wilful and intentional wrong," and that the defendants being a corporation could not be guilty of such a wrong. He obviously gave the averment of malice the meaning attributed to it by BAYLEY, J., in the case just referred to, namely, that the wrongful acts were done intentionally.

Great stress was laid at the Bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient. I have always understood, and I think it has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is prima facie wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the

statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories, it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from showing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In *Temperton* v. *Russell* (33) it was held that the principle of *Lumley* v. *Gye* (11) and *Bowen* v. *Hall* (10) was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in *Bowen* v. *Hall* (10) in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference. If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. Such a case is within the very words employed in *Bowen* v. *Hall* (10) as applied in the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader induced another not to contract with a third person with whom he was in negotiation, but to make the contract with himself instead, a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen* v. *Hall* (10). He induces a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it.

It was said at the Bar that there was an exception in favour of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favour by the law. But it is possible to give many illustrations to which no such answer would apply. I give one. A landowner persuades another to sell him a piece of land for which a neighbour is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive is to benefit himself at his neighbour's expense; he induces the owner of the land not to contract with his neighbour. The case is within the terms of the judgment in *Bowen* v. *Hall* (10). Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbour or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbour or of benefiting oneself at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered, does go far to show that such an action cannot be maintained.

A I think these considerations (subject to a point which I will presently discuss) sufficient to show that the present action cannot be maintained. It is said that the statement that the defendant would call men out, if made, was a threat. It is this aspect of the case which has obviously greatly influenced some of the learned judges. HAWKINS, J., says that the defendant without excuse or justification

B "wilfully, unlawfully, unjustly, and tyrannically invaded the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment,"

and that the plaintiffs are, therefore, entitled to maintain this action. But "excuse or justification" is only needed where an act is prima facie wrongful. Whether the defendant's act was so is the matter to be determined. To say that the defen-
C dant acted "unlawfully," is, with all respect, to beg the question which is whether he did so or not? To describe his acts as unjust and tyrannical proves nothing, for these epithets may be, and are, in popular language constantly applied to acts which are within a man's rights, and unquestionably lawful. In my opinion, these epithets do not advance us a step towards the answer to the question which has to be solved.

D The proposition is, therefore, reduced to this, that the appellant invaded the plaintiffs' right by intimidating and coercing their employers. In another passage, in his opinion, the learned judge says that there is no authority for the proposition that to render threats, menaces, intimidation, or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I quite agree with this. The threat of violence to property is equally
E a threat in the eye of the law. And many other instances might be given. On the other hand, it is undeniable that the terms "threat," "coercion," and even "intimidation" are often applied in popular language to utterances which are quite lawful and give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, perhaps extreme pressure, on the person to whom it is addressed, to take a particular course. Of this again, number-
F less instances might be given. Even then, if it can be said without abuse of language that the employers were "intimidated and coerced" by the appellant, even if this be in a certain sense true, it by no means follows that he committed a wrong or is under any legal liability for his act. Everything depends on the nature of the representation or statement by which the pressure was exercised. The law can-
G not regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning.

I understood it to be admitted at the Bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events I cannot doubt
H that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which, under the rules of the union, it was com-
I petent for the authorities to give, they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognised by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best and most likely to be effectual.

If, then, the men had ceased to work for the company either of their own motion, or because they were "called out," and the company in order to secure their return had thought it expedient no longer to employ the plaintiffs they could certainly have maintained no action. Yet the damage to them would have been just the same. The employers would have been subjected to precisely the same "coercion and intimidation," save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the pressure put upon them, and been actuated by the same motive, and the aim of those who exercised the pressure would have been precisely the same. The only difference would have been the additional result that the company also might have suffered loss. I am quite unable to conceive how the plaintiffs can have a cause of action, because, instead of the iron workers leaving either of their own motion, or because they were called out, there was an intimation beforehand that either the one or the other of these courses could be pursued. The iron workers were employed on the terms that they might leave at the close of any day, and that, on the other hand, the employers might, if they saw fit, then discharge them. The company had employed the men, knowing that they were members of the union, and they had on one occasion, at least, dealt with the appellant as its delegate. They had no ground for complaint if the men left, as they were by contract entitled to do, whether they left of their own motion, or followed the instructions of their union leaders. It is said that the company were in the power of the men, because of the business loss to which the withdrawal of the men would subject them. But to what was this due, if not to the act of the company themselves in employing these men under a contract which either party might any day determine? Under such circumstances, to compare the act of the company to that of the traveller who, on a pistol being presented to his head, hands his purse to the highwayman, appears to me grotesque. The object which the appellant and the iron workers had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the iron workers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being intrusted to other hands.

Some stress was laid in the court below upon the fact that the plaintiffs were not at the time in question engaged upon iron work, although immediately before that time they had been so employed elsewhere. This, it was said, showed that the motive of the defendant and the iron workers was the "punishment" of the plaintiffs for what they had previously done. I think that the use of the word "punishment" has proved misleading. That word does not necessarily imply that vengeance is being wreaked for an act already done, though no doubt it is sometimes used in that sense. When a court of justice, for example, awards punishment for a breach of the law, the object is not vengeance. The purpose is to deter the person who has broken the law from a repetition of his act, and to deter other persons also from committing similar breaches of the law. In the present case it was admitted that the defendants had no personal spite against the plaintiffs. His object was, at the utmost, to prevent them in the future from doing work which he thought was not within their province, but within that of the iron workers. If he had acted in exactly the same manner as he did at a time when the plaintiffs were engaged upon iron work, his motive would have been precisely the same as it was in the present case, and the result to the plaintiffs would have been in nowise different. I am unable to see, then, that there is any difference either in point of ethics or law between the two cases. The iron workers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that this was the case. The object which the defendant and those whom he represented had in view throughout

A was what they believed to be the interest of the class to which they belonged. The step taken was a means to that end. The act which caused the damage to the plaintiffs was that of the iron company in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendant be liable because he did not subordinate the interests of those he represented to the B plaintiffs? Self-interest dictated alike the act of those who caused the damage and the act which is found to have induced them to cause it.

I have been dealing so far with the ground upon which the judgment in the court below proceeded. The learned counsel for the respondents, however, rested their arguments mainly upon a different ground, which has found favour with the learned judges, who think the plaintiffs entitled to judgment. It was contended C that the defendant, by the course he took, had interfered with the plaintiffs in their trade or calling, and that this of itself was an actionable wrong. In support of this very broad proposition reliance was mainly placed on *Keeble* v. *Hickeringill* (8). The declaration charged the defendant with firing a gun with design to damnify the plaintiff, and frighten the wildfowl from his decoy. In the report (11 East, 574, *n.*) it is stated that the plaintiff was lord of a manor and had a decoy on his own ground, D which was next adjoining the defendant's ground, and there the plaintiff had decoy and other ducks, of which he made profit. It was held that the action lay. In the report in 11 Mod. 75, this observation is attributed to LORD HOLT: "Suppose defendant had shot on his own ground, if he had occasion to shoot it would be one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong." In another report LORD HOLT is reported as saying: E

> "The action lies, for, first, using or making a decoy is lawful; secondly, this employment of his ground for that use is profitable to the plaintiff, as is the skill and management of that employment."

It is argued that this decision rests upon the principle that intentional interF ference with the trade of another is wrongful. If it was intended by the decision to draw a distinction between firing by the defendant on his own land when the decoy was kept by the plaintiff for purposes of trade profit and doing the same act when the decoy was kept for purposes of pleasure only, I can see no ground for such a distinction. The defendant in firing upon his own land in such a way as to frighten the birds from the plaintiff's land, was either acting within his own rights G or not. If he was not, he would surely be liable, whether the plaintiff was using his land for pleasure or profit. If he was within his rights, he would not be liable in either case, and I do not see how his rights could depend on the circumstances that the plaintiff traded in ducks and did not merely use his decoy for purposes of sport, or that he sold them, and did not merely use them for consumption by his household. I cannot think that the right of action depended on the circumstance H that the plaintiff traded in ducks; and that there would have been no right of action, all other circumstances being the same, if he had not done so. The case may be supported, and the observation of LORD HOLT, which has been quoted, explained, by the circumstance that if the defendant merely fired on his own land in the ordinary use of it, his neighbour could make no complaint, while, if he was not firing for any legitimate purpose connected with the ordinary use of land, he might be held I to commit a nuisance. In this view of it, *Keeble* v. *Hickeringill* (8) has, of course, no bearing on the present case.

It is, however, treated in their opinions by the majority of the learned judges as establishing the wide and far-reaching proposition that every man has a right to pursue his trade or calling without molestation or obstruction, and that anyone who, by any act, though it be not otherwise unlawful, molests or obstructs him, is guilty of a wrong, unless he can show lawful justification or excuse for so doing. *Keeble* v. *Hickeringill* (8) was decided about two centuries ago; but I cannot find that it has ever been treated, unless it be quite recently, as establishing the broad

general proposition alleged. No such proposition is to be found stated, so far as I am aware, as the ground of any decision, or in any standard text-book of the English law. In SMITH'S LEADING CASES, which were selected, and the notes on them written, by one of the most eminent lawyers of his day, *Keeble* v. *Hickeringill* (8) is not even referred to. And the first editors of the work, after MR. J. W. SMITH'S death, WILLES and KEATING, JJ., lawyers on whose eminence it is unnecessary to dilate, equally passed it by without notice. If the view taken by the majority of the learned judges whose opinions were given at the Bar, be correct, *Keeble* v. *Hickeringill* (8) ought to have been itself treated as a leading case. It has not, as I believe, been an authority on which subsequent decisions have been based, except in cases relating to the disturbance of decoys of wild birds. It is, nevertheless, suggested by the learned judges that it embodies the principle on which many subsequent cases have been decided, though it was not referred to, and the judges who pronounced the judgments were apparently unconscious of the authority they are said to have followed. It is remarkable that among these cases are *Lumley* v. *Gye* (11) and *Bowen* v. *Hall* (10) which I have already discussed. They are said by several of the judges to rest on the principle established in *Keeble* v. *Hickeringill* (8). Some of the judges, indeed, criticise adversely the grounds upon which these cases were decided, and intimate that they can only be supported on the ground taken by LORD HOLT in *Keeble* v. *Hickeringill* (8). That case however was not cited by the counsel who argued *Lumley* v. *Gye* (11) or *Bowen* v. *Hall* (10), or by any of the judges who decided them. If it establishes the proposition contended for, it is astonishing that those very learned and distinguished judges were unaware of any such legal proposition, and, instead of taking this short cut to their decision, based it upon elaborate reasoning entirely unconnected with it.

Great reliance was placed by the respondents on certain dicta of HOLT, C.J., in *Keeble* v. *Hickeringill* (8). That learned judge is reported to have said that if a violent or malicious act is done to a man's ocupation, profession, or way of getting a livelihood, an action lies in all cases. And he gives the following illustrations:

> "If H. should lie in the way with guns and fright boys from going to school, and their parents would not let them go thither, that schoolmaster would have an action for loss of his scholars. A man hath a market to which he hath toll of horses sold, a man is bringing his horse to market to sell, a stranger hinders and obstructs him from going to the market, an action lies, because it imports damage. Again an action on the case lies against one that by threats frightens away his tenants at will."

In all these cases I think the Chief Justice was referring to acts in themselves wrongful. Firing guns in such a manner as to terrify persons lawfully passing along the highway would, I take it, be an offence. And the other illustrations given import, I think, that the obstruction and frightening were of such a character as to be unlawful, quite independently of the motives which led to them.

Carrington v. *Taylor* (7) was also relied on by the respondents. It is, I believe, the only case which has been expressly based on *Keeble* v. *Hickeringill* (8). The plaintiff there possessed an ancient decoy, and the defendant sought his livelihood by shooting wildfowl from a boat on the water, for which boat, with small arms, he had a licence from the Admiralty for fishing and coasting along the shores of Essex. The decoy was near a salt creek where the tide ebbs and flows. The only proof of disturbance of the decoy by the defendant was that, being in his boat shooting wildfowl in a part of the open creek, he had fired his fowling piece, first within a quarter of a mile of the decoy and afterwards within 200 yards of it and had killed several widgeons. The judge left these facts to the jury as evidence of a wilful disturbance of the plaintiff's decoy by the defendant. The jury returned a verdict of 40s. damages and the court, on a motion for a new trial, refused to disturb the verdict. They gave no reason for their judgment. Unless a decoy possesses some peculiar privileges in the eye of the law, I confess myself quite

A unable to understand why the defendant was liable to an action or was not within his rights in shooting the wild fowl at the place he did for the purpose of gaining a livelihood, which is stated to have been his object. In any case, the decision affords no support to the contention now under consideration. For there was no allegation that the plaintiff traded in wildfowl; "great profits and advantages," in pleader's language, might well have accrued to him without his doing so. And B there was no proof that he did so. Although some of the learned judges who support the judgment below rely on this case, one at least thinks it bad law. The case is important as showing, as I think it clearly does, that the judges of the Court of King's Bench in 1809 did not regard the judgment in *Keeble* v. *Hickeringill* (8) as founded on interference with trade or dependent on the presence of malice.

I turn now to the other cases relied on by the learned judges in support of the pro- C position on which they found their conclusion in favour of the respondents, which are said to have been decided upon the principle embodied in *Keeble* v. *Hickeringill* (8). Among the earliest of these is *Garret* v. *Taylor* (9). The declaration alleged that the plaintiff was a mason and used to sell stones and employed workmen in his stone pit. I quote from the fuller statement of the pleading in ROLLE'S REPORTS, p. 162:

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> "Al queux le defendant tantas et frequentas minas de vita et de mutilatione membrorum suorum et bonorum devastatione per diversas sectas legis dedit,"

whereby the plaintiff's workmen left, and he was unable to obtain others. This declaration was held to disclose a cause of action. It is suggested that it is difficult E to explain this decision, except on the ground that the law recognises in every man a right to carry on his trade without disturbance. I am unable to see the difficulty or to think that the decision rests on any principle specially relating to trade. If the plaintiff had not been a tradesman, but the owner of a house, and the same menaces had been uttered to those who came from time to time to visit him, I cannot but think that he would equally have had a cause of action. He would have F been affected prejudicially in the occupation and enjoyment of his property by acts in themselves wrongful. Again, in *Tarleton* v. *McGawley* (4), a gun was fired at a canoe coming to the plaintiff's ship, whereby one of the natives in it was killed, and so natives were deterred by fright from approaching it for the purpose of trading. It is said that the essence of the wrong in this case was that the plaintiff was disturbed in his trade. I do not think so. Can it be doubted that, if the shipowner G had desired the presence of persons on board his ship for any other purpose, and the same wrongful act had deterred them from approaching the ship, the shipowner might have maintained a similar action to recover damages for any loss or inconvenience to which he had been put owing to the wrongful act of the defendant?

I will not trouble your Lordships by going through all the cases referred to. Speaking generally, I believe these actions would equally have been maintainable H if a similar wrongful act had caused damage to, or had affected the legal rights of, a person wholly unconnected with trade. In all of them the act complained of was in its nature wrongful—violence, menaces of violence, false statements. In none of them was the proposition now contended for laid down or hinted at, and they can be supported without resort to any such principle. No doubt in some of the cases referred to the wrong was of such a nature that it is difficult to imagine circum- I stances in which precisely the same wrong could have caused damage to a person not in trade, but the act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss. Among the authorities relied on were those relating to slander of a man in the way of his trade. This action, again, was traced to the principle that a man's trade must not be interfered with. It is true that slander of a man in the way of his trade is actionable without proof of special damage; but, whatever the slander, the wrong is precisely the same—that defamatory words have been uttered. And slander of a man in the way of his office, if it be an office of profit or even of dignity, where it is

one from which the holder may be removed, is actionable, without proof of special damage, in precisely the same way as slander of a man in the way of his trade.

I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that everyone has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work is in law a right of precisely the same nature and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with someone else in his calling?

In the course of the argument one of your Lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook, told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler. One of the learned judges answers this question without hesitation in the affirmative. As, in his opinion, the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And, if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion, a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling, any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shown to be in its nature wrongful, and thus to require justification.

The notion that there may be a difference in this respect between acts affecting trade or employment and other acts seems to be largely founded on certain dicta of BOWEN, L.J., in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3). It must be remembered that these were obiter dicta, for the decision was that the defendants were not liable. The passage perhaps chiefly relied upon is (23 Q.B.D. at p. 613):

> "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong."

It will be noted that the learned judge here makes no distinction between acts which interfere with property and those which interfere with trade. For the purpose then in hand, the statement of the law may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide. Everything depends on the nature of the act, and whether it is wrongful

A or not. Whatever may be the effect of the dicta of some of the judges in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3), I regard it as an authority supporting the appellant's case. The defendants, owners of ships, formed an association with the object of securing to themselves exclusively a particular carrying trade. They allowed a rebate on the freights to all shippers who shipped only with members of the association, and took other steps to secure the trade for themselves. They also B sent ships to ports where the plaintiffs were endeavouring to obtain cargoes, to carry at unremunerative rates in order to secure the trade for themselves. A circular was sent by an agent of the defendants reminding shippers at a particular port that shipments for London by any of the plaintiffs' steamers at any of the ports in China would exclude the firm making the shipment from participation in the returns of freight, during the whole six-monthly period in which they had C been made even though the firm elsewhere might have given exclusive support to the steamers of the combination. It was held by this House [in an action by the plaintiffs against the defendants for damages for a conspiracy to injure them] that the plaintiffs had no cause of action. This, too, be it observed, though the action was in respect of a conspiracy, what was done being in pursuance of a common course of action concerted by several shipowners.

D In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. E I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that competition is regarded with special favour by the law; at all events, I see no reason why it should be so regarded. F But if the alleged exception could be established, why is not the present case within it? What was the object of the defendant and the workmen he represented but to assist themselves in competition with the shipwrights? In my opinion, there is no difference in principle between the two cases.

For the reasons I have given, I think the judgment should be reversed, and judg- G ment entered in the action for the defendant with costs. I have only very recently had the opportunity of knowing the views entertained by the Lord Chancellor with regard to this case. In consequence of them, I think it right to add the following observations. I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has H been exercised in a particular instance may be distasteful. I am unable to regard as altogether accurate the statement of my noble and learned friend that up to the period when this case reached your Lordships' House there was a unanimous consensus of opinion. I think he has overlooked the following facts. When the Court of Appeal in *Bowen* v. *Hall* (10) held that an action lay for maliciously inducing another to break his contract, Lord Coleridge, C.J., differing from his two col- I leagues, was of opinion that even in such a case an action could not be maintained. When in *Temperton* v. *Russell* (33) Lord Esher and Lopes, L.J., carried the doctrine further, and held that an action would lie for maliciously inducing another not to enter into a contract A. L. Smith, L.J., notwithstanding the strong expression of opinion by those learned judges, significantly reserved his own opinion on the point. And when in the present case Lord Esher and Lopes, L.J., re-affirmed the opinions they had previously pronounced, Rigby, L.J., only concurred in the judgment under appeal in deference to the opinions expressed in the previous case. In my opinion, the conclusion at which I have arrived is not in conflict with any

decision, or even with the pronounced opinions of any judges, except those enunciated in the recent cases now under review. On the contrary, I believe, with all deference to my noble and learned friend on the woolsack, that any other conclusion would run counter to principles of the common law which have been long well established. I regard the decision under appeal as one absolutely novel, only to be supported by affirming propositions far reaching in their consequences, and, in my opinion, dangerous and unsound.

LORD MACNAGHTEN.—I am sorry to say that I must begin by recapitulating the facts of the case, for the findings of the jury, taken by themselves, do not convey to my mind any definite meaning. The jury have found that the appellant Allen "maliciously induced" the Glengall Iron Co. to discharge the respondents from their service, and they have awarded damages in consequence. I do not know what the jury meant by the word "induced"; I am not sure that I know what they meant by the word "maliciously." Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself. I am, therefore, compelled to turn for help to the evidence at the trial, accepting, as I suppose the jury must have accepted, the account given by the respondents in preference to that offered by the appellant wherever there may be any shadow of difference between them. [His Lordship reviewed the evidence.] On their dismissal Flood and Taylor brought this action against Allen. Each party had the financial support of their union. The plaintiffs joined as co-defendants Jackson and Knight, the chairman and secretary of the Boilermakers' Union. Jackson and Knight had no more to do with the matter than any of your Lordships. The jury found that they did not authorise Allen in acting as he did. On further consideration the action was dismissed against them, and the dismissal was affirmed on appeal. It is not necessary for me to say anything about this part of the case, except that I cannot help thinking that the fact of the judge leaving any question to the jury as regards the chairman and secretary of the union must have rather tended to confuse the issue as between the plaintiffs and Allen. Although he pointed out that there was no evidence of conspiracy, it must, I should think, have given some colour to the suggestion of oppressive combination as an element to be considered, whereas in the course of the trial the case was, in fact, as it seems to me, reduced to a claim against Allen for what he did in his individual capacity.

Before I proceed to consider the legal grounds on which Kennedy, J., and the Court of Appeal decided the case against Allen, I should like to ask what was wrong in Allen's conduct. He had nothing to do with the origin of the ill-feeling against Flood and Taylor. He did nothing to increase it. He went to the dock simply because he was sent for by one of the men of his union. It seems to be considered the duty of a district delegate to listen to the grievances of the members of his union within his district, and to settle the difficulty if possible . The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was by going to see the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the "iron men" would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned the "iron men" were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason. Any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work among them. If so, it is difficult to see why fault should be found with Allen for going in their place and on their behalf, and saying what they would have said themselves.

Then, did Allen say or do anything in the course of his interview with Mr. Halkett which, in the events which have happened, gives Flood and Taylor a right of action

against him? That brings me to the case presented to the jury. In the statement of claim there were serious allegations for which, as it turned out, there was no foundation whatever in fact. It was alleged that Allen and his co-defendants had induced the company to break contracts with the plaintiffs. That was a mistake; there was no contract to break. It was alleged that Allen and his co-defendants had conspired against the plaintiffs. That was a mistake, too; there was not, as the learned judge said, "a shred of evidence of any conspiracy at all." Then there was a charge of intimidation and coercion. That charge vanished too. The only reference the judge made to it was to say "there is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of the term." The case as launched broke down. The judge however, saved two questions from the wreck, and put them to the jury. They were these: (i) Did Allen maliciously induce the company to discharge the plaintiffs? (ii) Did Allen maliciously induce the company not to engage the plaintiffs? In putting these questions he explained that the word maliciously was a term of art in law—a proposition, at any rate, not universally true. He said:

> "It means, connected with the word 'induce,' this—that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business."

That comes near the ordinary meaning of "malice," if "deliberate mischief" be taken as its ordinary meaning. And it is to be observed that in the cases professedly founded on *Lumley* v. *Gye* (11)—I refer particulary to *Bowen* v. *Hall* (10), *Temperton* v. *Russell* (33), and the present case in the Court of Appeal—the word "malice" seems to be used in a sense not far removed from its ordinary and popular signification. As regards the meaning of the word "induce," I do not think the jury got much assistance.

I rather gather from the summing-up that the jury were given to understand that if they thought that Allen merely represented the state of things as it was—and the feeling of the "iron men" at the Regent's Dock—they would be at liberty to answer the questions put to them about Allen in the negative. But the answer must be the other way if they thought that Allen went further, and assumed to represent the union, and to speak as if he had the power of the union at his back. That would be a threat, and would amount to "inducing." I do not think it can be said that Allen did "induce" the company to discharge the plaintiffs. Certainly it cannot be truly said that he procured them to be discharged. It was not his act that prevented the company from continuing to employ them. If the whole story had been a fiction and an invention on his part I could have understood the finding of the jury. But I do not think there was any misrepresentation on Allen's part; I do not think there was any exaggeration. Nor, indeed, was there any such point made at the trial. The evidence of the plaintiffs themselves proves that the "iron men" were in a very nasty temper. They believed the "iron men" meant mischief. Allen evidently thought they were bent on striking. Edmonds, the foreman, indeed, says he thought Allen "had only to hold up his hand, and the whole of the men would go off." But he gathered this from Allen's manner, not from what he said. But, after all, whatever he may have gathered from Allen's manner, it was not Edmonds who discharged the plaintiffs. It was Mr. Halkett, and he did it without consulting Edmonds. Mr. Halkett says nothing to show that he was afraid of Allen. He must have known too much about trade unions to have supposed for a moment that a subordinate officer in Allen's position could have taken upon himself to call the men out. It is quite plain what it was that induced Mr. Halkett to discharge the plaintiffs. It was nothing that originated with Allen. It was no misrepresentation on his part. It was not fear of his personal influence. It was simply a very natural desire for peace and quiet. Mr. Halkett did not want the yard upset. He did not want a row between two sets of workmen which was pretty sure to end in a strike.

So we see now, I think, what the findings of the jury come to if they are to be treated as being in accordance with the evidence. They must mean that Allen induced the company to discharge the plaintiffs, by representing to the manager, not otherwise than in accordance with the truth, the state of feeling in the yard, and the intentions of the workmen, and that he did so "maliciously," because he must have known what the issue of his communication to the manager would be, and naturally, perhaps, he was not sorry to see an example made of persons obnoxious to his union. But is his conduct actionable? It would be very singular if it were. No action would lie against the company for discharging the two shipwrights. No action would lie against the "iron men" for striking against them. No action would lie against the officers of the union for sanctioning such a strike. But if the respondents are right the person to answer in damages is the man who happened to be the medium of communication between the "iron men" and the company—the most innocent of the three parties concerned, for he neither set the "agitation" on foot nor did he do anything to increase it, nor was his the order that put an end to the connection between employer and employed. It seems to me that the result would have been just the same if Edmonds had told Mr. Halkett what was going on in the yard, or if Mr. Halkett had learned it from Flood and Taylor themselves.

Even if I am wrong in my view of the evidence and the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word and that he procured the dismissal of Flood and Taylor—that is, that it was his act and conduct, and his act and conduct alone, which caused their dismissal—and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who by persuasion or some other means, not in themselves unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse. The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point. But if the immediate agent cannot be made liable, though he knows what he is about, and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting the act not in itself illegal or improper into an actionable wrong.

If that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame, and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement; suppose a man declines to give a servant a character because he is offended with the servant for leaving; suppose a person of position takes away his custom from a country tradesman in a small village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling—no one I think, would suggest that there could be any remedy at law in any of these cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend not to employ the tradesman any more. Neither one nor

A the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is, that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion.
B Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation
C and wide scope for prejudice.

I should like to add that, in my opinion, the decision of this case can have no bearing on any case which involves the element of oppressive combination, the vice of which seems to me to depend on considerations which are conspicuously absent in the present case.

As regards authority, there is, I think, very little to be said. It is hardly neces-
D sary to go further back than *Lumley* v. *Gye* (11) in 1853. There is not much help to be found in the earlier cases that were cited at the Bar, not even I think in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be. In *Lumley* v. *Gye* (11) it was held that an action would lie for procuring a person to break a contract for personal service. The subsequent cases of *Bowen* v. *Hall* (10) and *Temperton* v. *Russell* (33) are authorities for the
E proposition that the principle is not confined to contracts for personal service. There is no doubt much to be said for that proposition. But the judgment under appeal does not depend on *Lumley* v. *Gye* (11) or on any decision before or after that case. It rests only on certain dicta, to be found first in *Bowen* v. *Hall* (10), and afterwards repeated in *Temperton* v. *Russell* (33). Those dicta are of great weight, owing to the eminence of the judge by whom they were pronounced, but they certainly were
F not necessary for the decision in either case. *Lumley* v. *Gye* (11) was heard on demurrer. The counts which were demurred to alleged that the defendant knew "the premises," that is, the existence of the contract stated in the declaration, and was "maliciously intending to injure the plaintiff," Mr. Willes, for the defendant, in reply, pointing out that malice was never averred in actions for seducing servants, argued that "the averment of malice can make no difference"; and that seems
G to have been the opinion of the majority of the court, who thought the action would lie. CROMPTON, J., treats the allegation of malice as meaning nothing more than the allegation of notice, and ERLE, J., indicates that the principle on which the action is to be rested is that "the procurement of the violation of the right"—that is, the plaintiff's right under the contract—"is a cause of action." If so, it would seem to follow that provided the violation is committed knowingly, it cannot
H matter whether the thing is done maliciously or not, and, therefore, with all deference to the opinion of BLACKBURN, J., who, if I rightly understand his words in *Cattle* v. *Stockton Waterworks Co.* (37), seems to say that "malicious intention" was the gist of the action, I should be disposed to hold that, if a right has been knowingly violated, an allegation of malice is superfluous, and that, if there has been no violation of any right, malice by itself is not a cause of action. I cannot, there-
I fore, agree with LORD ESHER, M.R., in thinking that the act complained of was "wrongful" because it was "malicious," and that, if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not. I am of opinion that judgment should be entered for the appellant.

LORD MORRIS.—If this was an ordinary case I should be satisfied by merely expressing my concurrence in the able and exhaustive judgment of the Lord Chancellor which deals so fully both with the law and the facts of the case, but as the

decision of this House, about to be pronounced, overturns, as I consider, the overwhelming judicial opinion of England, I feel bound to state shortly my views without reiterating the common facts of the case or going into the evidence in detail, as both have already been so often repeated. The first question that would arise is: Was there not a de facto contractual relation between the Glengall Iron Co., the employers, and the plaintiffs, the employees, which would have continued but for the malicious interference of the defendant. The plaintiffs were only day labourers but with a certainty of their employment being continued de die in diem for a considerable time. In my opinion, it is actionable to disturb a man in his business by procuring the determination of a contract at will or by even preventing the formation of a contract when the motive is malicious and damage ensues. The question of actual contractual relations in this case was not dealt with, as during the course of the trial it was assumed that there was no contractual relation existing between the Glengall Iron Co. and the plaintiffs which was determined by the action of the defendant. I desire, however, to deal with the case on the finding of the jury, namely: "That the defendant did maliciously induce the Glengall Iron Co. to discharge the plaintiffs from their employment."

At common law a workman had a right to work with any person who was willing to employ him. Both had a right to trade in labour as in any other commodity and as they thought fit. This was part of the personal liberty enjoyed by every man, and, like personal liberty, was the subject of peculiar safeguards, notably—it was a right which, like that of personal liberty, could not be bartered away. A contract restraining one's right to trade, with certain exceptions not material here, was like a contract to become a slave, null and void. One right as well as the other was inalienable. The existence of this right to trade was established at least as far back as the reign of Queen Anne. In *Keeble* v. *Hickeringill* (8) it was held that an action on the case lay for discharging guns near the decoy pond of another with a design to damnify the owner by frightening away the wildfowl resorting thereto, by which the wildfowl were frightened away and the owner damnified. It is to be observed that the act of discharging the gun was per se lawful. The ground of HOLT, C.J.'s, judgment was as follows:

> "Then when a man useth his art or skill to take them, to sell or dispose of for his profit, this is his trade, and he that hinders another in his trade or livelihood is liable to an action for so hindering him. . . . Now there are two sorts of acts for dong damage to a man's employment for which an action lies. The one is in respect of a man's privilege or in respect of his property. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood. There an action lies in all cases, but if a man doth him damage by using the said employment, as if Mr. Hickeringill had set up another decoy in his own ground near the plaintiff's and that had spoiled the custom of the plaintiff no action could lie."

Why? "Because he had as much liberty to make and use a decoy as the plaintiff." These words, in my opinion, draw the distinction between an act in se legal which is rendered unlawful when done maliciously and the same act which remains lawful although it does harm to another because it was done in the exercise of the owner's right to trade and that harm resulted from trade competition. SIR W. ERLE in his work on TRADE UNIONS, p. 12, lays down the proposition thus: [HIS LORDSHIP read the passage quoted by the Lord Chancellor at p. 60, ante, and continued.]

To what extent have these opinions and the judgment in *Keeble* v. *Hickeringill* (8) been dissented from or approved of in subsequent judicial proceedings? I am not aware of any judicial expression of dissent from them, while the judgments of several of the judges in the *Mogul Case* (3), in the Court of Appeal and in this House, largely support them. In the admirably logical and scientific judgment of BOWEN, L.J., he says (23 Q.B.D. at p. 613):

A "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it."

Among several cases he cites is that of *Keeble* v. *Hickeringill* (8). He proceeds to decide in favour of the defendant upon the ground that there was a just cause or B excuse for what they had done. He adds (ibid. at p. 618):

"Such a legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's lawful gain or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell."

C In this House, in the opinion of LORD BRAMWELL, which was read in his absence by LORD MACNAGHTEN, who expressed his agreement, it is stated:

"The plaintiffs do not complain of any act the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them,"

D and he refers generally without giving its name, to *Keeble* v. *Hickeringill* (8). LORD FIELD, in his opinion, said: "I think that this appeal may be decided upon the principles laid down by HOLT, C.J., in *Keeble* v. *Hickeringill* (8)." After pointing out that

"acts done by a trader in the lawful way of his business, although by the necessary results of effective competition, interfering injuriously with the trade of E another are not the subject of any action,"

he proceeds:

"Of course it is otherwise, as pointed out by HOLT, C.J., if the acts complained of, although done in the way or under the guise of competition or other lawful right are in themselves violent or purely malicious, or have for their F ultimate object injury to another from ill-will to him and not in the pursuit of lawful rights."

In this House opinions were expressed by seven of their Lordships. Not one expressed any disapproval or adverse criticisms of *Keeble* v. *Hickeringill* (8).

If the principle of *Keeble* v. *Hickeringill* (8) is applicable to this case, as, in my G opinion, it is, I fail to see how KENNEDY, J., could have withdrawn the case from the jury. In his charge he put Allen's case, as it seems to me, most favourably to the jury. He says (I merely summarise it):

"Now, bearing in mind how Allen came, you have to consider whether the plaintiffs have proved to you, not merely that he represented to the employers what the men working in that yard would be likely to do unless they could H come to some settlement, and left to the employers . . . the choice of action, and I do not think in that case you would say that was an inducement . . . that he felt himself in this position, 'I am a district delegate; in the interest alike of the doing of the employers' work as well as of the men, it is better that I should go and tell the employers what the facts are after telling the men that they are to take no hurried action,' to let the matter either be settled I peaceably by the employers or if it cannot be settled by them be brought in due course before the executive of the union."

The charge of the learned judge seems to me to put the case favourably for Allen, but it appears to me that some of your Lordships have put yourselves in the place of the jury by coming to the conclusion that Allen had gone to the employers merely to intimate as has been said, or represent to them the feelings and views of the men, to be their messenger or mouthpiece, that being the very case that was negatived by the jury. Indeed, LORD JAMES, in his opinion, which I have had the advantage of

reading, has gone further, for he says, "for him (Allen) to communicate such intention to the company did not injure the respondents." If this was correct there was no necessity to go any further. The plaintiffs would not have suffered damage by the act of the defendant. In my opinion, it was for the jury, the constituted tribunal in such cases, and not for your Lordships, to say whether Allen went to the employers as peacemaker, intimator, representer, messenger, or mouthpiece, as was stated by him, or rather for him by some of your Lordships, or whether he went with the object of, and with the purpose of, having the plaintiffs punished for past alleged offences by getting them discharged at once from their employment. The defendant gave a complete denial to the substance of Mr. Halkett's evidence. The defendant did not take in his evidence the position which is now taken up for him by some of your Lordships, of being a messenger or an intimator of what had occurred. He was conscious he had done wrong, and accordingly to try to save himself he denied altogether what Mr. Halkett had proved. The jury disbelieved him. His untruthful evidence gave colour to his conduct and action, which, in my opinion, amounted to this. He was an outsider, though he was telegraphed for by Elliott. He proceeded to threaten the employers with the withdrawal of the boilermakers, which would be most injurious to the employer, unless the plaintiffs were dismissed at once. His object was to injure the plaintiffs and to punish them, and he had the intention of further persecuting them by not allowing them to work anywhere, which was not the wish of the men or their union. His conduct was unauthorised, and he misrepresented to the employers both the wishes of the men and their objects, and acted outside the scope of his authority as a district delegate of the union.

I, therefore, conclude by adopting as my own the last paragraph of HAWKINS, J.'s, opinion on the question propounded to the judges by your Lordships when he said:

> "I think that there is an abundance of evidence fit to be left to the jury that, without excuse or justification, and not in the exercise of any privilege or in defence of any right, either of his own or the boilermakers, the defendant has wilfully, unlawfully, unjustly, and tyrannically invaded and violated the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment to their injury, and the plaintiffs, therefore, are entitled to maintain this action."

I am, therefore, of opinion that the considered judgment of KENNEDY, J., which was unanimously affirmed by the Court of Appeal, should be affirmed by this House.

LORD SHAND.—I am of opinion that the judgment complained of should be reversed, and judgment entered for the defendant with costs. Certain facts have, with reference to the evidence and the verdict of the jury, been clearly established. In the first place it is clear that the plaintiffs had no contract with their employers, the Glengall Iron Co., entitling them to continuous employment. They were engaged to work by the day, entitled to leave the employment at the end of each day, and, on the other hand, subject to the risk that their employers might at any time cease to employ them further. While this was so, it is, however, to be observed that it is matter of clear inference, and indeed of some direct evidence, that the employment would have gone on for some time longer than it did if the employers had not been induced to discontinue it. It is, in my opinion, further clear that the employment was discontinued by the employers, the Glengall Iron Co., because of the representations made to them by the defendant Allen. This has, I think, been proved, and indeed has been expressly affirmed by the verdict of the jury. There is no real controversy as to the statement or representation made by the defendant which induced the employers to dispense with the plaintiffs' services. The defendant, in effect, stated that if the plaintiffs were continued as workers, even at wood

work only, on the vessel then in the course of being repaired, the boilermakers then engaged at the iron work on the ship would cease work, and so put a stop to the completion of the repairs.

The learned judge was probably bound to lay down the law in the terms he used, having regard to the judgments delivered in the Court of Appeal in *Temperton* v. *Russell* (33), which, in the view of RIGBY, L.J., governed the decision of this case. I confess that, even if the direction given were sound in law, as I think it was not, the facts were such as I should have thought should have precluded such a verdict being given, if these, with the assistance of the learned judge, had received the weight to which they were entitled at the hands of the jury. If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did, that this was his motive of action and not a desire, to use the words of the learned judge, "to do mischief to the plaintiffs in their lawful calling." The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and the same principles must apply to it; and I ask myself what would be thought of the application of the word "malicious" to the conduct of a tradesman who induces the customer of another tradesman to cease making purchases from one with whom he had long dealt and instead to deal with him, a rival in trade. The case before the jury was, in my view, in no way different, except that in the one case there was competition in labour, in the other there would be competition in trade. Some of the learned consulted judges speak of Allen's conduct as having been caused by a desire to inflict "punishment" on the shipwrights for past acts, and indicate that, if the shipwrights had been actually working at iron work on the vessel at the time, the case would have been different. I cannot agree in any such view. "Punishment" in a wide and popular sense may possibly be used, though incorrectly, to describe the boilermakers' action; but it is quite clear that what they were resolved to do, and really did, was, while marking their sense of the injury which they thought (rightly or wrongly is not the question) the shipwrights were doing to them in trenching on their proper line of business, to take a practical measure in their own defence. Their object was to benefit themselves in their own business as working boilermakers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as "malicious," even in any secondary sense that can reasonably be attributed to that term, I cannot see.

Again, the expression was repeatedly used in the argument, and has been also adopted by some of the learned judges, that the men, or rather their representative, Allen, had used "threats" in his communications with employers, which were represented as improper, and afforded evidence to support the view that their action was malicious. What were these threats? Simply this, that, if the plaintiffs were continued in the employment, they, the boilermakers, would leave. Threats may, like false or fradulent representations, be of such a nature, if used, as to amount to improper and unlawful means used to induce action which may be injurious to others, causing them loss and damage, and I should not for a moment say that damages might not, in cases of such threats, be recoverable. But this can only apply to threats of violence, intimidation, obstruction, or the like—threats which may be described as menace which improperly affects freedom of action in the person who is induced to act or to refrain from acting. The boilermakers were quite entitled to resolve that they would not then or at any future time work at the same vessel, or even in the same yard, with the plaintiffs. No one can dispute their right so to resolve. They were quite entitled, having formed that resolution, to inform their employers that they had done so; indeed, I should say that the defendant Allen was only doing what was right and proper in intimating this resolution to the employers, in place of allowing the men to leave without notice to the employers, which would certainly cause them great inconvenience and loss. There was not threat of the nature of menace so as to amount to the use of illegal

means to induce the employers to act, no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismissal, may be said to use a threat, but he is not only acting lawfully, but in most cases is to be commended for so doing in place of giving an instant dismissal.

In giving his opinion in the present case CAVE, J., expressed the opinion that, if a butler who, for some reason or another, has made up his mind that he will no longer continue in service with the cook, with whom he has been in the same employment, should intimate his resolution to the employer, and the services of the cook should thereupon be dispensed with, the cook will have in law a claim of damages against the butler. If this view were sound, then the plaintiffs in this case might be entitled to succeed. Indeed, I have always thought throughout the course of the argument that the case put by the learned judge is perhaps the simplest form in which the very question now under discussion could be raised. But with great deference to the opinion of the learned judge, no such claim could arise in such circumstances, because it cannot be truly said that on the part of the butler there was either an unlawful act, or unlawful means used in the doing of a lawful act. A servant is surely entitled, for any reason sufficient in his judgment, or even from caprice I should say, to resolve that he will no longer continue after the expiration of a current engagement in service with another servant in the same employment. This being unquestionable, the only limitation on his right to act is that he must not use unlawful means to induce his employer to dispense with the services of his fellow servant, and his action being lawful, and no unlawful means being used in carrying it out, the motive, even if it be personal ill-will to another, would not, in my opinion, create liability to a claim of damages.

Coming now directly to the merits of the question in controversy in the case, the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted judges seem to me to fail, because, although it is no doubt true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and, indeed, the same right, on the part of the other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Among the rights of all workmen is the right of competition. In the like manner and to the same extent as a workman has a right to pursue his work or labour without hindrance, a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition which is in itself lawful, and cannot be complained of where no unlawful means (in the sense I have already explained) has been employed. The matter has been settled in so far as competition in trade is concerned by the decision of this House in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3). I can see no reason for saying that a different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons, and in intimating that resolution to his employers.

It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work, it might be on a particular ship, until the whole was completed (in which case the refusal to continue to give the work would be a breach of contract on the employers' part) that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant only induced them to do what they were entitled to do, and in the absence of any fraud or other unlawful means used to bring this about, the action fails. As already fully explained there was no case of malice in the ordinary sense of the term, as meaning personal ill-will, presented to the jury; but I agree with those of your Lordships who hold that, even if

such a motive had existed in the mind of the defendant, this would not have created liability in damages.

On the grounds already stated, I think the defendant only exercised a legal right in intimating that the boilermakers would leave work if the plaintiffs were continued; he used no fraud or illegal means in the assertion of that right; and the exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious: (*Bradford Corpn.* v. *Pickles* (24); and *Mogul Steamship Co. Case* (3), already cited). In the former of these cases Lord Watson said:

> "No use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious."

It seems to me, with reference also to the decision in the latter case, bearing on the rights of competitors in trade, that on the same principle it may be affirmed that the exercise of any legal right in the course of competition in labour or in trade does not become illegal because it is prompted by a motive which is improper or even malicious.

Both Lord Herschell and Lord Macnaghten have reserved their opinions as to the law applicable to a case in which the ground of action is that the defendant had induced an employer to commit a breach of contract, as in *Lumley* v. *Gye* (11), *Bowen* v. *Hall* (10), and the first branch of *Temperton* v. *Russell* (33). I desire also to reserve my opinion as to that case. The person who has committed a breach of contract is of course liable in damages in consequence. If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration. The proper and usual application of the maxim qui facit per alium facit per se in cases in which a wrongful act has been performed is to hold the person who has committed the wrong, i.e., in the case supposed the person who has broken his contract, liable although his act has been done through another acting for him, and it is at least open to consideration whether the maxim would apply to one who is not himself the wrongdoer, committing a breach of contract, but only persuades or induces another to do so. The case was not presented by the learned judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3), and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful, but this case raises no such question.

As to the older authorities referred to in the argument I agree in the views of Lord Herschell and Lord Watson, and I agree in thinking with them and with Lord Macnaghten that *Lumley* v. *Gye* (11) was not decided on any question of malice. It was urged by the counsel for the respondents that a disapproval of the law laid down in *Temperton* v. *Russell* (33) and repeated in this case will be attended with dangerous consequences as extending the power of trades unions or combinations beyond limits which these cases laid down, and I am not insensible to the truth of the observation that a certain amount of restraint which these cases introduced will be removed. But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort it should be removed. And if the force of combination should be harshly or oppressively used—if it should be used in circumstances in which right-minded men would deplore its use—it must be observed that those against whom combination is so employed have precisely the same liberty of action for resisting oppressive measures, and for causing those who use them to desist from that course of action.

LORD DAVEY.—In this case the jury have found (i) that the defendant Allen maliciously induced the Glengall Iron Co. to discharge the plaintiffs from their employment; (ii) that the defendant Allen maliciously induced the company not to engage the plaintiffs; and (iii) that damages to the extent of £20 to each plaintiff was thereby suffered by the plaintiffs. The learned judge directed the jury that there was no evidence of any breach of contract involved in the plaintiffs being discharged by the company; that there was not a shred of evidence of any conspiracy at all, and that there was no evidence of anything amounting to intimidation or coercion in any legal sense of the term. No exception has been taken, or, in my opinion, could be taken, to these directions. We must, therefore, take the finding of the jury to mean that the company were "induced" by the persuasion and representations of Allen to discharge the plaintiffs, i.e., not to continue to employ them. The sense in which "maliciously" was intended to be used in the verdict is shown by the passage in the summing-up which has already been read and commented on by your Lordships, to be the popular sense of intending to do a mischief to the respondents.

The main question which has been argued before your Lordships was whether the plaintiffs were entitled to judgment on the findings of the jury. The learned judge in his judgment, on further consideration after verdict, followed the decision of the Court of Appeal in *Temperton* v. *Russell* (33), and gave judgment for the plaintiffs. The Court of Appeal affirmed that decision. LORD ESHER, M.R., considered that *Temperton* v. *Russell* (33) was an authority binding on that court, that a thing which you may lawfully do to the injury of another if you do it without malice, is made unlawful and gives him a right of action if you do it with malice. The learned Lord gave additional reasons for his decision, in the course of which he laid down that, whether the advice is to break a contract or not to make a contract, it has just the same effect, and that, if you give advice to one not to make a contract with intent of doing an injury to the person who is going to make the contract with him, then the malice is something which makes what would have been a lawful thing without malice, unlawful. LOPES, L.J., also said that he could see no distinction between inducing a party to a contract to break it and inducing a party to discharge a servant, as in the present case. RIGBY, L.J., simply followed *Temperton* v. *Russell* (33).

I have stated the views expressed by the Court of Appeal at some length, because they exactly express the points on which I am constrained to differ from them. The proposition of those learned judges, when analysed, seems to me to amount to this: that damnum absque injuria, if accompanied by malicious intent, will give a right of action, or that a malicious motive per se amounts, or may in certain circumstances amount, to injuria. I am unable to assent to either of these propositions. BAYLEY, J., in the well-known case of *Bromage* v. *Prosser* said (4 B. & C. at p. 247):

> "Malice in common acceptation means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

If so, it seems to be an argument in a circle to say that an act not otherwise wrongful becomes so if malicious. Nor can I agree that there is no legal difference between persuasion to break a contract and persuasion not to enter into a contract. In the former case if the persuasion is successful the other party is deprived of the benefit of having his contract completed. In the latter case he loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him. In the one case there is a violation of right; in the other case there is not. I accept for the present purpose without comment the doctrine laid down in *Lumley* v. *Gye* (11) and *Bowen* v. *Hall* (10), that maliciously to induce one to break a contract of exclusive personal service with an employer to the injury of that employer is actionable. But a perusal of the judgments delivered by the learned judges in *Lumley* v. *Gye* (11) shows that, in their

opinion at any rate, it was vital to the plaintiff's case that there was a subsisting contract of service. An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived; but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any wrongful act is under liability. To persuade a person to do or abstain from doing what that person is entitled at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of the advice may be damage to another.

This is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference. But I do say that I am not aware of any authority binding on this House for holding, and it humbly appears to me to be against sound principle to hold, that the additional ingredient of malice should give a right of action against an individual for an act which, if done without malice, would not be wrongful, although it results in damage to a third person. The case of libel on a privileged occasion is, of course, altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege. In my opinion, the somewhat anomalous action for malicious prosecution is based on the same principle. From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But, if the person abuses his privilege for the indulgence of his personal spite, he loses the protection and is liable to an action, not for the malice, but for the wrong done in subjecting another to the annoyance and expense of a causeless prosecution. It was, however, argued that the act of the appellant in the present case was a violation of the right which every man has to pursue a lawful trade and calling, and that the violation of this right is actionable. I remark in passing that, if this be so, the right of action must be independent of the question of malice except in the legal sense. The right which a man has to pursue his trade or calling is qualified by the legal right of others to do the same, and compete with him though to his damage; and it is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to performance of a contract into which one has entered.

A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends on the will of another. But is there any such general cause of action irrespective of the means employed or mode of interference? I think it unnecessary to comment on all the cases which have been cited by counsel, and are referred to by the learned judges. I have read them carefully, and I am satisfied that in no one of them was anything decided which is an authority for the abstract proposition maintained. In every one of them you find there was either violence or the threat of violence, obstruction of the highway or the access to the plaintiff's premises, nuisance, or other unlawful acts done to the damage of the plaintiff. Nor does it appear to me that the gist of the action in those cases was that the plaintiff was a trader, or exercised a profitable calling. That circumstance no doubt afforded evidence of the damage. But I suppose that, if a person obstructed the access to my house or to my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him, though I do not keep a school or I am not a trader, but sailing in my yacht for my own pleasure. Or, if a person obstructs my free use of the highway, and I suffer damage thereby, I have a right of action, though my carriage does not ply for hire, but is used only for my own purposes. It is strange that, if there be any such right of action for interference with trade, there is not to be found some clear authority in the law books in its favour. And, as remarked by one of the learned judges, if those who argued and those who

decided *Lumley v. Gye* (11) had been aware of any such general doctrine, it would have disposed of that case without the elaborate consideration to be found in the judgments. I do not think that the well-known action for slander of a trader's goods supports the larger proposition attempted to be founded on it. BLACKSTONE treats that action as a particular example of slanderous words. And it appears to me an obvious fallacy to argue from the existence of some recognised and well-known cause of action to a larger and wider legal proposition of which the cause of action in question might be treated as a particular case if the larger proposition had been generally recognised.

The authority most relied on in support of the proposition maintained by the respondents is the well-known case of *Keeble* v. *Hickeringill* (8), or, more properly, the dicta of LORD HOLT as reported in 11 EAST, 574, n. That case was an action by the owner of a decoy pond against the defendant for driving away his wildfowl by firing guns with intent to damnify the plaintiff. It appears to have been twice argued, and there are four separate reports of it, which do not altogether agree as to the grounds of the judgment. But I think it was decided on the ground that the act of the defendant was a wilful disturbance of the enjoyment by the plaintiff of his own land for a lawful and profitable purpose, and what is called in law a nuisance. The reported cases in which the case has been followed (*Carrington* v. *Taylor* (7) and *Ibottson* v. *Peat* (38)) support this view. If this be a correct view of the decision, it is no authority for the larger proposition founded on it by the respondents; and the dicta of LORD HOLT, however much entitled to respect, are inadequate to support the weight which it is sought to place upon them.

Another point was made at your Lordships' Bar. It was contended that Allen was guilty of wilful misrepresentation in what he told Halkett; that the men never really intended to strike; and that Allen knowingly exceeded his instructions or what the men had authorised him to say when he said that they would do so. This is a question of fact to be determined on the evidence, and it might and should have been submitted to the jury. In my view, such a state of facts amounting to a charge of fraud would have constituted a legal wrong, and have been of the essence of the action. The point should, therefore, in my opinion, have been pleaded. But it is not to be found in the pleadings, and I cannot find a trace of its having been taken at the trial. No reference to such a question is to be found in the very full summing-up of the learned judge. So far as I can understand, the contention of counsel for the respondents at the trial was the exact contrary, as they were then endeavouring to recover against the other defendants, the representatives of the union. It is not the practice of your Lordships, where there has been a trial by jury, to allow a new issue or question to be raised at the Bar, which might and ought to have been, but was not, submitted to the jury for their consideration on the evidence. To do so would be to usurp the function of the jury. I do not, therefore, find it necessary to express any opinion on the point. I am of opinion that the judgment of the Court of Appeal should be reversed, and the action dismissed with the usual consequences.

LORD JAMES OF HEREFORD (read by LORD SHAND).—The respondents brought their action against the appellant and others, the cause of action in the fifth paragraph of the claim being thus alleged:

> "The defendant has maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Co. to break their contracts with the plaintiffs to the plaintiffs' damage, and has further intimidated and coerced the Glengall Co. and others not to enter into new contracts with the plaintiffs, whereby the plaintiffs have suffered damage."

It was admitted during the trial that the first head of this claim could not be supported, for the Glengall Co. broke no contract. The question, therefore, is confined within the second alleged cause of action. Thus your Lordships have to

A determine whether there was sufficient evidence given at the trial to support the allegation that the appellant "intimidated and coerced the Glengall Company" not to employ the respondents. Secondly, it is advisable to consider whether in any view of the appellant's conduct there was evidence to support a cause of action.

Looking at the facts, I come to the conclusion that the appellant cannot be said to have intimidated or coerced (within the legal meaning to be given to those B words) the Glengall Co. It is true he informed the company's representative of the existing intention of the boilermakers; but that intention to discontinue work if the respondents were further employed was not formed in consequence of any words or act of the appellant. He had learnt that that intention was formed by the boilermakers before his arrival at the ship. For him to communicate such intention to the company did not injure the respondents. The boilermakers would C have acted upon it whether the company knew or were ignorant of their resolution. For they were about to desert their work when the appellant prevented them from doing so, and prevailed upon them to give him an opportunity of communicating with the representatives of the company. For myself I believe that the appellant communicated only the boilermakers' pre-formed intention; but even if he said that the union would call out the boilermakers if the respondents were further D employed, I presume he was only communicating that which he knew would be the fact, and he was, therefore, warning the company's representatives not to pursue a course which would be detrimental to the company's interest. The appellant doubtless desired that the boilermakers' view of their claim, that they alone should execute iron work, should prevail, and, therefore, that steps should be taken to secure to them the success of that claim; and so naturally he would use solicitation E and persuasion to the company's representatives with the intention of procuring the non-employment of the respondents.

So it appears to me that the question for your Lordships' decision is thus resolved: Is it actionable for A. to solicit and persuade B. not to enter into a contract with C.? Before dealing with the answers that ought to be given to this question, it is worthy of observation that there were three actors in the events F leading to the non-employment of the respondents: (i) The boilermakers who refused to work with them; (ii) the appellant who communicated that refusal to the Glengall Co.; and (iii) the representatives of the company, who in consequence of the expressed intention of the boilermakers determined not further to employ the respondents. In all substance the injury inflicted upon the respondents proceeded in the first degree from the action of the boilermakers, and in the second from the G action of the company in yielding to the demand of the boilermakers. That the appellant took part in the transaction is true, but he played but a very minor part, and if he had never appeared on the scene at all the injury to the respondents would have been the same, for the company would equally have exercised their option and would have refused to employ the respondents in order to secure the H services of the boilermakers.

Under the circumstances it seems strange that it is not alleged that any action lies against the boilermakers, and that it should be distinctly admitted that no cause of action can be maintained against the company. If the principles laid down in the judgment of LORD ESHER, M.R., in *Bowen* v. *Hall* (10) and in *Temperton* v. *Russell* (33) were applied to the ordinary affairs of life, great inconvenience as I well as injustice would ensue. Every competitor for a contract who alleged that he was the best person to fulfil it would be liable to an action. Take the case of an architect who seeks to be employed to the exclusion of his rivals. He says, "My plans are the best, and following them will produce the best house at the least cost. Therefore, employ me and not A. or B." If he be so employed the architect would, according to the dicta in *Bowen* v. *Hall* (10) be liable to an action at the suit of his rivals, for he has induced a person not to enter into a contract with a third person, and his object clearly was to benefit himself at the expense of such third person. Indeed, if the opinion delivered by CAVE, J., that it is action-

able for the cook to say to her master: "Discharge the butler or I will leave you" is correct, in that case the ingredient of "being desirous to benefit herself at the expense of a third person" is wanting. For the objection of the cook might well proceed from a motive which would not represent any gain to herself.

But I am aware that it was urged at the Bar that, even if the views which I have expressed to your Lordships be correct, there is an exception from general principles in favour of those whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words "interfered with" in their legal sense should be given. Every man's business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference", and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly "interfere with" it. If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow. Of course the conduct of the boilermakers in the case before your Lordships amounted to an interference with the plaintiffs' business, and yet, as has been pointed out, it is not said that an action lies against them. Every organiser of a strike, in order to obtain higher wages, "interferes with" the employer carrying on his business; also every member of an employers' federation who persuades his co-employer to lock out his workmen must "interfere with" those workmen. Yet I do not think it will be argued that an action can be maintained in either case on account of such interference. But, whatever meaning may be attached to the words "interfere with," I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business or when he is engaged in any other pursuit. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) there was an extreme case of interference with the plaintiffs' business by methods which directly injured the plaintiffs in their trade for the express purpose of benefiting the defendants. The admitted interference was carried on by several defendants in a combination which in one sense amounted to a conspiracy, yet it was held by this House that no action could be maintained, for the acts done were not unlawful and the combination was not a criminal conspiracy. I abstain from passing in review the older cases which refer to the interference with trade or business, for they have already been very fully reviewed and dealt with.

I content myself with saying that I do not think that they establish more than that interference which is in itself unlawful constitutes a cause of action. It seems somewhat contrary to common sense that an interference which is rightful when applied to general subjects becomes wrongful when a trade or business is subjected to it. For these reasons I have, after some hesitation, come to the conclusion that, inasmuch as the appellant has used no unlawful means to produce a result, and that as the result produced represents nothing that is unlawful, this action cannot be maintained. I therefore think that the decision of the Court of Appeal should be reversed, and that judgment should be entered for the appellant.

Appeal allowed.

Solicitors: *Shaen, Roscoe, Massey & Co.; C. J. Smith & Gofton.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

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KRUSE *v.* JOHNSON

[Queen's Bench Division (Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., Mathew, Wright, Darling and Channell, JJ.), April 4, 14, 1898]

B [Reported [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 79 L.T. 647; 62 J.P. 469; 46 W.R. 630; 14 T.L.R. 416; 42 Sol. Jo. 509; 19 Cox, C.C. 103]

Local Authority—Byelaw—Benevolent interpretation—"Unreasonableness"—View of reasonable man—Byelaw prohibiting music or singing in street.

C It is right that the court should jealously watch the exercise by public undertakings which carry on business for their own profit of byelaws which they are empowered to make, but when the court is called on to consider the byelaws of public representative bodies like county councils the matter should be approached from a different standpoint. Such byelaws ought to be supported if possible. They ought to be benevolently interpreted, and credit D ought to be given to those who have to administer them that they will be reasonably administered. Courts of justice should be slow to condemn as invalid any byelaws made by local authorities on the ground of supposed unreasonableness. As to what is unreasonableness, it would be the duty of the court to condemn a byelaw as invalid and ultra vires because it was unreasonable if, e.g., they found it to be partial and unequal in its operation E as between different classes or manifestly unjust, or to disclose bad faith or involve such oppressive or gratuitous interference with the rights of those subject to it as could find no justification in the minds of reasonable men, but a byelaw is unreasonable merely because a judge thinks that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which he thinks ought to be there. F In matters which directly and mainly concern the people of the county who have the right to choose those whom they think best to represent them on their local government bodies such representatives may be trusted to understand their own requirements better than judges.

A county council, under s. 16 of the Local Government Act, 1888, made a byelaw which provided: "No person shall sound or play upon any musical or G noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally or by his or her servant to desist."

Held by Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., Wright, J., Darling, J., and Channell, J., Mathew, J., dissenting: although the provisions of the byelaw were not confined to cases H where the playing and singing in fact caused annoyance and it was left to the discretion of a police constable whether or not to put it into operation the byelaw was not invalid as being unreasonable or ultra vires.

Local Authority—Byelaw—Nature and scope of byelaw.

Per Lord Russell of Killowen, C.J.: A byelaw of the class which we are here considering I take to be an ordinance affecting the public or some portion I of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. It necessarily involves restrictions of liberty of action by persons who come under its operation as to acts which, but for the byelaw, they would be free to do or not to do, as they pleased. If validly made, it has the force of law within the sphere of its legitimate operation.

Notes. Considered: *White* v. *Morley*, [1899] 2 Q.B. 34; *Thomas* v. *Sutters*, [1900] 1 Ch. 10. Applied: *Nash* v. *Finlay* (1901), 85 L.T. 682. Considered: *Gentel*

v. *Rapps*, [1900-3] All E.R. Rep. 152. Applied: *Metropolitan Industrial Dwellings Co.* v. *Long* (1903), 68 J.P. 113. Considered: *Pomeroy* v. *Malvern U.D.C.* (1903), 67 J.P. 375; *Clayton* v. *Peise*, [1904] 1 K.B. 424; *Williams* v. *Weston-super-Mare U.D.C.* (1910), 103 L.T. 9; *Mitcham Common Conservators* v. *Cox*, *Same* v. *Cole*, [1911] 2 K.B. 854. Applied: *Dunning* v. *Maher* (1912), 106 L.T. 846. Considered: *Friend* v. *Brehout* (1914), 111 L.T. 832; *A.-G.* v. *Hodgson*, [1922] All E.R. Rep. 186. Applied: *Dodd* v. *Venner* (1922), 86 J.P. 130. Considered: *A.-G.* v. *Denby*, [1925] Ch. 596; *Roberts* v. *Hopwood*, [1925] All E.R. Rep. 24. Applied: *Everton* v. *Walker* (1927), 137 L.T. 594. Considered: *Townsends (Builders), Ltd.* v. *Cinena News and Property Management, Ltd.* (*David A. Wilkie and Partners, Third Party*), [1959] 1 All E.R. 7. Referred to: *Kitson* v. *Ashe*, [1899] 1 Q.B. 425; *Scott* v. *Pilliner* (1904), 91 L.T. 658; *Stiles* v. *Galinski*, *Nokes* v. *Islington Corpn.*, [1904] 1 K.B. 615; *Leyton U.D.C.* v. *Chew* (1907), 76 L.J.K.B. 781; *Moorman* v. *Tordoff* (1908), 98 L.T. 416; *L.C.C.* v. *Bermondsey Bioscope Co.*, [1911] 1 K.B. 445; *Russon* v. *Dutton* (1911), 104 L.T. 601; *Slee* v. *Meadows* (1911), 105 L.T. 127; *R.* v. *Broad*, [1915] A.C. 1110; *Repton School* v. *Repton R.D.C.*, [1918] 2 K.B. 133; *Sutton Harbour Improvement Co.* v. *Foster* (1920), 89 L.J.K.B. 829; *Roberts* v. *Williams* (1922), 127 L.T. 363; *Owner* v. *King* (1922), 128 L.T. 307; *Mills* v. *L.C.C.*, [1924] All E.R. Rep. 349; *R.* v. *Roberts*, *Ex parte Scurr*, [1924] 2 K.B. 695; *Short* v. *Poole Corpn.*, [1925] All E.R. Rep. 74; *Lee* v. *McGrath*, [1934] All E.R. Rep. 440; *Twickenham Corpn.* v. *Solosigns, Ltd.*, [1939] 3 All E.R. 246; *Sparks* v. *Edward Ash, Ltd.*, [1943] 1 All E.R. 1; *Re Hurle-Hobbs*, *Surridge's Application*, *Re Mills*, [1944] 1 All E.R. 249; *Harman* v. *Butt*, [1944] 1 All E.R. 558; *Bonsor* v. *Musicians' Union*, [1954] 1 All E.R. 822; *Fawcett Properties, Ltd.* v. *Bucks County Council*, [1959] 2 All E.R. 321.

As to byelaws made by a local authority, see 24 HALSBURY'S LAWS (3rd Edn.) 510 et seq.; and for cases see 13 DIGEST (Repl.) 237 et seq. For the Local Government Act, 1933, see 14 HALSBURY'S STATUTES (2nd Edn.) 353.

Cases referred to:

(1) *Edmonds* v. *Watermen and Lightermen Co.* (*Master and Senior Warden*) (1855), 24 L.J.M.C. 124; 1 Jur.N.S. 727; 13 Digest (Repl.) 242, *675*.

(2) *Bailey* v. *Williamson* (1873), L.R. 8 Q.B. 118; 42 L.J.M.C. 49; 28 L.T. 28; 37 J.P. 501; 21 W.R. 404; 36 Digest (Repl.) 358, *49*.

(3) *Munro* v. *Watson* (1887), 57 L.T. 366; 51 J.P. 660; 3 T.L.R. 445, D.C.; 38 Digest (Repl.) 171, *68*.

(4) *Johnson* v. *Croydon Corpn.* (1886), 16 Q.B.D. 708; 55 L.J.M.C. 117; 54 L.T. 295; 50 J.P. 487; 2 T.L.R. 371, D.C.; 38 Digest (Repl.) 171, *66*.

(5) *Fortescue* v. *St. Matthew, Bethnal Green, Vestry*, [1891] 2 Q.B. 170; 60 L.J.M.C. 172; 65 L.T. 256; 55 J.P. 758, D.C.; 26 Digest (Repl.) 580, *2418*.

(6) *Slattery* v. *Naylor* (1888), 13 App. Cas. 446; 57 L.J.P.C. 73; 59 L.T. 41; 36 W.R. 897; 4 T.L.R. 426, P.C.; 13 Digest (Repl.) 239, *640*.

(7) *Wanstead Local Board of Health* v. *Wooster* (1873), 38 J.P. 21; 2 Digest (Repl.) 336, *255*.

(8) *Alty* v. *Farrell*, [1896] 1 Q.B. 636; 65 L.J.M.C. 115; 74 L.T. 492; 60 J.P. 373; 12 T.L.R. 346; 40 Sol. Jo. 460; 18 Cox, C.C. 321, D.C.; 38 Digest (Repl.) 179, *105*.

(9) *Ipswich Taylors* v. *Sherring* (1614), 1 Roll. Rep. 4; 81 E.R. 285; sub nom. *Ipswich Tailors' Case*, 11 Co. Rep. 53 a; sub nom. *Ipswich Clothworkers' Case*, Godb. 252; 13 Digest (Repl.) 244, *702*.

(10) *Stationers' Co.* v. *Salisbury* (1693), Comb. 221.

(11) *City of London Case* (1609), 8 Co. Rep. 121 b.

(12) *Framework-Knitters Co.* v. *Green* (1696), 1 Ld. Raym. 113; 91 E.R. 972; 13 Digest (Repl.) 239, *646*.

(13) *Eagleton* v. *East India Co.* (1802), 3 Bos. & P. 55; 127 E.R. 32; 3 Digest (Repl.) 20, *147*.

(14) *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181; Fortes. Rep. 296; 10 Mod. Rep. 130; 1 Smith, L. C. (13th Edn.) 462; 43 Digest 11, *59*.

Case Stated by justices for the county of Kent.

The respondent, Police Superintendent Johnson, preferred an information against the appellant Kruse for that he on Sunday, Oct. 17, 1897, in the parish of Leeds, in Kent, did sing in a certain highway within fifty yards of a dwelling-house, after being required by a constable of the county to desist, contrary to a byelaw made by the Kent County Council under s. 16 of the Local Government Act, 1888. The justices convicted the appellant and fined him 40s. The byelaw under which the information was preferred was as follows:

"4. No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally or by his or her servant to desist."

It was proved to the satisfaction of the justices at the hearing that the appellant was conducting an open-air religious service at about 5.45 p.m., and with others congregated within fifty yards of a dwelling-house, and commenced to sing a hymn, in which those with him joined. After singing two or three lines of the hymn he was requested by a constable to desist, but he continued singing. The occupier of the house had not personally requested the appellant to desist on the day in question, but he had complained to the police about it on previous occasions, and the justices consequently found that the singing had caused him annoyance. It was contended on the part of the appellant that the byelaw was invalid on the grounds: (a) That is was unreasonable; (b) that it was not limited to cases of persons playing noisy instruments or singing to the annoyance of residents or passengers; (c) that it created a new offence and was repugnant to the general law of the land. The justices were of opinion that the byelaw was good and had been infringed, and they convicted the appellant.

By the Public Health Act, 1875, s. 182 [see now s. 250 (2) of the Local Government Act, 1933, and s. 32 (3) of the Interpretation Act, 1889]:

"All byelaws made by a local authority under and for the purposes of this Act shall be under their common seal; and any such byelaw may be altered or repealed by a subsequent byelaw made pursuant to the provisions of this Act, provided that no byelaw made under this Act by a local authority shall be of any effect if repugnant to the laws of England or to the provisions of this Act."

By s. 184 [see Act of 1933, s. 249 (2), s. 250 (3), (5), (6)]

"Byelaws made by a local authority under this Act or for purposes same as or similar to those of this Act under any local Act, shall not take effect unless and until they have been submitted to and confirmed by the Local Government Board [now Minister of Housing and Local Government], which Board is hereby empowered to allow or disallow the same as it may think proper; nor shall any such byelaws be confirmed unless notice of intention to apply for confirmation of the same has been given in one or more of the local newspapers circulated within the district to which such byelaw relates one month at least before the making of such application, and unless for one month at least before any such application a copy of the proposed byelaws has been kept at the office of the local authority, and has been open during office hours thereat to the inspection of the ratepayers of the district to which such byelaws relate without fee or reward. The clerk of the local authority shall, on the application of any such ratepayer, furnish him with a copy of such proposed byelaws or any part thereof on payment of sixpence for every hundred words contained in such copy. A byelaw required to be confirmed by the Local Government Board shall not require confirmation, allowance, or approval by any other authority."

By Municipal Corporations Act, 1882, s. 23 [see now the Act of 1933, s. 249 (1), s. 251] : A

"The council may from time to time make such byelaws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough, and may thereby appoint B such fines, not exceeding in any case £5, as they deem necessary for the prevention and suppression of offences against the same. Such a byelaw shall not be made unless at least two-thirds of the whole number of the council are present. Such a byelaw shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall. Such a byelaw shall not come into force until the expiration of forty days after a copy thereof, C sealed with the corporate seal, has been sent to the Secretary of State, and if within those forty days the Queen, with the advice of her Privy Council, disallows the byelaw or part thereof, the byelaw or part disallowed shall not come into force; but it shall be lawful for the Queen at any time within those forty days to enlarge the time within which the byelaw shall not come into force, and in that case the byelaw shall not come into force until after the D expiration of that enlarged time."

By the Local Government Act, 1888, s. 16 [see now the Act of 1933, s. 249 (1)] :

"A county council shall have the same power of making byelaws in relation to their county, or to any specified part or parts thereof as a council of a borough have of making byelaws in relation to their borough under s. 23 of the Muni- E cipal Corporation Act, 1882, and s. 187 of the Public Health Act, 1875, shall apply to such byelaws."

Robson, *Q.C.*, and *Hohler* for the appellant.
Dickens, *Q.C.*, and *Arthur Gill* for the respondent.

Cur. adv. vult. F

May 14, 1898. The following judgments were read.

LORD RUSSELL OF KILLOWEN, C.J.—The county council of Kent, claiming to act under their statutory powers, made the following byelaw :

"4. Playing musical instruments, etc.—No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within G fifty yards of any dwelling-house after being required by any constable or by an inmate of such house personally or by his or her servant to desist."

The appellant was summoned before the magistrates for offending against this byelaw, when it was proved that on Oct. 17, 1897, he persisted in singing in a public highway within fifty yards of a dwelling-house after having been required H by a police constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought. The question reserved for this I court is whether the byelaw is valid. If valid the conviction is to stand. It is objected that the byelaw is ultra vires on the ground that it is unreasonable, and, therefore, bad. It is necessary, therefore, to see what is the authority under which the byelaw in question has been made, and what are the relations between its framers and those affected by it.

But first it seems necessary to consider what is a byelaw. A byelaw of the class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers

ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the byelaw, they would be free to do or not to do, as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation: see *Edmonds* v. *Watermen and Lightermen Co.* (*Master and Senior Warden*) (1).

In the present case we are dealing with a byelaw made by a local representative body, namely, the county council of Kent, which is created under the Local Government Act, 1888, and is endowed with the powers of making byelaws given to municipal corporate bodies under the Municipal Corporations Act, 1882. Section 16 of the Local Government Act, 1888, provides that a county council shall have the same power of making byelaws in relation to their county as the council of a borough have in relation to their borough; and it further provides that s. 187 of the Public Health Act, 1875, shall apply to such byelaws. I will take these statutes in the order of time. Section 182 of the Act of 1875 provides that all byelaws made by a local authority under that Act shall be under their common seal and may be altered or repealed by a subsequent byelaw, but no byelaw shall be repugnant to the laws of England or to the provisions of the Act. Section 183 gives power to impose penalties. Section 184 provides that byelaws shall not take effect until confirmed by the Local Government Board, which may allow or disallow them, and, before their confirmation, notice of intention to apply for confirmation must be advertised, and for a month at least before such application a copy of the proposed byelaws must have been kept at the office of the local authority for the inspection of ratepayers, and the clerk of the local authority is bound to furnish on application a copy of the proposed byelaws, or a part of them, to any ratepayer on certain payment being made. [See now Act of 1933, s. 249 (2), (3), s. 250 (3), (4), (6).] Section 23 of the Act of 1882 provides that the council of a borough may from time to time make such byelaws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner; and they may, by such byelaws, appoint such fines, not exceeding £5, as they deem necessary for the prevention of offences against the byelaws. It is under this authority that the byelaw in question was framed.

What are the checks or safeguards under which this very wide authority of making byelaws is exercisable? The same section (23) [repealed] further provides that no byelaw can be made unless two-thirds of the whole number of the council are present, and, when so made, it shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall, and it shall not come into force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State, and if, within those forty days the Queen, with the advice of her Privy Council, disallows a proposed byelaw or part thereof, such byelaw or such part shall not come into force, and the Queen may within the forty days enlarge the time within which the byelaw shall not come into force.

We thus find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the byelaws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards; there must be antecedent publication of the byelaw with a view, I presume, of eliciting the public opinion of the locality upon it, and such byelaws shall have no force until after they have been forwarded to the Secretary of State. Further, the Queen, with the advice of her Privy Council, may disallow the byelaw wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the court of the responsibility of inquiring into the validity of byelaws

where they are brought in question, or in any way affects the authority of the court in the determination of their validity or invalidity. It is to be observed, moreover, that byelaws, having come into force, are not like the laws, or what were said to be the laws, of the Medes and Persians—they are not unchangeable. The power is to make byelaws from time to time as to the authority shall seem meet, and, if experience shows that in any respect existing byelaws work hardly or inconveniently, the local authority, acted upon by public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that, should experience warrant that course, the legislature which has given may modify or take away the powers they have delegated.

I have thought it well to deal with these points in some detail, and for this reason, that the great majority of the cases in which the question of byelaws has been discussed are not cases of byelaws of bodies of a public representative character intrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the courts should jealously watch the exercise of these powers and guard against their unnecessary or unreasonable exercise to the public disadvantage. But when the court is called upon to consider the byelaws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such byelaws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any byelaws so made under such conditions on the ground of supposed unreasonableness.

Notwithstanding what COCKBURN, C.J., said in *Bailey* v. *Williamson* (2)—an analogous case—I do not mean to say that there may not be cases in which it would be the duty of the court to condemn byelaws made under such authority as these were made as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say Parliament never intended to give authority to make such rules, and that they are unreasonable and ultra vires. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely, it is not too much to say that, in matters which directly and mainly concern the people of the county who have the right to choose those whom they think best fitted to represent them on their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of byelaws were to be determined by the opinion of judges as to what was reasonable—in the narrow sense of that word—the cases in the books on this subject are no guide, for they reveal, as, indeed, one would expect, wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

So much for the general considerations which it seems to me ought to be borne in mind in considering byelaws of this class. I now come to the byelaw in question. It is admitted that the county council of Kent were within their authority in making a byelaw in relation to the subject-matter which is dealt with by the impeached byelaw. In other words, it is conceded—and properly so—that the local authority might make a byelaw imposing conditions under which musical instruments and singing might be permitted or prevented in public places. But it is objected that they have no authority to make a byelaw on that subject in the terms of this byelaw. Further, it is not contended that the byelaw should, in order to be valid, be confined to cases where the playing or singing amounted to a nuisance, but the objections are, as I understand them, that the byelaw is bad—first, because it is not confined to cases where the playing or singing is in fact causing annoyance, and next because it enables a police-constable to bring it into operation by a request on his part to the player or singer to desist.

As to the first of these objections, if the general principles upon which these byelaws ought to be dealt with are those which I have already stated, it is clear that the absence of this qualification cannot make the byelaw invalid. But, further, such a qualification, in my judgment, would render the byelaw ineffective. What is to be the standard of annoyance? What may be a cause of annoyance to one person may be no annoyance, and may even be pleasurable, to another person. Again, who is to be the judge in such a case of whether there is or is not an annoyance? Is it to be the resident of the house within fifty yards of the playing or singing, or is it to be the magistrate who hears the charge? It is enough to say that, in my judgment, the absence of the suggested qualification cannot make the byelaw invalid, even if it be admitted that its presence would be an improvement.

As to the second objection—namely, that the policeman has the power of putting the byelaw into operation by requiring the player or singer to desist—I again say that, even if the absence of this power would be an improvement and would make the byelaw in the apprehension of some more reasonable, it is not on the principles I have already stated any ground for declaring the byelaw to be invalid. In support of this objection pictures have in argument been drawn (more or less highly coloured) of policemen who, without rhyme or reason, would or might gratuitously interfere with what might be a source of enjoyment to many. In answer, I say a policeman is not an irresponsible person without check or control; if he acts capriciously or vexatiously he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges. If the policeman persisted in saying that the musician should desist when the people in the neighbourhood desire his music, his gratuitous interference would promptly come to an end. Nor is it correct to say (as has been erroneously stated in some of the cases cited) that the magistrate would be bound in every case to convict where the musician did not desist when called upon. It is clear that, under s. 16 of the Summary Jurisdiction Act, 1879, the magistrate, if he thinks the case of so trifling a nature that it is inexpedient to inflict any punishment, may without proceeding to conviction dismiss the information [see now Criminal Justice Act, 1948, s. 3 (1), s. 7 (1)]. The facts of this case are certainly no illustration of the byelaw having been gratuitously or vexatiously put in force. The Case states that, although it was not proved that the occupier of the house within fifty yards had on the day in question requested the constable to require the appellant to desist, yet it was proved that the singing was an annoyance to the occupier, and that he had on previous occasions complained to the police of such singing. Indeed, it was stated during the argument that the conviction here appealed from was the second conviction of the appellant for an offence against this byelaw.

I have carefully read the cases cited in argument, but I do not propose to consider them in detail. Many of them relate to byelaws made under different statutes; others it is difficult to reconcile; few deal with the principles upon which byelaws like those in question are to be dealt with by the courts; and some of them—

as, for instance, *Munro* v. *Watson* (3) and perhaps *Johnson* v. *Croydon Corpn.* (4) may be distinguished from the present case. In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts, usually consisting of two members, and that those cases, being in their nature criminal, there has been no judgment of a Court of Appeal upon them. It is for this reason that the present special court has been constituted. I cannot doubt that this court has authority to review, and if it thinks fit to differ from, any prior decision of a Divisional Court on this subject: see *Fortescue* v. *St. Matthew, Bethnal Green, Vestry* (5).

I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the byelaws made by representative public bodies are to be considered. There is one notable exception; I refer to *Slattery* v. *Naylor* (6). That was a case in the Privy Council, in which the members of that court had to consider the validity of a byelaw passed by the municipal council of the borough of Petersham, in New South Wales, under the provisions of the Municipalities Act, 1867. The court consisted of LORDS HOBHOUSE, HERSCHELL, and MACNAGHTEN and SIR BARNES PEACOCK and SIR RICHARD COUCH. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that, beyond doubt, the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the byelaw there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which byelaws of representative governing bodies should be considered. That it has done thoroughly and clearly.

In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable byelaw; but, whether I am right or wrong in this view, I am clearly of opinion that no court of law can properly say that it is invalid. In the result, the conviction appealed from must be affirmed, but, as the question is one of wide importance, as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

SIR FRANCIS JEUNE, P.—The byelaw the validity of which is in question on this appeal, in effect, makes it an offence to perform music or singing in a public place or highway within fifty yards of a dwelling-house if an inmate of such house, or if a police constable require the performer to desist. The provisions as to the inmate and as to the police constable give rise to somewhat different considerations. The sole question is, whether this court should hold that in its judgment, this byelaw is invalid because it is unreasonable.

I agree with the contention urged before us that it is material to consider by what authority the byelaw was made. It was made by the county council of Kent, that is to say, a public representative body to which Parliament has confided the duty of making byelaws for the good rule and government of the inhabitants of Kent and the prevention of nuisances in that county. Three considerations appear to me to apply with especial force to such an authority dealing with such a subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations such as dock or railway companies, who often have a pecuniary interest in their byelaws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as a county council must be credited with adequate knowledge of the locality, its wants and wishes; and thirdly, the opportunity afforded by legislation for a request for reconsideration, and an appeal to higher authorities by members of the public shows that any byelaw that comes into force has secured at least the acquiescence of those whom it affects. Cases may be imagined in which, in spite of these considera-

tions, this court, acting in the discharge of its undoubted powers and duty, might feel compelled to hold a byelaw made by a county council invalid on the ground that it was unreasonable. But when a question of the requirements and wishes of the locality is involved, this court should, I think, be very slow to set aside the conclusions of the local authority. If support be needed for this opinion, it is to be found in the language of the Privy Council in *Slattery* v. *Naylor* (6), an appeal which came from a colony to which the settlers carried the law of England, and which was very fully considered by a Board of high authority. I will quote only one of the many passages that might he referred to (13 App. Cas. at p. 452):

> "The jurisdiction of testing byelaws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen the same jurisdiction has been exercised over them. But, in determining whether or not a byelaw is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

The main ground of objection taken to this byelaw is, as I understand it, that it does not require proof that annoyance has in this particular instance been caused by the musical performance complained of. It is undoubtedly true that in several cases it has been held by this court that the absence of a provision that annoyance or nuisance must be shown renders the byelaw unreasonable, but such cases appear to me to be distinguishable from the present. In *Johnson* v. *Croydon Corpn.* (4) it was held that a byelaw prohibiting in effect music other than military music in the streets of the borough on Sunday was unreasonable on the ground, as I understand it, that it did not require evidence of annoyance being caused. It is obvious that, for aught contained in such a byelaw, a musical performance subject to condemnation under it might have taken place on a spot where no one could be annoyed, or in a manner to which no one felt any objection. But it is not necessary that a requirement of evidence of actual annoyance should be prescribed in terms. It is enough if the circumstances render annoyance certain or even probable. For example, it has been held that a byelaw forbidding the keeping of pigs within a hundred feet from a dwelling-house in a populous place is reasonable: *Wanstead Local Board* v. *Wooster* (7). *Slattery* v. *Naylor* (6), where is was held reasonable to prohibit burials within a hundred yards of public buildings, dwelling-houses, or public roads, is another illustration of the same principle.

These were instances of matters by which anyone affected would presumably be annoyed. But a musical performance in a street is not a thing in its nature certain to annoy anyone. It is only an annoyance if someone who hears it thinks it is one to him. In the byelaw before us it is accordingly provided that an offence is committed only if the performance takes place within fifty yards of a dwelling-house, and has been objected to by an inmate of such house. I will deal with the provision as to the constable presently. To my mind, this insistence on the place of the performance and on the objection being taken by an inhabitant affected may be considered to supply the element which, in the cases I have referred to, appeared to this court to have been wanting. People who live in public streets must submit to the primary purposes for which those streets exist. They must put up with frequent annoyances of traffic, and occasional annoyances from the opening of roads for repair, for the supply of gas, water, or electricity, or from building operations in their vicinity. But street music is not a primary purpose of a street. It may be harmless if no one who lives there objects to it, it may be even acceptable to the locality; but, if an inhabitant affected entertains and signifies an objection, I do not think that this court should consider that a county council, in giving him a veto upon it, pursues an unreasonable course.

The byelaw provides in the alternative that a police constable may require the performance to desist. Whether this be an unreasonable provision, appears to me

to depend on the view taken as to the probable action of a police constable in such a matter. If it is thought that he will act harshly, and without fair grounds of public order or comfort, it would be unreasonable to vest him with such discretion. But if it be believed that he will act either in assistance of an inhabitant entitled to object, but who does not wish to be involved in a not improbable altercation, or because he sees that public order is concerned, it is not unreasonable that he should be intrusted to exercise a discretion on the requirements of the case. Which of these two views is to be taken seems to me precisely a matter on which the judgment of the county councillors is entitled to be respected, especially as probably most of them are magistrates. I for one cannot pretend to know whether a Kent policeman may be trusted to do his duty fairly and properly, as well as I have no doubt they do. *Alty* v. *Farrell* (8), which was cited to us as an authority against the reasonableness of conferring on policemen such powers as are given in the present case, appears to turn on the powers of the borough under the Act in question, to delegate their authority to all constables instead of to persons specially appointed to execute the provisions of the Act. Further, it is not to be forgotten that an important safeguard is provided by the legislature against the exceptional caprice of an inhabitant, or abuse of discretion by a policeman, because s. 16 of the Summary Jurisdiction Act, 1879, enables a magistrate to dismiss an information if he thinks that the charge, though proved, was, in the particular case, of a trifling nature. I agree with the Lord Chief Justice that this conviction should be affirmed, but without costs.

CHITTY, L.J., concurred in the judgment of the Lord Chief Justice.

MATHEW, J.—The byelaw in question has been made under the Local Government Act, 1888, with which were incorporated certain provisions of the Public Health Act, 1875, and the Municipal Corporations Act, 1882. By one of the incorporated sections, namely, s. 23 of the Act of 1882, the county council were enabled to make such byelaws as to them seemed meet for the good rule and government of the district under their jurisdiction, and for the prevention and suppression of nuisances not already punishable in a summary manner. By the same section, in accordance with the usual practice where statutory powers to make byelaws are conferred, certain formalities were directed to be observed before the local enactments came into operation. These formalities, it was admitted, had been complied with, and the first question which presented itself was whether the byelaw in question had been thereby legalised.

By reciting the Ordinances of Corporations Act, 1503, a previous Act which had been allowed to expire, it was provided that no masters, wardens, and fellowships of crafts or mysteries, nor any rulers of guilds or fraternities, should take upon them to make or to execute any acts or ordinances by them theretofore made in disheritance or diminution of the prerogative of the Crown, or of others, nor against the common profit of the people; but that the same acts or ordinances should be examined and approved by the Chancellor, Treasurer of England, or Chief Justices of both benches, or three of them, or before both the justices of assize in their circuit or progress in that shire where such acts or ordinances were made, on pain of forfeiting £40 for every time that they should do to the contrary. It was decided in very early times that the approval of the byelaw by the authorities mentioned in the statute did not give it validity, if not otherwise legal: *Ipswich Taylors' Case* (9); *Stationers' Co.* v. *Salisbury* (10); 2 KYD ON CORPORATIONS, 109. The validity of the byelaws must be determined by the judges when they are properly brought before them. This duty has been cast on the superior courts when any restriction is sought to be imposed on personal liberty and is traceable to the clause in the Great Charter: "Nullus liber homo disseisiatur de . . . libertatibus suis . . . nisi . . . per legem terræ. . . ." This rule has been followed and acted upon down to the present time.

The power to make byelaws is conferred upon a vast number of corporate bodies and associations created by charter, or by statute, as e.g., municipal bodies, companies for trading and other purposes, literary and scientific associations, and such institutions as the University of London and the College of Surgeons: see for further instances LUMLEY ON BYELAWS, at p. 164. From the many decisions upon the subject it would seem clear that a byelaw to be valid must, among other conditions, have two properties: it must be certain—that is, it must contain adequate information as to the duties of those who are to obey—and it must be reasonable: see *City of London Case* (11); Com. Dig. Byelaw B. 1; *Framework-Knitters' Co.* v. *Green* (12); *Eagleton* v. *East India Co.* (13). The byelaw in question was, so far as is material to my judgment, in the following form:—

> "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling house after being required by any constable . . . to desist."

It was contended on behalf of the appellant that the byelaw in the present case was not reasonable and was not certain. It forebade without qualification of any kind conduct which might be perfectly innocent and unobjectionable. It did not provide, as had been done in similar enactments, and in the county council's byelaw No. 3, that the act prohibited should be an annoyance to anyone. It contained no exception, and would, according to its terms, condemn all music and singing within fifty yards of a dwelling-house as in the nature of a nuisance. The right to prohibit was conferred on any policeman. Why should liberty of conduct, it was asked, be so interfered with? A policeman has no such authority in the metropolis. Why should a policeman in the country be entrusted with powers so easily abused?

For the respondent it was argued that the byelaw was well enough. It had been framed by a representative body created under recent legislation, whose regulations should be indulgently treated. It must be taken, it was said, that Parliament intended that local authorities should be upheld, and to this end that new canons of construction should be adopted by the courts to preserve their byelaws from being declared invalid. It was no longer enough to point out that a byelaw according to its terms was unreasonable; it should be upheld if it might be reasonably enforced, and it was no longer an objection that it might be unreasonably enforced. It was urged that there were adequate safeguards for the public which, though not expressed, ought to be implied. It was true that any policeman might prohibit acts of which no reasonable man ought to complain; but it was said that confidence might be reposed in the discretion of the policeman, and that he would not be likely to interfere unreasonably. This seems to me too generous a view of the qualifications of the ordinary constable. There was said to be a further safeguard - -viz., that the county council would not sanction interference by the police unless there was some good cause. But a byelaw once made could not and ought not to be controlled in its operation by the members of the council. Further, it was argued that the policeman who interfered without good cause would be reprimanded by his superiors, or a magistrate would probably refuse to issue a summons. These suggestions implied that there would be cases in which a constable ought not to have the power to prohibit or to prosecute. It seems to me that the public ought to be informed in clear language what these cases were. It would not be satisfactory to a person, who was innocent of any real offence and was summoned as a criminal, to have an apology offered to him on the ground that the policeman had been wanting in discretion. Again, it was said that a magistrate would have power to refuse to convict in a trifling case, under s. 16 of the Summary Jurisdiction Act, but the byelaw affords no security that this power would be exercised. A magistrate might reasonably consider that he was bound to convict, for a byelaw once duly published became part of the law of the land in the locality to which it applies. It should be remembered that this law has been made for the purpose of securing the good rule and government of the district. It would appear not to be well calculated

in its present form to secure any such result. The interference of a policeman which the byelaw permits would not be unlikely, it seems to me, to produce angry altercation, and to lead to a breach of the peace. A

I do not propose to refer at length to the cases cited in the argument, where byelaws made under local authority have in recent times been condemned as unreasonable. In none of those cases is there any indication of the principle which I understand to be now contended for, namely, that such ordinances should receive a special kind of interpretation. The powers conferred on county councils have been spoken of in the discussion as something previously unknown to the law; but, from the earliest times when charters were granted to towns, municipal affairs have been managed by elected representatives of the inhabitants. The byelaws made by such bodies have frequently been declared invalid. Take, for instance, the byelaws which have been held to be unreasonable restraints of trade, and which are referred to in the judgment in *Mitchel* v. *Reynolds* (14). No case has been cited in which there is any trace of the principle now contended for, that such byelaws are to be interpreted with any particular indulgence because of their popular origin. If this view be adopted, it seems to me that the judges will be placed in an anomalous position. Where they differ from bodies not popularly elected, their jurisdiction to pronounce upon the validity of a byelaw would remain unimpaired; but, where they differed from bodies like a county council, their position would be altogether different. They would be bound to uphold what in other cases they would be right in condemning. I concur in the view that deference should be shown by the courts to the byelaws of a local authority which might appear to interfere unduly with personal liberty, where there was reason to suppose that the regulations were called for by the requirements of the particular place. There may be peculiar circumstances in the condition of a borough or part of a county which make stringent regulations as to personal conduct necessary. In that sense I agree that a byelaw ought to receive an indulgent interpretation. But this byelaw is not confined to a particular locality; it applies to the whole of rural Kent. B C D E F

It seems to me that what we are asked to do in this case is not to interpret the byelaw, but to frame a new enactment with the necessary safeguards for freedom of conduct. It is practically proposed that we should add a proviso to the byelaw as it stands to the effect that it ought not to be unnecessarily or unreasonably enforced. This I consider that we have no power to do. The only authority relied on for the novel principle contended for by the respondent was the judgment of the Privy Council in *Slattery* v. *Naylor* (6). In that case a byelaw had been made by a local authority in New South Wales for regulating interments in cemeteries. Under its provisions interments in a particular place had been prohibited. The court held that the byelaw was valid. It is difficult to see how any doubt could have existed on the subject. This decision was sufficient to dispose of the case, but it would seem that an argument had been addressed to the court that the compliance with the statutory requisites required by the colonial law, had been sufficient to render the byelaw valid, and I gather that this view was favourably entertained by their Lordships. The argument was that the byelaw was legalised by force of s. 158 of the colonial Act, under which it had been made, and which provided that all byelaws consistent with the provisions of the Act, and not repugnant to any other Act or law in force in the colony, should have the force of law when confirmed by the governor and published in the Government Gazette. It seems to me clear that the case is only an authority on colonial law, and I do not find in the judgment any indication of an intention to pronounce an opinion upon the decisions of our courts, which declare what has been understood to be the law of England upon this subject. G H I

I have been unable to find any authority in any of our books for the suggestion that the validity of a byelaw can be established in any other way than by the judgment in a court of law as to its meaning according to the ordinary rules of

construction. In my judgment, this byelaw should be amended. It came into operation on May 19, 1897, and the offence with which it deals is, therefore, of very recent creation. As it stands, any constable may prohibit any singing on any highway within fifty yards of a dwelling-house in any part of the county of Kent, except such parts as are within a municipal borough. It has been suggested that the real intent of the council was to prevent noisy demonstrations which would be offensive to residents within their jurisdiction. If this were so, it becomes difficult to understand why this intention was not stated in plain terms, and why the language should be so wide of the mark. It seems to me to be of special importance, where the aid of constables is invoked to maintain order, that the duties of the police, on the one hand, and the obligations of the public, on the other, should be stated with reasonable clearness. Laxity in the preparation of local enactments is not to be encouraged. I regret to be unable to concur in the view of the majority of my colleagues. Their judgment appears to me to conflict with the recent decisions referred to in the course of the discussion, and with the views expressed by SIR HENRY HAWKINS, the late CAVE, J., the present Master of the Rolls, and the late KAY, L.J. In *Alty* v. *Farrell* (8), a byelaw which gave a policeman an unqualified right to require a vendor of coal in small quantities to weigh the coal in the policeman's presence was held to be unreasonable and invalid, because the power might be exercised oppressively. This principle seems to me applicable in the present case. The decision in *Alty* v. *Farrell* (8) has the high authority of the Lord Chief Justice and WRIGHT, J. The judgments of the majority of the judges by whom this case is decided will no doubt be entitled to great respect from those who may have similar cases to deal with, but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the difference of judicial opinion that may arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way. I am of opinion that this conviction should be quashed.

WRIGHT, DARLING, and **CHANNELL, JJ.,** concurred in the judgment of the Lord Chief Justice.

Conviction affirmed.

Solicitors: *Schultz & Son*, for *A. J. Ellis*, Maidstone; *Kingsford, Dorman & Co.* for *Hoar, Howlett & Tatham*, Maidstone.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

BURROWS *v.* RHODES AND ANOTHER

[QUEEN'S BENCH DIVISION (Grantham and Kennedy, JJ.), March 7, 20, 1899]

[Reported [1899] 1 Q.B. 816; 68 L.J.Q.B. 545; 80 L.T. 591; 63 J.P. 532; 48 W.R. 13; 15 T.L.R. 286; 43 Sol. Jo. 351]

Deceit—Inducement to commit criminal offence—Competency of action for damages.

If an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution regarding, or for indemnity against, the liability which results to him therefrom. But where a person has been induced by the

fraudulent misrepresentation of another to do an act, indifferent in itself, which turns out to be unlawful because it constitutes either a private wrong or a criminal offence, but which was not at the time apparently unlawful and was done in honest ignorance of the circumstances which constituted its unlawfulness, the person doing the act is entitled to maintain an action against the person making the misrepresentation for damages in respect of the damage suffered by him through his commission of the unlawful act.

A statement of claim alleged that the defendants, having secretly determined to invade the territory of a friendly State with a hostile armed force, by various false and fraudulent representations and by falsely representing that the expedition was a lawful one and had the sanction and licence of the Crown, induced the plaintiff to take part in the expedition, and that the plaintiff, relying upon these representations of the defendants and believing that the expedition was a lawful one, took part in the same and thereby received severe injuries and suffered damage.

Held: the statement of claim disclosed a cause of action to which it was no answer for the defendants to say that the expedition was a criminal venture as being in breach of s. 11 (1) of the Foreign Enlistment Act, 1870, and the plaintiff, having taken part in the commission of that offence, was disentitled to recover.

Notes. Considered: *R. Leslie, Ltd.* v. *Reliable Advertising and Addressing Agency, Ltd.*, [1914-15] All E.R. Rep. 1068; *Weld-Blundell* v. *Stephens*, [1920] All E.R. Rep. 32. Applied: *James* v. *British General Insurance Co., Ltd.*, [1927] All E.R. Rep. 442. Considered: *Haseldine* v. *Hosken*, [1933] All E.R. Rep. 1. Applied: *Strongman* (1945), *Ltd.* v. *Sincock*, [1955] 3 All E.R. 90.

As to the effect of misrepresentation, see 26 Halsbury's Laws (3rd Edn.) 856-862, and for cases see 35 Digest 24 et seq. For the Foreign Enlistment Act, 1870, see 5 Halsbury's Statutes (2nd Edn.) 852.

Cases referred to:

(1) *Holman* v. *Johnson* (1775), 1 Cowp. 341; 98 E.R. 1120; 12 Digest (Repl.) 313, *2404.*

(2) *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73; 4 Tyr. 677; 3 L.J.Ex. 317; 149 E.R. 999; 32 Digest 83, *1137.*

(3) *Merryweather* v. *Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337; 42 Digest 979, *95.*

(4) *Adamson* v. *Jarvis* (1827), 4 Bing. 66; 12 Moore, C.P. 241; 5 L.J.O.S.C.P. 68; 130 E.R. 693; 35 Digest 25, *165.*

(5) *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] 2 A.C. 318; 71 L.T. 163; 10 T.L.R. 511; 6 R. 245, H.L.; 42 Digest 980, *105.*

(6) *Everet* v. *Williams* (1725), Lindley on Partnership, 9th Edn., p. 124, n.; Law Quarterly Review, Vol. 9, p. 197; 2 Pothier on Obligations by Evans, p. 3, n.; 36 Digest (Repl.) 581, *1390.*

(7) *Campbell* v. *Campbell* (1840), 7 Cl. & Fin. 166.

(8) *Shackell* v. *Rosier* (1836), 2 Bing. N.C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L.J.C.P. 193; 132 E.R. 245; 12 Digest (Repl.) 266, *2050.*

(9) *Arnold* v. *Clifford* (1835), 2 Sumner's Circuit Court Reports, U.S., 238.

(10) *Martyn* v. *Blithman* (1611), Yelv. 197; 80 E.R. 130; sub nom. *Blithman* v. *Martin*, 2 Bulst. 213; sub nom. *Blithman and Martin's Case*, Godb. 250; 12 Digest (Repl.) 292, *2247.*

(11) *Farebrother* v. *Ansley* (1808), 1 Camp. 343; 3 Digest (Repl.) 40, *290.*

(12) *Betts* v. *Gibbins* (1834), 2 Ad. & El. 57; 4 Nev. & M.K.B. 64; 4 L.J.K.B. 1; 111 E.R. 22; 42 Digest 979, *99.*

(13) *Dixon* v. *Fawcus* (1861), 3 E. & E. 537; 30 L.J.Q.B. 137; 3 L.T. 693; 7 Jur.N.S. 895; 9 W.R. 414; 121 E.R. 544; 34 Digest 187, *1544.*

(14) *Fletcher* v. *Harcot* (1622), Hut. 55; 123 E.R. 1097; sub nom. *Batterseys Case*, Win. 48; 12 Digest (Repl.) 324, *2506.*

(15) *R.* v. *Prince* (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 30 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138, C.C.R.; 15 Digest (Repl.) 1032, *10,142*.

(16) *R.* v. *Tolson* (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629, C.C.R.; 15 Digest (Repl.) 890, *8578*.

(17) *Cundy* v. *Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 30 Digest (Repl.) 96, *719*.

(18) *R.* v. *Bishop* (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox, C.C. 404, C.C.R.; 33 Digest 270, *1884*.

(19) *Lampleigh* v. *Brathwait* (1615), Hob. 105; 1 Brownl. 7; Moore, K.B. 866; 80 E.R. 255; 12 Digest (Repl.) 587, *4538*.

Also referred to in argument:

Scott v. *Brown, Doering, McNab & Co., Slaughter and May* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 41 W.R. 116; 8 T.L.R. 755; 36 Sol. Jo. 698; 4 R. 42, C.A.; 15 Digest (Repl.) 1201, *12,199*.

Point of Law raised on the pleadings as to whether the statement of claim disclosed any cause of action.

The statement of claim stated that the British South Africa Co. was a British company incorporated by royal charter, dated Oct. 29, 1889, for trading and other purposes, with powers of government and other powers as mentioned in the charter, and having for the principal field of its operations a defined region of South Africa. The defendant Rhodes was at all times material to this action a director of the company, and was entrusted with the management of all its property and affairs in South Africa. The defendant Jameson was an officer and agent of the company, and was entrusted with the control of the forces of the company which were employed in the invasion hereinafter mentioned. In or about the month of September, 1894, the plaintiff was employed by the company to serve for a year in the armed forces of the company within the territorial limits prescribed for the company by the charter, and he entered upon and remained continuously in such employment from the time of his engagement until after the happening of the matters hereinafter complained of. In the month of September, 1895 (when the plaintiff was at Buluwayo and his period of service was about to expire), the defendants having secretly determined to invade the territory of the South African Republic with a hostile armed force, in order to induce the plaintiff to renew his engagement and take part in such invasion as a member of the force, fraudulently represented to the plaintiff that the detachment in which he was serving was about to be employed in active service and that it would be to his benefit, and they requested him to continue in the service of the company. The defendants intended the plaintiff to believe, and he did believe, that the service on which the detachment was about to be employed was of a lawful nature, and, relying on the aforesaid representations, the plaintiff agreed to and did continue in the said company's service for a further period. The representations, it was alleged, were to the knowledge of the defendants untrue. Shortly after the plaintiff had entered into the above agreement the defendants caused a considerable number of the troops in the employment of the company (including the detachment in which the plaintiff was serving) to be concentrated at or near Pitsani under the control of the defendant Jameson for the purpose of the invasion. On Dec. 29, 1895, the defendants, for the purpose of the invasion and in order to induce the plaintiff to take part therein and to enter the territory of the republic as a member of the company's armed forces, fraudulently represented to the plaintiff that fighting was about to commence in or near Johannesburg, that protection was needed for the women and children there, that a body of the Rhodesian Horse would meet and co-operate within the territory of the republic with the troops with which the plaintiff was serving, that a body of

Cape Mounted Rifles (forces of Her Majesty) was also waiting near the frontier of the republic to join and co-operate with the said troops, and that the proposed invasion had the sanction and support of Her Majesty's government. These representations, it was said, were to the knowledge of the defendants untrue.

The plaintiff complained that, he believing the aforesaid representations to be true, and relying thereupon, was induced thereby to enter the territory of the South African Republic as a member of the company's armed forces and to engage in hostilities with the troops of the Republic, and that by reason of the matters aforesaid the plaintiff suffered great injury and was subjected to severe hardship and imminent dangers. The troops of the company with which he was serving were defeated by the forces of the republic at Doornkop, and in the battle which was fought there the plaintiff was severely wounded and lost a leg and subsequently had to undergo seven surgical operations. He was taken and kept prisoner by the authorities of the republic, and was liable to summary execution at their hands. Hospital accommodation was refused him, and he was left lying exposed in the street at Pretoria. He was also rendered liable to severe punishment in England for offences against the laws of England, and was brought to England as a prisoner. He was caused much pain and suffering, and his health and capacity for earning his livelihood were and always would be greatly impaired. The plaintiff set out as particulars of special damage: Loss of kit (£25); loss of pay for first eight months of 1896 (£120); loss of earnings from Sept. 1, 1896 to Nov. 1, 1898, at £200 a year (£433 6s. 8d.), and loss of leg; and he claimed £3,000 damages.

By para. 11 of the defence the defendants submitted that the statement of claim disclosed no cause of action.

By s. 11 of the Foreign Enlistment Act, 1870:

> "If any person within the limits of Her Majesty's Dominions, and without the licence of Her Majesty—Prepares or fits out any naval or military expedition to proceed against the Dominions of any friendly State, the following consequences shall ensue: (1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour. (2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty."

Cohen, *Q.C.*, and *Lord Robert Cecil* for the defendants.
Lawson Walton, *Q.C.*, and *Barnard Lailey* for the plaintiff.

Cur. adv. vult.

Mar. 20, 1899. The following judgments were read.

GRANTHAM, J.—In this case we are asked to determine whether on the statement of claim as presented to us (or with such amendments, if any, as may be necessary to raise the question of law desired to be determined) any cause of action has been shown for which an action is maintainable according to English law. For the purposes of our judgment, this being a demurrer by the defendants, all the facts alleged in the claim must be taken to be true and admitted by the defendants.

What, therefore, are those facts? Shortly these. That the defendants, having secretly determined to invade the territory of a friendly Power with a hostile armed force, they, for the purpose of inducing the plaintiff to enter their service as an armed servant, deceived the plaintiff as to their intentions, told him that the service on which they wished to employ him was lawful, that, as fighting would shortly take place in the said South African Republic between other forces, his services were required for the protection of women and children, that the force of which he was a member would have the support of other lawfully appointed forces, and that such

A invasion of the territory of the South African Republic had the sanction and support of Her Majesty's government, whereas, in fact, all the aforesaid representations were untrue to the knowledge of the defendants. Acting on and believing in these statements, the plaintiff entered the service of the defendants, and in obeying their orders received the injuries and suffered the losses complained of, for which he B seeks to recover damages in this action. It is difficult to realise any period of our history in which a defendant making such fraudulent statements and inflicting such serious injury would not be liable for the consequences of his fraud, and yet it has been solemnly argued that such is the law at the present time.

Let us see, therefore, on what grounds the learned counsel for the defendants attempts to support his contention that this statement of claim discloses no good C cause of action. He does not rely on a possible assumption that the damages resulted from a voluntary enlistment of the plaintiff on a warlike expedition for the pay and the prospective advantages likely to accrue to him, and were not in any way caused or aggravated by the fraud; but he admits that his contention rests solely on the assumption that the plaintiff, innocent of all knowledge of wrong on his part, did by obeying the order of the defendants in fact become a criminal him- D self, and could not therefore complain of any wrong done him by the defendants who were participes criminis with him. But how does he show that he is a criminal? He relies on the Foreign Enlistment Act, 1870, s. 11 (1) [ante p. 120]. The defendants contend, therefore, that, it being immaterial whether the person employed in such expedition had a mens rea or guilty knowledge of the nature of his act or not, and, though the plaintiff believed, as he did, that his action had the E sanction of the Queen's government, yet he was just as much a criminal as the defendants who had knowingly broken the law, and that, once the plaintiff was proved a criminal, he could not, according to the defendants, be heard to complain of the original and deeper dyed fraud of the defendants, which had placed the plaintiff, unwittingly on his part, in a position which made him liable to be called a criminal. A grosser perversion of English justice it is impossible to imagine, and F I should indeed be sorry if under any circumstances it could be proved to be English law. It must not be forgotten that the plaintiff has not been proved to be a criminal in any court of law. He has not been tried, much less convicted, and never will be tried, and, therefore, cannot be convicted, and under the circumstances a jury would, I doubt not, acquit him if he was now tried; but, till he has been convicted, how can the defendants be heard to say that, as in their opinion G the plaintiff's conduct was an infringement of the Act, he must be treated as if he had been convicted of being a criminal by Act of Parliament?

Let us look, therefore, at the authorities relied upon by counsel for the defendants to see what aid, if any, they give him in his contention. First, he relies on the dictum of LORD MANSFIELD in *Holman* v. *Johnson* (1), wherein he says (1 Cowp. at p. 343):

H "the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is allowed. . . . No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise ex turpi causa, there the court says he has no right to be assisted. . . . I So if the plaintiff and defendant were to change sides the latter would have the advantage of it, for where both are equally in fault potior est conditio defendentis."

It seems to me that no stronger authority could be quoted against the defendants. The plaintiff's cause of action is not founded, as far as he is concerned, on any immoral or illegal consideration, but, as the defendants rely on their own immorality and illegality, it does sound very ill in their mouths to endeavour to rob the plaintiff of his rights by their (the defendants') illegality; and as in these proceedings the

defendants have changed places with the plaintiff and are practically plaintiffs, as they are claiming a judgment on their demurrer, I am only echoing LORD MANSFIELD in saying I will not allow the plaintiffs to rely on their illegality to obtain a judgment against the defendant, for potior est conditio defendentis, and, the demurrer being dismissed the present plaintiffs' right of action is admitted.

The next case counsel for the defendants relied on was *Colburn* v. *Patmore* (2). This case, when it is carefully examined, seems to me to help the defendants less even than the last. The only matter under discussion in that case was whether the plaintiff, the printer and owner of a paper, having been convicted of a criminal libel and fined £100, could recover that sum from the defendant, the editor of the paper, whom he alleged to have first inserted the libel contrary to his duty to the plaintiff and so induced the plaintiff to publish it. It was held he could not recover it because he had not shown that he had not himself approved of the libel before printing and publishing it himself. But even taking the obiter dicta of the learned judge as law in the passage where (quoting from LORD LYNDHURST'S judgment) LORD LYNDHURST says (1 Cr. M. & R. at p. 83):

> "I know of no case in which a person who has committed an act declared by the law to be criminal has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

Quite true. But what compensation can he not recover? Why, compensation for the damage he has incurred by proceedings having been taken against him for the commission by him of the wrongful act complained of. As MR. MAULE (afterwards MAULE, J.) said during the argument:

> "The question is whether a person convicted of a criminal offence can claim an indemnity from another who has participated with him in the commission of that offence,"

i.e., indemnity for the damages recovered against him for the commission of the offence. In this case the plaintiff, in the first place, has been convicted of no offence, and, in the second place, is not seeking to recover an indemnity for damages recovered against him, but is seeking to recover damages for a wrong done to him, in which he did not participate except as a sufferer and in which it cannot be said he was a particeps criminis. When the false and fraudulent representation was made which was the causa causans of this action, no crime had been committed by the defendants, much less by the plaintiff, and as far as the plaintiff knew no crime had been committed by the defendants at any time up to the happening of the events which caused the damage to the plaintiff, for if the invasion had the sanction and authority of Her Majesty or her government, as the defendants alleged, there was no breach of any statute for which the plaintiff or the defendants could be made liable.

Counsel for the defendants relies next on *Merryweather* v. *Nixan* (3), in which it was held that one wrongdoer cannot have redress or contribution against another. True, it was so held; but what does BEST, C.J., say about it in delivering the judgment of the court in *Adamson* v. *Jarvis* (4)? He says (4 Bing. at pp. 72-73):

> "From the concluding part of the judgment in *Merryweather* v. *Nixan* (3), and from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

Again, in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (5), the noble Lords, though not overruling *Merryweather* v. *Nixan* (3), damn the case with faint praise, decline in terms to apply it to Scotland, and refuse to extend its operation one iota. As the action of the plaintiff is only made a criminal act by statute, and

A is not inherently a criminal act, the plaintiff cannot be presumed to have known of his guilt until he has been proved to have been guilty.

As the expedition in question is alleged to have been something in the nature of a highway robbery, I am surprised that the defendants did not refer to *Everet* v. *Williams* (6), mentioned in LINDLEY ON PARTNERSHIP (6th Edn.), p. 101 [9th Edn., p. 124, n.], which it was said was a suit by one highwayman against another for an B account of their plunder, the bill alleging that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, purses, etc., and that the defendant applied to him to become a partner, and that, after dealing together at several places, such as Bagshot, Hampstead, Salisbury, etc., they differed as to their respective shares, and so the suit in Chancery was instituted for an account. The bill was dismissed with costs because it was held that they were both participes C criminis, and so the plaintiff could not recover. Perhaps it may be that the learned counsel were afraid to refer us to this case lest the same results should happen—viz., that the counsel who signed the bill was made to pay the costs of the bill, and the solicitors were fined £50, and the plaintiff and defendant were both hanged.

As the defendants have failed to establish their case, it is hardly necessary to refer to any authorities on the other side, and I will only mention *Campbell* v. D *Campbell* (7) (7 Cl. & Fin. at p. 181), where one partner in a distillery had been convicted of illegal transactions and made liable to penalties, and he was held entitled to recover against his co-partner contribution for those penalties, notwithstanding the authority of *Colburn* v. *Patmore* (2), before referred to, because (as LORD COTTENHAM said) he was not particeps criminis in the sense which would disentitle him to sue for contribution. If, in such a case, he could recover, how much E more so when the cause of action is not one for indemnity for damages given against him for the commission of the alleged illegal act, but is for damage for the alleged fraud on the part of the defendants in putting the plaintiff into such a position as caused him personal injury and loss quite irrespective of any illegal complicity in a crime. It is true the plaintiff also refers in his statement of claim to the liability the defendants had made him incur to severe punishment in England for offences F against the English law, but he never was made liable to punishment, he never was made a criminal, and he suffered no damage from that liability, and I, therefore, treat that part of the statement of claim as struck out, as no damages are really claimed under that head.

As the defendants have entirely failed to refer us to any authority that, in my judgment, justifies their contention that the plaintiff's declaration discloses no G good cause of action for which he can sue, I am glad to be able to say that our law has been purged from the suggestion that fraud and false representation injurious to an innocent person can be committed with impunity if the injured person has by such fraud and false representation been unwittingly and innocently made to commit what the law has said shall be called a crime. For these reasons, in my judgment, the demurrer must be dismissed with costs. H

KENNEDY, J.—The plaintiff in this action seeks to recover damages from the defendants on the ground that they induced him by false and fraudulent representations to renew an engagement of service with the British South Africa Co., and to take part in the well-known expedition which was led by the defendant Jameson into the Transvaal in December, 1895, in consequence whereof he was damnified I in various ways which are set forth in the statement of claim. In the statement of claim the plaintiff alleges, among other things, that by reason of the premises he was rendered liable to severe punishment in England for offences against the laws of England. The defendants have pleaded that the statement of claim discloses no cause of action, their point being that the paragraph which I have just quoted, puts the plaintiff out of court. It is an admission that the plaintiff's participation in the expedition constituted a criminal offence under s. 11 of the Foreign Enlistment Act, 1870, and the defendants' argument is that no action can be maintained to recover damages for having been induced to commit a crime. It is upon the

correctness of this contention that the court is called upon to adjudicate, as if the point had been raised by a demurrer under the old common law practice.

I have come to the conclusion, for reasons which I will state, that the defendants' contention ought not to prevail. It has, I think, long been settled law that, if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. In *Shackell* v. *Rosier* (8), where, in consideration that the plaintiff had published a libel at the defendant's request and had at the like request consented to defend an action brought against the plaintiff for such publication, the defendant promised to indemnify the plaintiff from the costs of the action, the Court of Common Pleas held that the promise could not be enforced. In the preceding year—1835—in the American case of *Arnold* v. *Clifford* (9), STORY, J., held that a promise to indemnify another for doing a private wrong or for committing a public crime is against public policy and void at law: see also *Martyn* v. *Blithman* (10), which is cited in the note to *Farebrother* v. *Ansley* (11), 1 Camp. at p. 348. Where the circumstances constituting the unlawfulness of the act are known to the doer of it, his inability to obtain contribution or indemnity appears to me to be clear. In the next place it is, I think, also clear that an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorised or (as is alleged in this action) fraudulently induced by another to do an act, indifferent in itself, which has turned out to be unlawful because it constitutes a private wrong, but which was not at the time apparently unlawful and was done in honest ignorance of the particular circumstances which constituted its unlawfulness: see the judgment of BEST, C.J., in *Adamson* v. *Jarvis* (4); *Betts* v. *Gibbins* (12); *Dixon* v. *Fawcus* (13); and POLLOCK ON THE LAW OF TORTS (5th Edn.), p. 171. In such a case an express promise to indemnify is valid in law: *Fletcher* v. *Harcot* (14).

I come now to the question which was very fully argued before us in the present case, namely: Does this right of indemnity which exists in the case of a wrong done by misadventure, when the wrong is a private wrong, exist also in any case in which the wrong is a criminal offence? The defendants contend that it does not. They say that in no case whatever where the act constitutes a criminal offence can the doer of it have a right of indemnity against any of the consequences of the act. It appears to me that this proposition of the defendants is wider and more general than the law warrants. Certainly there is no right of indemnity where the doer of the act which another has authorised or induced knows it at the time to be an offence. If upon the face of his claim for indemnity, in a case in which knowledge is an essential ingredient of the offence, the plaintiff admitted that he was guilty of the offence his claim would be, on the face of it, bad. If in the like case he was on the trial proved to have been convicted of the offence, judgment must be given against him. Nor, in my judgment, can there be any valid claim to indemnity when the doer of the act which constitutes the offence, has done it with knowledge of all the circumstances necessary to constitute the act an offence, but in ignorance that the act done under those circumstances constituted an offence. A man is presumed to know the law. Thirdly, although it is not necessary to decide the point, I am inclined to think that there could be no claim to indemnity for being authorised or induced to do an act where the act, which is in fact criminal, is done in ignorance, indeed, of some circumstance which is necessary to constitute a crime, or even is done in a belief that such circumstance does not exist, but the doer knows that the act is morally a wrong act. In such a case the doer of the act has the mens rea in the sense attributed to that expression of BRAMWELL, B., in the well-known case of *R.* v. *Prince* (15) (L.R. 2 C.C.R. at p. 173 et seq.), referred to by WILLS, J., in *R.* v. *Tolson* (16) (23 Q.B.D. at p. 180). Such a case might, I think, occur, although it is not likely to occur often.

But I am unable to accept the defendants' proposition where the act, though a criminal offence—malum prohibitum—is, upon the state of facts which the doer, by the fraudulent misrepresentation of the person against whom he claims indemnity, has been induced to believe to be the true state of facts, neither criminal nor immoral. Take the present case as an example. For the purposes of the argument of the point before us, the facts must be assumed to be as the plaintiff alleges them to be. It must, therefore, be assumed that he was rendered liable to be convicted of an offence under s. 11 of the Foreign Enlistment Act, 1870. It must also be assumed —in regard to the construction of that section—for the purposes of the present argument, that a man may be convicted of an offence under it if he assists or is employed in such an expedition as the expedition in question, although he can prove that he was induced to do what he did by a fraudulent misrepresentation of another that a portion of Her Majesty's regular forces was privately near the frontier of the South African Republic to join and co-operate, and that the proposed invasion had the sanction and support of Her Majesty's government—a statement of facts from which, if it was made, anyone, I should think, would naturally and reasonably infer, and would believe that it was intended he should infer, that the licence of Her Majesty, which would legalise the expedition, had been granted. It appears to me that a representation that the expedition had the "sanction" of Her Majesty's government, necessarily involves a representation that the "sanction" had been given in the way in which by this section of the Act of Parliament it could properly be given, namely, with the licence of Her Majesty.

The learned counsel for the defendants contends that, even in such a case, a claim for indemnity, or indeed any claim for damages arising out of the matter which constitutes the offence, is on grounds of public policy legally inadmissible. Speaking for myself, I can see no ground of public policy upon which redress for consequent damage should be refused to the person so led to commit an offence by the false and fraudulent representation of facts which in this case, as I understand this in fact, if true, as he believed them to be, justified the doer in believing that he was acting in accordance with the law. It appears to me that if the defendants' reasoning on this point were adopted, a real injustice might result. Two illustrations drawn from cases which present simpler features than are presented by the present case have occurred to me—the one the case of an offence which is dealt with in courts of summary jurisdiction, the other an offence which is matter of indictment. The Licensing Act, 1872, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. It was held in *Cundy* v. *Le Cocq* (17) that the prohibition was absolute, and that knowledge of the condition of the person served with liquor was not necessary to constitute the offence. Suppose a person by a fraudulent misrepresentation of the sobriety of another person who gives no indication of intoxication, but whom he knows to be drunk, authorises and induces a licensed victualler, who has no reason to disbelieve, and does honestly believe, the truth of the representation, to sell drink to the drunken person, and the licensed victualler is convicted and fined. Upon what consideration of public policy should a man who, if the representation as to sobriety had been true, would have committed no offence either against law or morals be debarred from any redress against the man who had by fraud inflicted upon him what might be a very serious injury?

Or, take a case under the Lunacy Act, 1845 (8 & 9 Vict., c. 100), s. 44 [repealed]. A person who receives two or more lunatics into his house, not being a registered asylum or hospital, or a house duly licensed under that Act or any previous Act, commits an indictable offence, and in *R.* v. *Bishop* (18) it was held by the Court for Crown Cases Reserved that it afforded no defence to prove, as was proved in that case, that the defendant honestly and on reasonable grounds believed that the persons whom she received were not lunatic. Suppose in such a case that the belief had been induced by a false and fraudulent misrepresentation on the part of the person who requested and authorised the proprietor of the house to receive the persons into his care, I am unable to see upon what ground of public policy or prin-

ciple of justice the proprietor, who has been led into the commission of the offence by the fraud of another, and who is free from every imputation of real wrongdoing, should be denied a right of suing for damages the person whose successful fraud has caused him to do that which the law has made an offence. I may add, upon the question of public policy, that, as I think was stated by counsel in the course of the argument, there is express provision in the Sale of Food and Drugs Act, 1875, s. 28 [repealed], for the right of a person convicted under the Act recovering the amount of any penalty in which he may have been convicted under the Act together with the costs which have been paid or incurred by him from the person who sold him the adulterated article.

If we turn from the consideration of principles to look for authority, it appeared to be argued by the learned counsel who argued the case before us that there is no decision which can be invoked as an authority upon the point before us. Counsel for the defendants cited a passage from the judgment of LORD MANSFIELD in *Holman* v. *Johnson* (1) which does not, in my opinion, appear to have any real bearing upon the question which we are considering, but he relied principally upon the opinion which was expressed by LORD LYNDHURST, C.B., in *Colburn* v. *Patmore* (2), in which opinion BOLLAND, ALDERSON, and GURNEY, BB., concurred. It is quoted and criticised in their notes to *Lampleigh* v. *Brathwait* (19) by the learned editors of the third, fourth, fifth, sixth, and seventh editions of SMITH'S LEADING CASES. It does not appear to me to help the defendants in the present case. The facts shortly were, that the plaintiff, the proprietor of a journal, had been prosecuted and convicted and fined for falsely and maliciously printing and publishing a libel in his print. He thereupon sued the editor for inserting the libel in the journal falsely, maliciously, and negligently, and without his authority or consent, and he claimed to recover damages which included the amount of the fine and the expenses to which he had been put in defending himself. The decision of the court, which was adverse to the plaintiff, was given upon a point of pleading, but there was a very full discussion in the course of the argument as to the right of the plaintiff, having been himself convicted and fined for the libel, to sue the editor for indemnity. The members of the court expressed in the course of their judgments a strong opinion that he had no such right. LORD LYNDHURST, in the passage upon which the present defendants rely said (4 Tyr. at p. 688):

> "I am not aware of any case in which a man convicted of an act declared by law to be criminal and punished for it accordingly (in the report in 1 Cr.M. & R. the words are 'who has committed an act declared by law to be criminal') has been suffered to maintain an action against the party who participated with him in the offence, in order to procure indemnity for the damages occasioned by that conviction; but after hearing the argument, I entertain little or no doubt that such an action could not be maintained."

It appears to me that the facts in *Colburn* v. *Patmore* (2), or in such an analogous case as LORD LYNDHURST indirectly, I think, had in mind when he pronounced this opinion and the facts as pleaded in the present case, give rise to very different considerations. The plaintiff in *Colburn* v. *Patmore* (2) could not, after his conviction, be heard to say that he did not falsely and maliciously publish the libel. As it was put by ALDERSON, B., in the course of the argument, the plaintiff, though actually ignorant, was legally cognisant of the publication of the libel.

As I have already pointed out, it cannot, in my judgment, be successfully contended that the claim for indemnity can be maintained where the doer of the act knew at the time, or must be presumed to have known, the circumstances which made the act either a private wrong or a public crime. Here the gist of the plaintiff's case is that he did not know the facts which made his conduct criminal; but, on the contrary, was led by the defendants to believe and did believe in the existence of a fact—the sanction of the British government—which, if it was given as he had a right, upon the defendants' representation, to assume it had been in

the proper way given under the licence of Her Majesty, would have been an answer to any imputation of illegality. Further, while I have felt it to be my duty, after the full and careful arguments addressed to us by the learned counsel, to deal with the case as if the plaintiff had been convicted and was claiming an indemnity for the penal consequences of the commission of a criminal offence, it should, I think, be borne in mind that in fact the plaintiff here has not been convicted, and is claiming, under various heads, damages which are unconnected with the possibility of conviction or punishment. The nearest claim in character to an indemnity for damages consequent upon the conduct of the defendants as inducing the commission of a crime is contained in the allegation that he was brought to England as a prisoner. Whether any of these other heads of damage are so proximately connected with the alleged tortious conduct of the defendants as to be legally available, we have not to consider. It is a matter which, like the proof of the tort itself, the plaintiff will have to prove at the trial. It may be that in any case some of these claims of damage might be legally sustained, even if a claim for indemnity, shortly so called, against the penal consequences of the commission of an offence, could not. I prefer, however, to base my judgment for the plaintiff, in regard to the question before the court, upon the broader grounds which I have stated above.

Judgment for plaintiff.

Solicitors: *G. B. Crook; Hollams, Sons, Coward & Hawksley.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

THE GRETA HOLME

HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Shand), March 19, 23, April 6, July 29, 1897]

[Reported [1897] A.C. 596; 66 L.J.P. 166; 77 L.T. 231; 13 T.L.R. 552; 8 Asp.M.L.C. 317]

Damages—Loss of use of chattel through another's negligence—Owner of chattel not definite sum out of pocket—Right to damages.

Where a chattel which is owned by a non-profit-making public corporation (and semble any non-profit-making concern), and so is not commercially employed, is damaged owing to the negligence of another the corporation is entitled to damages in respect of the loss of the use of the chattel even though they cannot prove that they are a definite sum of money out of pocket by the wrong sustained.

So **held** by LORD HALSBURY, L.C., LORD WATSON, LORD HERSCHELL, LORD MACNAGHTEN, and LORD SHAND, LORD MORRIS dissentiente, reversing the decision of Court of Appeal, [1896] p. 192.

Notes. Applied: *Mediana (Owners)* v. *Comet (Owners)*, *The Mediana*, [1900-3] All E.R. Rep. 126. Considered: *The Bodlewell*, [1907] P. 286; *Mersey Docks and Harbour Board* v. *Marpessa (Owners)*, [1904-7] All E.R. Rep. 855. Distinguished: *Admiralty Comrs.* v. *Valeria (Owners)*, [1922] All E.R. Rep. 463. Considered: *Admiralty Comrs.* v. *Chekiang (Owners)*, *The Chekiang*, [1926] All E.R. Rep. 114. Applied: *Admiralty Comrs.* v. *Susquehanna (Owners)*, *The Susquehanna*, [1926]

All E.R. Rep. 124; Considered: *Strand Electric and Engineering Co.* v. *Brisford Entertainments, Ltd.*, [1952] 1 All E.R. 796. Referred to: *The Kate* (1899), 80 L.T. 423; *The Astrakhan*, [1910] P. 172; *The Tugela* (1913), 30 T.L.R. 101; *The West Wales*, [1932] P. 165; *The Edison*, [1933] All E.R. Rep. 144; *Sunley & Co.* v. *Cunard White Star, Ltd.*, [1939] 3 All E.R. 641; *The Hebridean Coast*, [1961] 1 All E.R. 82.

As to damages for the loss of the use of a chattel, see 11 HALSBURY'S LAWS (3rd Edn.) 225-232, 263-266, and for cases see 17 DIGEST (Repl.) 82-84.

Cases referred to:

(1) *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1875), L.R. 10 C.P. 189; 44 L.J.C.P. 148; 31 L.T. 847; 23 W.R. 310; 24 Digest (Repl.) 766, *7555*.

(2) *Knights* v. *Quarles* (1820), 2 Brod. & Bing. 102; 4 Moore, C.P. 532; 129 E.R. 896; 24 Digest (Repl.) 766, *7554*.

(3) *Cobb* v. *Great Western Rail. Co.*, [1893] 1 Q.B. 459; 62 L.J.Q.B. 335; 68 L.T. 483; 57 J.P. 437; 41 W.R. 275; 9 T.L.R. 253; 37 Sol. Jo. 248; 4 R. 283, C.A.; affirmed, [1894] A.C. 419; 63 L.J.Q.B. 629; 71 L.T. 161; 58 J.P. 636; 10 T.L.R. 508; 6 R. 203, H.L.; 17 Digest (Repl.) 127, *359*.

(4) *The Rutland* (1886), 80 L.T. 177, n.; [1896] P. 195, n.; Shipping Gazette, Dec. 6, 1886; 41 Digest 808, *6688*.

Also referred to in argument:

Bodley v. *Reynolds* (1846), 8 Q.B. 779; 15 L.J.Q.B. 219; 7 L.T.O.S. 61; 10 Jur. 310; 115 E.R. 1066; 17 Digest (Repl.) 78, *19*.

Re Trent and Humber Co., Ex parte Cambrian Steam Packet Co. (1868), 4 Ch. App. 112; 38 L.J.Ch. 38; 19 L.T. 465; 17 W.R. 181, L.C.; 17 Digest (Repl.) 172, *680*.

The Argentino (1888), 13 P.D. 191; 58 L.J.P. 1; 59 L.T. 914; 37 W.R. 210; 6 Asp.M.L.C. 348, C.A.; affirmed sub nom. *Gracie* (*Owners*) v. *Argentino* (*Owners*), *The Argentino* (1889), 14 App. Cas. 519; 59 L.J.P. 17; 61 L.T. 706; 6 Asp.M.L.C. 433, H.L.; 17 Digest (Repl.) 80, *27*.

The Gazelle (1844), 2 Wm. Rob. 279; 3 Notes of Cases, 75; 8 Jur. 428; 166 E.R. 759; 41 Digest 804, *6648*.

The Clarence (1850), 3 Wm. Rob. 283; 7 Notes of Cases, 579; 14 Jur. 557; 166 E.R. 968; sub nom. *The Catherine* v. *The Clarence*, 5 L.T. 121; 41 Digest 802, *6626*.

Hughes v. *Quentin* (1838), 8 C. & P. 703; 173 E.R. 681, N.P.; 2 Digest (Repl.) 304, *110*.

The City of Peking v. *Compagnie des Messageries Maritimes*, *The City of Peking* (1890), 15 App. Cas. 438; 59 L.J.P.C. 88; 63 L.T. 722; 39 W.R. 177; 6 Asp.M.L.C. 572, P.C.; 41 Digest 805, *6657*.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.), reported [1896] P. 192, affirming a decision of the Admiralty Division disallowing the claim of the appellants to the sum of £1,591 8s. 6d. for the loss of the use of their steam sand-pump dredger No. 7.

The action was brought in rem by the Mersey Docks and Harbour Board, the appellants, against the respondents, in respect of a collision in which the respondents' steamship *Greta Holme* ran down and sank the dredger. A decree was pronounced in favour of the appellants subject to a reference to the Admiralty Division to ascertain the amount of damages. Among the items of claim put forward by the appellants was one for the loss of the use of their dredger, and, this item having been disallowed by the registrar, his decision was affirmed by the President of the Admiralty Division, SIR FRANCIS JEUNE. The facts are fully set out in the opinion of LORD WATSON (p. 130 post).

Sir W. Phillimore, *T. G. Carver*, and *Glynn* for the appellants.

Aspinall, *Q.C.*, and *Holman* for the respondents.

Their Lordships took time for consideration.

July 29, 1897. The following opinions were read.

LORD HALSBURY, L.C.—The question in this case is whether the respondents are liable to pay damages to the appellants for the loss by the latter of the use of their steam sand-pump dredger, which was rendered incapable of doing its work for a certain period of time. That the respondents would have been liable for some damages, at all events, if the owners of the dredger had been an individual trading with the use of a machine, does not appear to be denied, though in respect of some part of the damage the Master of the Rolls throws out a doubt, which I am not quite able to follow, as to the remoteness of the damages insisted on.

As I understood the argument of the respondents it came to this. The appellants are a public body who have to maintain the harbour works and the river Mersey in a condition fit for public use, and, as they are not authorised to make any use of their machinery for profit, as a private individual would have been entitled to make, they are not entitled to recover damages, although the fact be not denied that by the negligent act of the respondents the appellants were deprived of the use of their machine for a certain number of weeks. I confess I have some difficulty in following the reasoning or how the conclusion flows from the premises. It is a sufficiently familiar head of damages between individuals that, if one person injures the property of another, damages may be recovered, not only for the amount which it may be necessary to spend in repairs, but also for the loss of the use of the article injured during the period that the repairing may occupy. Nor has it ever been doubted, so far as I am aware, that, if a passenger in a railway collision is injured by the negligence of the railway company, he may recover damages, not only for the pain and suffering and injury to his health, etc., but also for the loss which he sustained by reason of being unable to pursue his ordinary avocations.

In *Bradshaw* v. *Lancashire and Yorkshire Rail. Co.* (1), where the question arose whether an executrix might recover, in an action for breach of contract against the railway company, the damage to the deceased's personal estate arising in his lifetime—the medical expenses, and loss occasioned by his inability to attend to business—it was held without doubt that damages for the loss of not being able to attend to business were recoverable. The question there arose in a manner which rendered it peculiarly necessary to determine whether the damage sought to be recovered was the natural and direct consequence of the breach, and, indeed, I think it would have hardly been contested in that case, but that the question there arose whether the maxim actio personalis moritur cum persona applied: *Knights* v. *Quarles* (2). The distinction between "tort" and "contract," though pertinent in that case, is immaterial here: see observations of Bowen, L.J., in *Cobb* v. *Great Western Rail. Co.* (3) ([1893] 1 Q.B. at p. 464).

Such being the general state of the law, it is difficult to see upon what ground the legal character filled by the appellants here can affect the question whether they are entitled to recover damages for being deprived of the use of their dredger during the period the dredger was being repaired. That the dredger was required for their use cannot be denied: that their operations in reducing the silting up were delayed by the loss of it cannot be denied. Both those facts are found adversely to the respondents; then why are not the appellants entitled to recover damages for the loss thus sustained? The answer given is that, although their dredging operations were delayed, the appellants sustained no tangible pecuniary loss. I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that, during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to

me, go very far beyond the particular case now before your Lordships. But, to my mind, it is a principle for which there is no authority whatever. This public body has to pay money, like other people, for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrong-doer.

For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed, and the appeal allowed. As I understand, it is the wish of the parties not to be sent back for the assessment of damages, and, only because it is their wish, I am ready to express the opinion that £500 ought to be granted the appellants in respect of damages hitherto refused.

LORD WATSON.—On Mar. 6, 1895, the steamship *Greta Holme*, belonging to the respondents in this appeal, collided, in the river Mersey, with the steam sand-pump dredger No. 7, which is the property of the appellants, the Mersey Docks and Harbour Board. Cross-actions were brought by the parties, which were consolidated, and were thereafter disposed of by an order of the Admiralty Court, finding that the *Greta Holme* was alone to blame for the collision, and condemning her owners in damages and costs. By the same order, the amount of damages was referred to the determination of the registrar, assisted by merchants, and the counterclaim of the respondents was dismissed. The judgment of the Admiralty Court was subsequently affirmed by the Court of Appeal.

This appeal relates to two items of damage which occur in the claim submitted to the registrar by the present appellants. The first of these is £1,500, being a sum calculated at the rate of £100 per week for fifteen weeks during which the dredger was under repair and could not be used for any purpose by her owners; and the second is £91 8s. 6d., as an allowance for the further period of sixteen days during which she could only be used as a hopper barge, her machinery being still under repair. The registrar, with the concurrence of the merchants by whom he was assisted, reported against both these items of claim. The main reason assigned for that conclusion was that the appellants are not in the position of a trading company which is entitled to claim for loss of profits, and "although their dredging operations were, no doubt, delayed by the disabling of this dredger, it does not appear to us that the plaintiffs have sustained any tangible pecuniary loss." The report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, consisting of the Master of the Rolls, with A. L. Smith, L.J., and Rigby, L.J. The learned judges concurred in the observations made in the report of the registrar, with reference to the position of the appellants as a corporation which does not exist for the purpose of making profits, and as to the absence of any tangible proof of actual loss.

The appellants are a body of trustees who are charged with the duty of maintaining the harbour works and waterway of the river Mersey in the interest of the public, and, in particular, of those members of the public who either own vessels which use the harbour, or are otherwise directly interested in the trade of the port. They derive their available funds from rates levied from those who use their undertaking, which they are empowered to increase in the event of these being insufficient to meet necessary expenditure, and are bound to diminish in the contrary event of the rates being more than sufficient for that purpose. Towards all persons who have an interest in the prosperity of the harbour, the duty of the appellants is to maintain its efficiency in competition with other ports in the United Kingdom, but the only members of the public who have a direct pecuniary interest in their administration are those who pay the rates. As representing their interests, the appellants, although they do not earn profits for distribution among a body of shareholders, are nevertheless bound to conduct their operations in an efficient manner and with due economy; and whenever loss does arise from illegal interference with

their works or plant, it must come out of the pockets of the ratepayers, unless they are recouped by the wrong-doer.

At the time of the collision, No 7 and a twin dredger, both of which are constructed upon a principle which is novel, were engaged in deepening the river near to the landing-stage for large foreign ships, that being a necessary operation, and one which the appellants were desirous of completing. During the repair of No. 7, the other dredger continued to work at the same part of the river; but the result of her losing her companion was that, during the periods of fifteen weeks and sixteen days, so far from making effective progress in the work of deepening, at the end of that time the bottom of the channel stood at a higher level than it had occupied at the commencement. It is proved that for the use of a dredger of the same class as No. 7 a rent of £100 per week could have been obtained without difficulty; and also that the appellants would not have let the dredger, even if it had not been injured by the collision, because it was of importance to them that the work in which it was engaged should be completed without delay.

That it is a wrongful act, although it may not be wilful but simply negligent, to deprive either an individual or a corporation of the services of a dredger or other plant which is constantly required for useful purposes, does not appear to me to be a proposition admitting of serious dispute; and I am not prepared, unless in circumstances which do not occur in this case, to lay down the rule that a corporation which does not pursue its operations for the sake of gain, in the ordinary sense, does not suffer appreciable damage from their interruption. The Master of the Rolls expressed an opinion that the damages sought by the respondents, if not too shadowy, "were too remote to be the proper subject-matter of damages in a collision suit." None of the other learned judges in the court below appears to have taken that view; and, on consideration, I am unable to accept it. The loss to the appellants of the services of dredger No. 7 for a period exceeding the quarter of a year was the natural, necessary, and direct result of her collision with the *Greta Holme*, to whose fault the collision was solely attributable, and, in my opinion, there is no maritime or other rule which protects the owners of the offending ship against damages attendant upon results of that kind. The evidence of the assistant engineer to the appellants shows that it would have been impossible to supply the place of No. 7 by chartering another suitable dredger. If it had been possible, and if the reasons assigned for the judgments under appeal are valid, that would not have been a justifiable proceeding on the part of the appellants, who, according to these reasons, were suffering no appreciable damage from the want of a dredger. At all events, had they chosen to go to the expense of hiring, they would not have been entitled to recover a single sixpence of the hire paid by them from the respondents.

That is, in my opinion, the logical result of the principles which have been followed by the courts below in the decision of this case—a principle which, if affirmed, would be very far-reaching. They seem to me to go this length, that a corporation who invest large sums of money in a dredger, or in any other article which they intend to use, and do use continuously, for purposes which are of interest to them, but are not productive of private gain, although they protect the pocket of the ratepayer, can recover from a wrong-doer the cost of repairing injury done to these articles, and are not entitled to recover damages from a person who deprives them of the use of such articles without lawful cause. Upon the whole matter, I am of opinion that the appellants have succeeded in proving substantial and not merely nominal damage, and that opinion is not weakened by the fact that, owing to the enforced absence of No. 7 dredger, there was a deposit of silt which would not otherwise have accumulated, and required to be removed after her return to duty. To this extent I entirely agree with the observations of the learned judges that the data for estimating the amount of substantial damage are not precise. In cases like the present that difficulty is sometimes inevitable, and is of common occurrence; but it is a difficulty which can be easily and often satisfactorily overcome by a jury

under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, for the task of assessing damages in cases like the present; but, having taken the whole facts and probabilities of the case into consideration, I have come to the conclusion that, in respect of the two items in question, the sum allowed to the appellants ought not to be less than £400. For these reasons I am of opinion that the judgment appealed from ought to be reversed.

LORD HERSCHELL.—I entirely concur. I take it to be clear that in general a person deprived of the use of a chattel is entitled to recover damages in respect thereof, even though he cannot prove a tangible pecuniary loss, by which is meant a definite sum of money out of pocket, by the wrong sustained. That is not disputed. But it is said, as the plaintiffs are trustees carrying on an undertaking not for profit, there can be no loss of profit by what has occurred, and consequently that they are not entitled to damages. There is no authority for such a proposition. The only case relied on was that of *The Rutland* (4), and in that case I am not satisfied that it was intended to lay down any such proposition. The learned judge in that case was not satisfied that any damage was sustained. But, however this may be, I think that the proposition cannot be supported on principle. If the appellants had hired a dredger instead of purchasing one, that the respondents would have been bound to make good the sum so paid during the time of repair is beyond doubt. How should they be deprived of payment because they purchased the dredger? The money invested in the dredger was paid out of their pockets, and while deprived of the use of the dredger they had to pay interest on the money. Surely a sum equivalent to that they were at least entitled to. But I think that they are entitled to general damages. It is true that these damages cannot be measured by any scale, nor could that be done in the case of deprivation where an individual has purchased something for the purpose of comfort and not of profit.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—The judgment appealed from unanimously upholds the decision of the President of the Court of Admiralty, who had the report of the registrar, assisted by two merchants, on the reference made to him as to damages. The registrar found that £3,691 11s. 3d., with interest at 4 per cent., was due to the appellants in respect of their claim for damages by reason of the collision. The appellants claimed £5,594 under thirteen different heads. The registrar allowed damages under eleven of those heads, but he allowed no damages under the claim for loss of use of the dredger during the time she was under repairs—somewhere about fifteen weeks.

In my opinion, the order appealed from should be affirmed. We have been furnished with the shorthand-writer's notes in *The Rutland* (4). A collision took place with a dredger, and the registrar, after inquiry, did not allow any sum for detention during repairs and alterations, which extended over about five months. The President of the Admiralty Court (Sir James Hannen), in his judgment, affirming the report of the registrar, said:

> "The dredger was employed by the harbour authorities, not for the purposes of gain, but for the purpose of making the harbour good and convenient, so that it might attract vessels of greater draught of water. It was, therefore, not like a ship built for the purpose of being employed on a voyage which, if damage was done, would entitle the owner to compensation. There was no such prospect in this case, which must be looked at purely from the point of view of the damages capable of being estimated in money if the harbour authorities suffered by the dredger being disabled. The registrar came to the conclusion that no tangible damage had been done. It had not been suggested that it could have been let during the time it was detained for repairs."

The present case appears to me substantially identical with that of *The Rutland* (4). Apart from this authority, what case have the appellants made out? Their engineer stated that, if they chose to let the dredger, they could get £100 a week for it, and that they had applications. This evidence is merely chimerical, and it has been properly put aside by the Master of the Rolls as merely imaginary. The appellants had no intention of ever letting the dredger. It was used to deepen and to keep deep the river; and what damage could the appellants suffer by reason of its detention during repairs? Apart from personal inconvenience or aggravated circumstances, the appellants, in order to recover pecuniary loss, must show that the character of the detriment has been pecuniary. The appellants could only recover the actual loss sustained, of which they had given some reasonable proof. In my opinion, the appellants have not suffered any such loss. The work on which the dredger was engaged might have been to some extent delayed, but no pecuniary loss arose, which, in my opinion, is the only subject on which they can recover damages. The American steamers came and went, and so did the ordinary shipping using the Mersey; so that there was no loss of dues. Damages given in such a case could be but the merest guesswork founded upon no evidence.

LORD SHAND.—I concur in all that has been said by the Lord Chancellor, and those who concur with him.

Appeal allowed.

Solicitors: *Rowcliffes, Rawle, Johnstone & Gregory*, for *A. T. Squarey*, Liverpool; *Downing, Holman & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

REDDAWAY & CO. AND ANOTHER *v.* BANHAM & CO. AND ANOTHER

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten and Lord Morris), February 18, 20, 21, 24, March 26, 1896]

[Reported [1896] A.C. 199; 65 L.J.Q.B. 381; 74 L.T. 289; 44 W.R. 638; 12 T.L.R. 295; 13 R.P.C. 218]

Passing Off—Trade description—Truthful and accurate description of product—Previous use by plaintiff to describe goods—Signification to persons in trade that goods those of plaintiff—Right to injunction.

As a general rule a trader has no right to restrain another trader from using common English words truthfully and accurately as a description of his products merely because those descriptive words have been used by him, the original trader, to describe his goods, but where the words have become identified with the original trader and have acquired a secondary signification so that they convey to persons in the particular trade that goods so described are the goods of the original trader the use of the words amounts to a false representation that the goods are those of the original trader, and the original trader is entitled to an injunction.

Per Lord Herschell: The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them, by themselves

without explanation or qualification, by another manufacturer would deceive a purchaser into the belief that he was getting the goods of the first-named maker.

Rule laid down in *Leather Cloth Co.* v. *American Cloth Co.* (1) (1865), 11 H.L.Cas. 523, approved and applied.

Decision of the Court of Appeal, [1895] 1 Q.B. 286, reversed.

Notes. Applied: *Powell* v. *Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54; *Rockingham Rail. Co. and Jarrahdale Timber Co.* v. *Allen* (1896), 12 T.L.R. 345. Considered: *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893. Distinguished: *Cellular Clothing Co.* v. *Maxton and Murray*, [1899] A.C. 326. Considered: *Chivers* v. *Chivers* (1900), 17 R.P.C. 420. Applied: *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (1900), 83 L.T. 259; *Cash* v. *Cash* (1901), 84 L.T. 349. Considered: *Aerators, Ltd.* v. *Tollitt*, [1900-3] All E.R. Rep. 564. Applied: *Reddaway* v. *Frictionless Engine Packing Co.* (1902), 19 R.P.C. 505; *Reddaway* v. *Stevenson* (1902), 20 R.P.C. 276; *Faulder* v. *Rushton* (1903), 19 T.L.R. 452. Distinguished: *Bile Bean Manufacturing Co.* v. *Davidson* (1905), 22 R.P.C. 553; *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312. Applied: *Plotzker* v. *Lucas* (1907), 24 R.P.C. 551; *Kinnel Ballantine* (1909), 27 R.P.C. 185. Followed: *May* v. *May* (1914), 31 R.P.C. 324. Applied: *Goddard* v. *Watford Co-operative Society* (1924), 41 R.P.C. 218. Considered: *Havana Cigar and Tobacco Factories* v. *Oddenino*, [1924] 1 Ch. 179; *Reddaway & Co.* v. *Hartley* (1931), 47 T.L.R. 226. Referred to: *Lever* v. *Bedingfield* (1898), 80 L.T. 100; *Willox* v. *Pearson* (1901), 18 T.L.R. 220; *Randall* v. *British and American Shoe Co.* (1902), 18 T.L.R. 611; *Weingarten* v. *Bayer* (1903), 88 L.T. 168; *Imperial Tobacco Co. (of Great Britain and Ireland)* v. *Purnell* (1904), 21 R.P.C. 368; *Brock's "Crystal Palace" Fireworks* v. *Pain* (1911), 105 L.T. 976; *Edge* v. *Nicholls*, [1911] 1 Ch. 5; *Brinsmead* v. *Brinsmead* (1913), 30 R.P.C. 493; *A. G. Spalding Bros.* v. *A. W. Gamage, Ltd.*, [1914-15] All E.R. Rep. 147; *Re Woodward's Trade Mark, Woodward* v. *Boulton Macro* (1915), 112 L.T. 1112; *Ridgway Co.* v. *Fullbrook* (1923), 40 R.P.C. 335; *Mathieson* v. *Sir Isaac Pitman & Sons, Ltd.* (1930), 47 R.P.C. 188; *Lyons & Co.* v. *Lyons* (1931), 49 R.P.C. 188; *Re Hammermill Paper Co's Opposition, Re Pirie & Sons, Ltd.* (1932), 146 L.T. 493; *Canadian Shredded Wheat Co.* v. *Kellogg Co. of Canada, Ltd.*, [1938] 1 All E.R. 618; *Illustrated Newspapers, Ltd.* v. *Publicity Services (London), Ltd.*, [1938] 1 All E.R. 321; *Draper* v. *Trist*, [1939] 3 All E.R. 513; *John Jaques & Son, Ltd.* v. *Chess*, [1939] 3 All E.R. 227; *Office Cleaning Services, Ltd.* v. *Westminster Office Cleaning Association*, [1944] 2 All E.R. 269; *Midland Counties Dairy, Ltd.* v. *Midland Dairies, Ltd.* (1948), 65 R.P.C. 429; *Treasure Cot Co.* v. *Hamley Bros., Ltd.* (1950), 67 R.P.C. 89; *M. Saper, Ltd.* v. *Specters, Ltd. and Boxes, Ltd.* (1953), 70 R.P.C. 173; *Baume & Co.* v. *A. H. Moore, Ltd.*, [1958] 2 All E.R. 113; *Adrema* v. *Adrema G.m.b.H.*, [1958] R.P.C. 323; *J. Bollinger* v. *Costa Brava Wine Co.*, [1959] 3 All E.R. 800.

As to a trader's right to prevent use of trade descriptions and passing off, see 38 Halsbury's Laws (3rd Edn.) 593 et seq.; and for cases see 43 Digest 264 et seq.

Cases referred to:

(1) *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 H.L.Cas. 523; 6 New Rep. 209; 35 L.J.Ch. 53; 12 L.T. 742; 29 J.P. 675; 11 Jur.N.S. 513; 13 W.R. 873; 11 E.R. 1435, H.L.; 43 Digest 211, *570.*

(2) *Burgess* v. *Burgess* (1853), 3 De G.M. & G. 896; 22 L.J.Ch. 675; 21 L.T.O.S. 53; 17 Jur. 292; 43 E.R. 351, L.JJ.; 43 Digest 286, *1155.*

(3) *Croft* v. *Day* (1843), 7 Beav. 84; 49 E.R. 994; 43 Digest 285, *1148.*

(4) *Perry* v. *Truefitt* (1842), 6 Beav. 66; 49 E.R. 749; 43 Digest 296, *1218.*

(5) *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch.D. 748; 42 L.T. 851; 28 W.R. 966, C.A.; 43 Digest 266, *1034.*

(6) *Wotherspoon* v. *Currie* (1872), L.R. 5 H.L. 508; 42 L.J.Ch. 130; 27 L.T. 393; 37 J.P. 294, H.L.; 43 Digest 273, *1073.*

(7) *Montgomery* v. *Thompson*, [1891] A.C. 217; 60 L.J.Ch. 757; 64 L.T. 748; 55 J.P. 756; 8 R.P.C. 361, H.L.; 43 Digest 273, *1075*.

(8) *Turton* v. *Turton* (1889), 42 Ch.D. 128; 58 L.J.Ch. 677; 61 L.T. 571; 54 J.P. 151; 38 W.R. 22; 5 T.L.R. 545, C.A.; 43 Digest 286, *1150*.

(9) *Young* v. *Macrae* (1862), 9 Jur.N.S. 322; 43 Digest 279, *1107*.

(10) *Singer Manufacturing Co.* v. *Loog* (1880), 18 Ch.D. 395; 44 L.T. 888; 29 W.R. 699, C.A.; affirmed (1882), 8 App. Cas. 15; 52 L.J.Ch. 481; 48 L.T. 3; 31 W.R. 325, H.L.; 43 Digest 264, *1019*.

(11) *Braham* v. *Bustard* (1863), 1 Hem. & M. 447; 2 New Rep. 572; 9 L.T. 199; 27 J.P. 708; 11 W.R. 1061; 71 E.R. 195; 43 Digest 272, *1068*.

(12) *Johnston* v. *Orr Ewing* (1882), 7 App. Cas. 219; 51 L.J.Ch. 797; 46 L.T. 216; 30 W.R. 417, H.L.; 43 Digest 313, *1354*.

Also referred to in argument:

Reddaway v. *Bentham Hemp-Spinning Co.*, [1892] 2 Q.B. 639; 67 L.T. 301; 8 T.L.R. 734; 36 Sol. Jo. 696; 9 R.P.C. 503, C.A.; 43 Digest 309, *1322*.

Cheavin v. *Walker* (1877), 5 Ch.D. 850; 46 L.J.Ch. 686; 37 L.T. 300, C.A.; 43 Digest 326, *1473*.

Siegert v. *Findlater* (1878), 7 Ch.D. 801; 47 L.J.Ch. 233; 38 L.T. 349; 26 W.R. 459; 43 Digest 271, *1063*.

Seixo v. *Provezender* (1866), 1 Ch. App. 192; 14 L.T. 314; 12 Jur.N.S. 215; 14 W.R. 357, L.C.; 43 Digest 217, *616*.

Re Leonard and Ellis's Trade Mark, *Leonard and Ellis* v. *Wells* (1884), 26 Ch.D. 288; 53 L.J.Ch. 603; 51 L.T. 35, C.A.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), reported [1895] 1 Q.B. 286, reversing a decision of Henn Collins, J., at the trial at the Manchester Assizes of an action brought by the appellants against the respondents for an injunction to restrain the latter from using the word "camel hair" in such a manner as to deceive purchasers into the belief that they were purchasing goods of the appellants' manufacture and from passing off their goods as and for goods of the appellants' manufacture.

According to the case of the appellant company, the appellant Frank Reddaway had been for many years a manufacturer of machine belting, and in October, 1892, he converted his business into a limited company under the title of F. Reddaway & Co., Ltd., the appellant company. Up to the year 1877 machine belting was generally made of leather, but for some years previously to that date the Lancashire Belting Co. had been manufacturing and selling, under the name of the Lancashire belt, belting composed of woven material identical with that subsequently used by the appellant Frank Reddaway for his camel-hair belting. In 1877 Frank Reddaway began making woven belting from yarn similar to that used in making carpets, which yarn consisted principally of wool or hair, and sold the belting as "woollen belting," or as "solid woven worsted belting," and, finding that belting so made was greatly superior, especially in warm climates and in places where the belting was exposed to atmospheric influences, to all other forms of belting, and that his business in such belting was rapidly increasing, he began about the year 1879 for the purpose of identifying his belting and distinguishing it from the belting of other manufacturers, to advertise his belting as "camel-hair belting." Subsequently, he began to use the terms "camel belting," and "camel brand belting" in connection with his belting. From time to time he issued large numbers of circulars and price lists, in which he described his belting as "camel-hair belting," and in 1881 he registered as a trade mark the figure of a camel with three pulleys and a belt going round them. In subsequent years he registered other trade marks, in all of which either the figure of a camel or the word "camel" appeared, and was usually combined with drawings of pulleys and belting. Down to the date of this action the appellant Frank Reddaway and the appellants F. Reddaway & Co., Ltd., had widely and continuously advertised their belting in connection with such trade

marks, and described it in trade lists and circulars as "camel hair," or "camel," or "camel brand" belting, and had spent in advertising it upwards of £18,000. A

The yarn which was the chief constituent of the appellants' belting was made from a mixture of hair and wool, which was imported into this country from various Eastern ports, and was largely sold in this country to carpet manufacturers and others as "camel-hair yarn." It was admitted by the counsel for the appellants that "camel-hair yarn" was made of camel hair, and that camel-hair yarn constituted the largest ingredient of their belting. Prior to the use of this material by the appellant Frank Reddaway in the manufacture of belts, it was sold as brown worsted, and, except to the extent to which it was used for belting by the Lancashire Belting Co., it was used exclusively by carpet manufacturers. A very large proportion of the appellants' trade in such belting was with India and the colonies, to which countries large quantities of the belting had been consigned, and such belting had for many years past acquired a high reputation there. All such belting so consigned was stamped by the appellants, either with the figure of a camel, or with the word "camel," or both, and had come to be generally known, and was commonly inquired for as "camel" or "camel hair" belting, without any mention of the makers' name, the only persons or firms in India who had until recently used either the name "camel" or the figure of a camel in connection with belting being the appellants. B C D

The respondent George Banham had been in the employment of the appellants, but he left it about the end of 1889, and commenced the manufacture of cotton belting on his own account on a small scale. This belting he called "solid woven cotton belting." Subsequently he manufactured belting of the same materials as those from which the appellants' camel belting was made, except that linen was used as a substitute for cotton for binding the belting, and this belting he sold and advertised as "Arabian" belting. In 1891 he turned his business into a limited company, who were the respondents, George Banham & Co., Ltd., and they, in April or May, 1891, commenced selling and advertising belting as camel hair belting, selling it in England and also exporting it to India and elsewhere. The respondent, George Banham, stated during his cross-examination at the trial that the words "camel hair belting" and no other words or marks were in almost all cases stamped on the belting itself, and that only in a few exceptional instances did the respondent company stamp their names or any other distinguishing mark on their belting, with the result that the purchasers had no means of knowing who were the manufacturers of the articles they bought. E F

The appellants brought this action against the respondents to restrain them from infringing their trade mark. At the trial of the action, at Manchester, before Henn Collins, J., and a special jury, the learned judge left the following questions to the jury: G

> (i) "Does camel hair belting mean belting made by the plaintiffs as distinguished from belting made by other manufacturers? Answer: Yes. (ii) Or does it mean belting of a particular kind without reference to any particular maker? Answer: No. (iii) Do the defendants so describe their belting as to be likely to mislead purchasers, and to lead them to buy the defendants' belting as and for the belting of the plaintiffs? Answer: Yes. (iv) Did the defendants endeavour to pass off their goods as and for the goods of the plaintiffs so as to be likely to deceive purchasers? Answer: Yes." H

Upon these findings of the jury Henn Collins, J., entered judgment for the appellants with costs. The Court of Appeal reversed the decision of the learned judge on the ground that the belting of the respondents was made of such a material that it might fairly and properly be described as "camel hair belting," and that consequently the respondents were entitled to describe it as such in the manner in which they had described it. I

Moulton, Q.C., Asquith, Q.C., and *J. C. Graham* for the appellants.
Bigham, Q.C., McCall, Q.C., and *Cleave* for the respondents.

Their Lordships took time for consideration.

Mar. 26, 1896. The following opinions were read.

LORD HALSBURY, L.C.—I believe this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your Lordships have been engaged, that it is sometimes difficult, when examining former decisions, to disentangle what is decided as fact and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs, or pictures does or does not come up to the proposition which I have enunciated, in each particular case must always be a question of evidence, and the more simple the phraseology, the more a mere description of the article sold comes to be nearer to or far from a representation of the goods of the rival manufacturer, the greater becomes the difficulty of proof, but if the proof establishes the fact, the legal consequence appears to follow.

In this case the words "camel hair belting" suggest such a difficulty of proof. If I had been sitting as a juryman in this case I confess (but for a circumstance I am about to mention) I should have had great difficulty in acquiescing in the contention that a person was making his goods pass as the goods of somebody else by simply describing the subject of sale by these words. This belting is partly made or substantially made of camel hair. To me or to other persons not familiar with the trade this undoubtedly does seem simply a description of the article sold, and not a representation of its being made by a particular manufacturer. But then I should not know what persons engaged in the trade would know how far particular words, even though descriptive of the article sold, may have acquired a kind of technical signification which would give to them in the trade as completely the character of being made by a particular manufacturer as if they were stamped with his trade mark. The circumstance to which I referred is to be found in a letter dated June 12, 1891. The writer, who doubtless knew what he was doing, specially desires that the thing which he is ordering should bear no other stamp than "Camel Hair Belting," and if he gets that he adds: "I think I can take this order from Reddaways." I think that with this letter before them the jury were perfectly right, and that my prima facie impression from the words being only descriptive of the article sold would have been wrong.

The result is, in my mind, that the proof is satisfactory, and that one man's goods are being sold as if they were the goods of the other. Reliance appears to have been placed in the Court of Appeal on what was supposed to be decided in *Burgess* v. *Burgess* (2) by KNIGHT BRUCE and TURNER, L.JJ., and I think it is necessary to examine the decision in *Burgess* v. *Burgess* (2) to see what it really did decide and the facts upon which the decision was based. KINDERSLEY, V.-C., had by an injunction restrained the defendant from continuing to use the words "Late of 107, Strand," where he had been employed by his father, and from continuing on the sides of his shop door a plate with the words "Burgess's Fish Sauce Warehouse, late of 107, Strand." The defendant Burgess had for many years been in the employment of his father in the trade of an Italian and fish sauce warehouseman, and had shortly before the application for the injunction set up in King William Street a similar business, placing the words of which the Vice-Chancellor restrained the use on his shop door and the sides of his house. An appeal was brought against the refusal of the Vice-Chancellor to go further, and to prohibit the use of the words "Burgess's Essence of Anchovies" on any billhead, invoice, or advertisement. The refusal of KNIGHT BRUCE, L.J., to interfere with what the Vice-Chancellor had determined is stated by himself to be grounded on the fact that the defendant carried on business under his own name, "sells his essence of anchovies, which appears to be assumed to be a known article as Burgess's Essence of Anchovies, which in truth it is." The learned lord justice said (3 De G.M. & G. at p. 904):

"The whole ground of complaint is the great celebrity which during many years has been possessed by the elder Mr. Burgess's essence of anchovies. That does not give him such exclusive right, such a monopoly, such a privilege as to prevent any man from making essence of anchovies and selling it under his own name." A

He thus treated the words "essence of anchovies" as describing a known article not peculiar to any one manufacturer. TURNER, L.J., I think, most accurately says (ibid. at p. 905): B

"It is a question of evidence in each case whether there is false representation or not. Looking at the labels before us, I think it is clear that, since the order made by the Vice-Chancellor, there has been no representation made on the part of the defendant that the goods which he is selling are the goods manufactured by the plaintiffs." C

I only have to add to that that even then the learned judges did not conclude the question, for, dealing with an interlocutory injunction, as they were, they left the plaintiff, if he thought proper to try his action at law, and make out, if he could, that there was the false representation, which if made, would give a ground of action. D But it is most important to observe the hypothesis of fact upon which that judgment proceeds, and if the facts, such as they have been established in his case could have been made out, I cannot understand that there is any principle of law laid down which would have prevented an injunction, although the defendant's name was "Burgess," and although the article was described by a descriptive name, which, however, had not, as a matter of fact, in that case in the view of the judges the E technical signification of being only made by Burgess the father.

It seems to me, therefore, that there is nothing in that decision, or indeed in any other, which interferes with the propriety of an injunction where the proposition of fact with which I have started can be established; and it is to be observed that whatever the form of the injunction, if the principle of it is duly observed, it is only such a form as prevents the mischief pointed to. F It would be impossible, for instance, to say that a trader could not describe his goods truly by enumerating the particulars of which they consisted, unless such description was calculated to deceive and make his goods pass as the goods of another. What in each case or in each trade will produce the effect intended to be prohibited is a matter which must depend upon the circumstances of each trade, and the peculiarities of each trade. G It would be very rash a priori to say how far a thing might or might not be described without being familiar with the technology of the trade. For these reasons I move that the judgment of the Court of Appeal be reversed, and that the respondents do pay to the appellants the costs both here and below.

LORD HERSCHELL stated the facts and continued: Upon the findings of the H jury HENN COLLINS, J., entered judgment for the appellants with costs, and he granted an injunction restraining the respondents from continuing to use the word "camel hair" in such a manner as to lead purchasers into the belief that they are purchasing belting of the appellants' manufacture, and from thereby passing off their belting as and for the belting of the appellants' manufacture. On appeal, the judgment of HENN COLLINS, J., was reversed, and judgment entered for the respon- I dents. In the opinion of the Court of Appeal inasmuch as the words "camel hair belting" were descriptive of the article sold, the words "camel hair" indicating the material of which it was made, the respondents were entitled to use the same language as that used by the appellants with reference to the belting which they sold, and the appellants could have no right to restrain them from doing so, even though, as the jury had found the words "camel hair belting" would be understood to mean belting manufactured by the appellants, and purchasers of the belting would be deceived into the belief that they were obtaining goods of the appellants'

manufacture. The Master of the Rolls expressed the view that a manufacturer might obtain the right to prevent a person using a name which would be understood as his, and the use of which would thus interfere with his trade, but that, though this was the fundamental proposition, you could not restrain a man from telling the simple truth, and that this was all the respondents had done when they called their belting "camel hair belting." It must be taken, if the findings of the jury are to stand, on which I shall have a word or two to say presently, that the description by the respondents of their belting as "camel hair belting" would deceive purchasers into the belief that they were getting something which they were not getting, namely, belting made by Reddaway. If they would be thus deceived by the respondents' statement, there must surely be some fallacy in saying that they have told the simple truth. I will state presently where I think the fallacy lurks.

Before I do so, however, it is right that I should say that there appears to me abundant evidence to support the findings of the jury. For many years belting made of camel hair yarn had been known in the markets of the world. It had been sold under a variety of names. But there was ample evidence to justify the finding that among those who were the purchasers of such goods the words "camel hair" were not applied to belting made of that material in general—that, in short, it did not mean in the market belting made of a particular material, but meant belting made by a particular manufacturer. It is impossible, I think, to read the correspondence which passed between the respondents and those who were ordering goods of, or procuring orders for them, without seeing that this was the case. Moreover, it is impossible to doubt that the respondents were well aware of the fact. They begin by calling their belting "Arabian," and state that they are prepared to guarantee it "to be better than the belting commonly called 'camel-hair belting.'" They are told by one of their correspondents that if he has a sample similar to one he forwards (which was made by Reddaway) "stamped 'Camel Hair Belting,' nothing more" he thinks he can take this order from Reddaways. They do their best to comply with their correspondents' wish, and send belting so stamped. Another correspondent asks for 500 feet, whch is to be quite equal to Reddaways' "Camel Hair Belting," and must be in every respect identical with the sample of that make. It was to be stamped "Warranted best Camel Hair Belting." In that, or another case, it is not quite clear which, the respondents stated to the firm whom they employed to manufacture the belting that no manufacturer's name must appear on it or it would be useless.

I see no reason to be otherwise than completely satisfied with the answers which the jury gave. On this assumption I proceed to inquire whether the appellants have made out any right to relief. I cannot help saying that, if the respondents are entitled to lead purchasers to believe that they are getting the appellants' manufacture when they are not, and thus to cheat the appellants of some of their legitimate trade, I should regret to find that the law was powerless to enforce the most elementary principles of commercial morality. I do not think that your Lordships are driven to any such conclusion. The principle which is applicable to this class of cases was, in my judgment, well laid down by LORD KINGSDOWN in *Leather Cloth Co.* v. *American Cloth Co.* (1). It had been previously enunciated in much the same way by LORD LANGDALE in *Croft* v. *Day* (3). LORD KINGSDOWN's words were as follows (11 H.L.Cas. at p. 538):

> "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore (in the language of LORD LANGDALE in the case of *Perry* v. *Truefitt* (6 Beav. at p. 73) 'be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.' "

It is, in my opinion, this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival

trader, whether it is done by the use of a mark which has become his trade mark, or in any other way. A

The word "property" has been sometimes applied to what has been termed a trade mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade mark, though, no doubt, some of the rights which are incident to property may attach to it. Where the trade mark is a word or device never in use before, and meaningless except as indicating by whom the goods in connection with which it is used were made, there can be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade mark of one manufacturer had been thus appropriated by another would be enough to bring the case within the rule as laid down by LORD KINGSDOWN, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade mark thus identified with a particular manufactory the rights of the person whose trade mark it was would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property. But there are other cases which equally come within the rule that a man may not pass off his goods as those of his rival, which are not of this simple character—cases where the mere use of the particular mark or device which has been employed by another manufacturer would not of itself necessarily indicate that the person who employed it was thereby inducing purchasers to believe that the goods he was selling were the goods of another manufacturer. The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances, or in such manner as to put off his goods as the goods of the plaintiff. If he could succeed in proving this, I think that he would, on well-established principles, be entitled to an injunction. B C D E F

In my opinion, the doctrine on which the judgment of the Court of Appeal was based—that where a manufacturer has used as his trade mark a descriptive word, he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade mark—is not supported by authority, and cannot be defended on principle. I am unable to see why a man should be allowed in this way, more than in any other, to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of a rival. The authority relied on was *Burgess* v. *Burgess* (2). When the judgments in that case are examined, it seems to me clear that no such point was decided. TURNER, L.J., commences by saying (3 De G.M. & G. at pp. 904, 905): G H

> "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

He then points out that where a person is selling goods under a particular name, and a person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses; but where the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. He adds: "It is a question of evidence in each case whether there is a false representation or not." This, I think, clearly recognises that a man may so use even his own name in connection with the sale of goods so as to make a false representation. I

In *Massam* v. *Thorley's Cattle Food Co.* (5), JAMES, L.J., said (14 Ch.D. at p. 752):

> "*Burgess* v. *Burgess* (2) has been very much misunderstood if it has been understood to decide that anybody can always use his own name as a description of an article whatever may be the consequences of it, or whatever may be the motive for doing it, or whatever may be the result of it."

After quoting from the judgment of TURNER, L.J., the passages to which I have just referred, he said (ibid. at p. 753):

> "That I take to be an accurate statement of the law, and to have been adopted by the House of Lords in *Wotherspoon* v. *Currie* (6) in which the House of Lords differed from the view which I had taken."

The decision in *Wotherspoon* v. *Currie* (6) is an important one, and is, in my judgment, inconsistent with the ratio decidendi of the Court of Appeal in the present case. The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it prima facie means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as "camel hair" is descriptive of the material of which the plaintiff's belting is made. LORD WESTBURY pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff. In *Massam* v. *Thorley's Cattle Food Co.* (5) just referred to, JAMES, L.J., said (14 Ch.D. at p. 753):

> "The defendant was actually manufacturing starch at Glenfield, having gone thither for the purpose of enabling him to say that he was manufacturing it at Glenfield. The House of Lords said that the mere fact that he was really carrying on his manufacture at Glenfield, and was not, therefore, telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiffs."

I think that this view of the decision of the House of Lords was correct, and that it is at variance with the view taken by the Court of Appeal that the respondents in the present case could not be liable to an action because in using the words "camel hair," in connection with their belting, they were simply telling the truth. I rather demur, however, to the statement of JAMES, L.J., that the defendant in *Wotherspoon* v. *Currie* (6) was not telling a lie in calling his starch "Glenfield starch," as I do to the view that the respondents here were telling the simple truth when they sold their belting as camel hair belting. I think the fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which is false, and knows and intends this to be the case, is surely not to be absolved from a charge of falsehood, because in another sense which will not be conveyed and is not intended to be conveyed, it is true. In the present case the jury have found, and, in my opinion, there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the appellants. They have found that the effect of using the words in the manner in

which they were used by the respondents would be to lead purchasers to believe that they were obtaining goods manufactured by the appellants, and thus both to deceive them and to injure the appellants. On authority, as well as on principle, I think the appellants are in these facts entitled to relief.

Massam v. *Thorley's Cattle Food Co.* (5), from the judgment of JAMES, L.J., from which I have already quoted, is an authority in favour of the appellants' contention. It was argued for the respondents that in that case there was fraud, inasmuch as Thorley, whose name formed part of the designation of the company, had only a small, indeed, it may be said a nominal, interest in it. I do not think that this was the foundation of the judgment; the reasoning of JAMES, L.J., would have been equally forcible if Thorley's interest had been the principal one. The company had quite as much right to call themselves by the name they adopted as by any other. What they were restrained from doing was endeavouring to pass off their goods as the goods of another manufacturer. This was the wrongful act which brought them within the reach of the law, and not the particular means by which they carried out their design.

Besides the cases to which I have referred, there are other authorities which support the appellants' case. I need only mention one—*Montgomery* v. *Thompson* (7) in your Lordships' House. It was said in the court below that the judgment there proceeded on the ground that the defendant had acted fraudulently. But the only fraud consisted in doing acts designed to cause persons to purchase his goods as and for the plaintiffs'. The acts commented on were only the means devised to accomplish that end. On the findings of the jury I think that precisely the same kind of fraud is present in the case under appeal. I ought, perhaps, to notice *Turton* v. *Turton* (8), which was said to be an authority in the respondents' favour. The case was, I think, an entirely different one. There was no proof that the defendants were passing off their goods as those of the plaintiffs, the utmost that was shown was that similarity (there was not identity) in the name of the firms might lead incautious persons to make mistakes. Reliance was placed for the respondents upon the decision of WOOD, V.-C., in *Young* v. *Macrae* (9), and in the Court of Appeal RIGBY, L.J., regarded it as adverse to the appellants' contention. When carefully examined I do not think that it is so. Where a patentee attaches a particular name to the production he patents, that name becomes common property as descriptive of the patented article. It possesses, indeed, no other name. That name would necessarily be applied to it by all persons desiring to purchase the article. It is not descriptive of the production of a particular manufacturer, but of the article itself, by whomsoever it is manufactured. Indeed, there is no presumption that the patentee will manufacture it, even during the term of the patent; more often than not patented articles are manufactured by other persons by the licence of the patentee.

What right, it was asked, can an individual have to restrain another from using a common English word because he has chosen to employ it as his trade mark? I answer, he has no such right; but he has a right to insist that it shall not be used without explanation or qualification if such a use would be an instrument of fraud. Who suffer injury by such a conclusion, or would be the worse if the defendant is thus restrained? It has been shown that the public had not needed the words "camel hair" do describe a particular kind of belting, that the words have never been used in the trade in that sense. What JAMES, L.J., said in *Thorley's Case* (5) is applicable to the present. He observed (14 Ch.D. at p. 755):

> "Thorley's Food for Cattle had never become an article of commerce as distinguished from the particular manufactory from which it had proceeded."

It is not proposed, in the present case, to prohibit the use of the words "camel hair" altogether. The injunction granted by HENN COLLINS, J., had not that effect. In the case just referred to the counsel for the plaintiff, at the conclusion of the judgment, asked whether the substance of their Lordships' judgment was not that the

defendants were not to use the name Thorley in connection with their cattle food. JAMES, L.J., replied (ibid. at p. 763):

> "We cannot prohibit them from using the name if they use it in a way not calculated to mislead the public."

I say the same about the use of the words "camel hair" in the present case. For these reasons, I think that the judgment of the Court of Appeal should be reversed.

LORD MACNAGHTEN.—In this case your Lordships are not asked, at least by the appellants, to lay down any new law. The appellants are content to rely upon the old and familiar doctrines of the court which have been repeated over and over again. In a well-known trade mark case—*Singer Manufacturing Co.* v. *Loog* (10), in which there was no claim to a registered mark—JAMES, L.J., said (18 Ch.D. at p. 412):

> "I have often endeavoured to express what I am going to express now (and probably I have said it in the same words, because it is very difficult to find other words in which to express it), that is, that no man is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign, or symbol, device or other means whereby, without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie, or to make a false representation to somebody else who is the ultimate customer. That being, as it appears to me, a comprehensive statement of what the law is upon the question of trade mark or trade designation, I am of opinion that there is no such thing as a monopoly, or a property in the nature of a copyright, or in the nature of a patent, in the use of any name. Whatever name is used to designate goods, anybody may use that name to designate goods, always subject to this, that he must not, as I said, make directly or through the medium of another person, a false representation that his goods are the goods of another person. That I take to be the law."

I have cited this passage because it seems to me to state clearly the principle on which Mr. Reddaway and his associates are entitled to relief against Mr. Banham and the company of which he is managing director. The substance of Reddaway's complaint, as I understand it, is that Mr. Banham is putting his goods on the market under a designation which enables purchasers from him to make a false representation to their customers. It is immaterial that the designation in question taken by itself would convey to a person not conversant with the trade information which cannot be called untrue, if by means of that designation Mr. Banham does make, not perhaps directly, but certainly through the medium of other persons, a false representation that his goods are the goods of Reddaway. Reddaway and Banham—I use those names for shortness—are both manufacturers of hair belting, a kind of belting which is much used for driving machinery. This article has a large sale at home and abroad. In countries where the heat is great and the air very dry it is preferable to leather. Hair belting, whoever the maker of it may be, is generally composed more or less of stuff imported into England, and sold in the English market as "camel hair." Until recently nobody seems to have imagined that the camel hair of commerce was true to name. It was believed to be a mixture of hair—hair of sheep and goats, and various Eastern animals—in which the hair of the camel might be found, but which did not even pretend to be really camel's hair. Indeed, so little importance was attached to its nominal connection with the camel, that until it acquired some celebrity through Reddaway's manufacture, the yarn made from it used to be sold in the market simply as brown worsted. It seems to have been the fashion for manufacturers of hair belting to distinguish their goods by the name of some chosen animal, hairy or hairless. There was, for instance, "buffalo belting," "yak belting" and "crocodile belting." Reddaway, unfortunately for him, as it turned out, selected the camel as his emblem. He

called his belting "camel hair belting." Owing to the excellence of his manufacture, his belting became widely known all over the world. It was advertised as camel hair belting. It was ordered, sold, and invoiced as such; and so camel hair belting came to mean Reddaway's belting, and nothing else.

It was admitted at the trial that for about fourteen years no belting had been made or sold under the description of camel hair or camel hair belting except by Reddaway and certain persons whom he had promptly challenged and stopped. Indeed, so long as the expression camel hair belting was taken to be a fanciful designation, Reddaway had no difficulty in holding the field against any interloper who hoped to find more profit and less trouble in trading on another man's reputation than on his own merits. Banham was for two years in the employment of Reddaway at his works. In 1889 he set up for himself, and began to make hair belting. Like others in the trade he used more or less the camel hair of commerce. At first he called his belting "Arabian belting." Then he began cautiously and tentatively to offer his goods as "camel hair belting." After 1891, when he turned his business into a limited company, his proceedings were marked with less caution; at least, they attracted Reddaway's attention, and then the present action was brought. The action was launched on the footing that the expression camel hair belting was a fanciful term. But in the course of the trial it was proved, partly by the evidence of experts, and partly by an exhibit collected from a living animal in the Zoological Gardens at Manchester, that the camel hair of commerce, of which many bundles were produced, was really and truly for the most part composed of genuine camel's hair. This evidence seems to have come as a revelation to Reddaway and his advisers. However, they accepted the situation, and forbore to contest the point further. And so it was established that Reddaway's trade designation, instead of being, as everybody supposed, a fanciful term, was nothing more or less than a substantially accurate description of the material of which his belting was composed.

The Court of Appeal treat this discovery as the end of the whole matter. They hold that, on this one fact being established, Banham became entitled to put his goods on the market as camel hair belting without any qualification whatever. Anybody and everybody who wants to get a footing in the connection which Reddaway has formed is now free, if the Court of Appeal is right, to use Reddaway's password. The appellants concede—they cannot, indeed, any longer dispute—that everybody who makes belting of camel hair is entitled to describe his belting as camel hair belting, provided he does so fairly. But they contend, and I think with reason, that neither Banham nor anybody else is entitled to steal Reddaway's trade under colour of imparting accurate and possibly interesting information. Practically the only difference which the unexpected turn in the evidence has made is this: the case now comes more properly under the second branch of the proposition laid down by JAMES, L.J., whereas, if camel hair belting had kept its place as a fanciful term it would have fallen under the first. The learned counsel for the respondents maintained that the expression camel hair belting used by Banham was "the simple truth." Their proposition was that "where a man is simply telling the truth as to the way in which his goods are made, or as to the materials of which they are composed, he cannot be held liable for mistakes which the public may make." That seems to me to be rather begging the question. Can it be said that the description "camel hair belting," as used by Banham, is the simple truth? I will not call it an abuse of language to say so, but certainly it is not altogether a happy expression. The whole merit of that description, its one virtue, for Banham's purposes, lies in its duplicity. It means two things. At Banham's works, where it cannot mean Reddaway's belting, it may be construed to mean belting made of camel's hair. Abroad to the German manufacturer, to the Bombay millowner, to the up-country native it must mean Reddaway's belting—it can mean nothing else. I venture to think that a statement which is literally true, but is intended to convey a false impression, has something of a faulty ring about it. It is not sterling coin; it has no right to the genuine stamp and impress of truth.

I have now dealt with the only peculiarity in the case. For the rest the action is one of a very ordinary type. In a trial which lasted three days, after a summing-up which seems to me to be admirably concise and clear, a special jury of the county of Lancaster found that "camel hair belting" means belting made by Reddaway, and that it does not mean belting of a peculiar kind without reference to any particular maker. They also found that the respondents describe their belting so as to be likely to mislead customers, and to lead them to buy their belting as and for the belting of the appellants. There was another finding, not perhaps necessary for the decision, on which I desire to say a few words. It is stated in the judgment of the Master of the Rolls, that the learned counsel for the appellants at the trial did not appear to have asked the judge to leave to the jury the question whether the respondents had done anything fraudulently. "Indeed," his Lordship adds, "no such question seems to have been raised by the pleadings." If your Lordships turn to the pleadings you will observe that the question was raised directly. It is quite true that the word fraud is not to be found in the statement of claim. But the whole gist of the action was that the respondents were endeavouring to palm off their goods as the goods of the appellants by selling them under a designation which would enable purchasers from them in this country to deceive customers abroad. That is, as it seems to me, a charge of dishonesty, and I must say I think the charge was established. It was proved by admissions wrung from Mr. Banham on cross-examination and by the correspondence which was put in evidence. When a manufacturer's goods are a drug on the market, so long as they bear his own name, or proclaim their true origin, and yet are saleable at once if marked with nothing but some common English words, and when that manufacturer holds himself out as ready and willing so to mark his goods, and does so mark them at the "instigation," as he says, of a purchaser, a Lancashire jury may perhaps be trusted to solve the riddle. The jury found, and, in my opinion, rightly found, that the respondents endeavoured to pass off their goods as and for the goods of the appellants.

Cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another. I do not, therefore, propose to trouble your Lordships with any reference to authorities except those relied on in the judgment of the Court of Appeal. The judgment of TURNER, L.J., in *Burgess* v. *Burgess* (2), though eclipsed, as it has been said, in public favour by the brilliancy and point of his colleague's language, is an accurate and masterly summary of the law. But it seems to me to be an authority in favour of Reddaway, and not in favour of Banham. I am quite at a loss to know why *Turton* v. *Turton* (8) was ever reported. The plaintiff's case there was extravagant and absurd. With regard to *Young* v. *Macrae* (9), which is referred to at some length, it must be remembered that it was a judgment on an interlocutory application, and that the Vice-Chancellor reserved the question for the hearing with an intimation that it would then deserve serious consideration. It does not seem to me to have any bearing upon the present case, and I only notice it to observe that whenever it is quoted the Vice-Chancellor's comments upon his own decision ought not to be lost sight of. On a later occasion in *Braham* v. *Bustard* (11) the Vice-Chancellor said (1 Hem. & M. at p. 454):

> "I had to consider this question in the case of Young's paraffin oil [*Young* v. *Macrae* (9)], and in that case if the evidence had shown that the plaintiff had been the first to apply the name paraffin to the oil, I should have granted an injunction, but there I had it proved that the name 'paraffin oil' had long been known as the scientific name of the article, and that the defendant could not well have called it anything else."

Lastly, *Montgomery* v. *Thompson* (7) was cited, but only for the purpose of putting it aside; I am sure I do not know why. That was a gross case, no doubt, but fraud is infinite in variety. Sometimes it is audacious and unblushing; sometimes it

pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it. But fraud is fraud all the same; and it is the fraud, not the manner of it, which calls for the interposition of the court. In principle and in substance I can see no difference between the present case and *Montgomery* v. *Thompson* (7).

In the result I am of opinion that the appeal must be allowed. As regards the form of the injunction I should be disposed to say that in all cases where the defendant is to be restrained from using unfairly words or marks which he is at liberty to use provided only they are used fairly, it would be better that the injunction should go in the form approved by this House in *Johnston* v. *Orr Ewing* (12), and I, therefore, concur in the motion that has been proposed.

LORD MORRIS.—I have felt some difficulty in concurring as I do in the judgment proposed to be given in favour of the appellants by your Lordships, for it establishes, and, in my opinion, for the first time, the proposition that a trader is not permitted merely to tell truthfully and accurately the material of which his goods are made. I find myself coerced, however, to a conclusion against the respondents by the finding of the jury, which amounts to this, that camel hair belting had become so identified with the name of the appellants, Reddaway, as that camel hair belting had in the market obtained the meaning of Reddaway's belting, and there was sufficient evidence given at the trial to support that finding of the jury. That finding establishes as a fact that use of the words "camel hair belting" simpliciter deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public. That something, to my mind, is obviously done when the respondents put prominently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name "camel hair belting," irrespective of its deceiving the public, and everyone has a right to describe truly his article by that name provided he distinguishes it from the appellants' make. In this case the respondents did not so distinguish it, because they omitted to state that it was their own make. Consequently, I concur in the motion which has been made.

Appeal allowed.

Solicitors: *W. J. & E. H. Tremellen*, for *A. Macdonald Blair*, Manchester; *Chester, Mayhew, Broome & Griffithes*, for *Chew, Sons & Hilditch*, Manchester.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

GROVES *v.* LORD WIMBORNE

[COURT OF APPEAL (A. L. Smith, Rigby and Vaughan Williams, L.JJ.), June 28, 1898]

B

[Reported [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 47 W.R. 87; 14 T.L.R. 493; 42 Sol. Jo. 633]

Statutory Duty—Breach—Competency of civil action at suit of injured person—Construction of statute as a whole—Penalty provided for breach—Matters to be considered—Factory—Failure to fence dangerous machinery—Injury to C *worker.*

When a statute provides for the performance by a certain person of a particular duty and someone for whose protection the statute was passed is injured by a failure to perform that statutory duty an action will lie by the person injured against the person who has failed to perform the duty unless it appears from the whole purview of the statute that the legislature intended D that the only remedy for a breach of the duty created by the Act should be a penalty imposed by the Act. In determining this question, the fact that the remedy given by the statute is to enure for the benefit of the person injured is a cogent and weighty fact to be taken into account, but the nature of the duty imposed by the Act, the nature of the injuries likely to be caused by a breach of the duty, the amount of the penalty to be imposed, and the person E on whom it is imposed have also to be considered.

A workman employed in a factory was injured through a breach of the duty, imposed on the occupier of the factory by s. 5 of the Factory and Workshop Act, 1878, of securely fencing dangerous machinery in the factory.

Held: an action would lie by the workman to recover from the occupier damages for breach of his statutory duty.

F

Notes. The Factory and Workshop Act, 1878, and the amending Act of 1891 have been repealed. The equivalent sections to ss. 5 and 86 of the Act of 1878, as amended are now ss. 14 and 155 (2) of the Factories Act, 1961: 41 HALSBURY'S STATUTES (2nd Edn.) 239. Section 82 of the Act of 1878 was re-enacted by the Factories Act, 1937, s. 133, but that section was repealed by the Factories Act, G 1959, and not re-enacted.

Applied: *David* v. *Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146. Considered: *Watkins* v. *Naval Colliery Co. (1897), Ltd.*, [1911] 2 K.B. 162; *Butler (or Black)* v. *Winskill*, [1911-13] All E.R. Rep. 318. Applied: *Jones* v. *Canadian Pacific Rail. Co.* (1913), 83 L.J.P.C. 13; *R.* v. *Marshland Smeeth and Fen District Comrs.*, [1920] 1 K.B. 155. Considered: *G. Scammell and Nephew, Ltd.* v. *Hurley*, [1929] H 1 K.B. 419. Applied: *Higgins* v. *Harrison* (1932), 25 B.W.C.C. 113. Distinguished: *Rudd* v. *Elder Dempster & Co.* (1932), 49 T.L.R. 202. Considered: *Wheeler* v. *New Merton Board Mills, Ltd.*, [1933] All E.R. Rep. 28; *Lochgelly Iron and Coal Co.* v. *McMullan*, [1934] A.C. 1; *Square* v. *Model Farm Dairies (Bournemouth), Ltd.*, [1939] 1 All E.R. 259; *Knott* v. *L.C.C.*, [1943] 1 K.B. 126. Applied: *Leicester Permanent Building Society* v. *Butt*, [1943] 2 All E.R. 523. I Considered: *Biddle* v. *Truvox Engineering Co.*, [1951] 2 All E.R. 835. Applied: *Solomons* v. *Gertzenstein, Ltd.*, [1954] 2 All E.R. 625. Referred to: *Crossfield* v. *Manchester Ship Canal Co.* (1904), 73 L.J.Ch. 345; *Gibson* v. *Dunkerley, Lees* v. *Sykes* (1910), 102 L.T. 587; *Pursell* v. *Clement Talbot* (1914), 111 L.T. 827; *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K.B. 131; *Fowler* v. *Kibble*, [1922] All E.R. Rep. 626; *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] All E.R. Rep. 127; *Dew* v. *United British Steamship Co.* (1928), 139 L.T. 628; *Monk* v. *Warbey*, [1935] 1 K.B. 75; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1936] A.C. 206; *Kearns* v. *Gee, Walker and Slater, Ltd.*, [1936] 3 All

E.R. 151; *Craze* v. *Meyer-Dunmore Bottlers' Equipment Co.*, [1936] 2 All E.R. 1150; *Murray* v. *Schwachman, Ltd.*, [1937] 2 All E.R. 68; *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; *Lewis* v. *Denyé*, [1939] 1 All E.R. 310; *The Napier Star*, [1939] P. 330; *Stimson* v. *Standard Telephones and Cables, Ltd.*, [1939] 2 All E.R. 441; *Youngman* v. *Pirelli General Cable Works, Ltd.*, [1940] 1 K.B. 1; *London Armoury Co.* v. *Ever Ready Co. (Great Britain) Ltd.*, [1941] 1 All E.R. 364; *Yellard* v. *Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278; *Potts (or Riddell)* v. *Reid*, [1942] 2 All E.R. 161; *George* v. *Mitchell and King*, [1943] 1 All E.R. 233; *Clark* v. *Brims*, [1947] 1 All E.R. 242; *Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544; *Harrison* v. *National Coal Board*, [1951] 1 All E.R. 1102; *Green* v. *Portsmouth Stadium, Ltd.*, [1953] 2 All E.R. 102; *Hartley* v. *Mayoh & Co.*, [1954] 1 All E.R. 375; *Watt* v. *Kesteven County Council*, [1954] 3 All E.R. 441; *Bryers* v. *Canadian Pacific Steamship Co., Ltd.*, [1956] 3 All E.R. 560.

As to actions for the breach of statutory duties, see 36 HALSBURY'S LAWS (3rd Edn.) 449 et seq., and for cases see cases there cited and 42 DIGEST 725.

Cases referred to:

(1) *Gorris* v. *Scott* (1874), L.R. 9 Exch. 125; 43 L.J.Ex. 92; 30 L.T. 431; 22 W.R. 575; 2 Asp.M.L.C. 282, Ex. Ch.; 42 Digest 759, *1853*.

(2) *Britton* v. *Great Western Cotton Co.* (1872), L.R. 7 Exch. 130; 41 L.J.Ex. 99; 27 L.T. 125; 20 W.R. 525; 24 Digest (Repl.) 1046, *171*.

(3) *Kelly* v. *Glebe Sugar Refining Co.* (1893), 20 R. (Ct. of Sess.) 833; 30 Sc.L.R. 758; 1 S.L.T. 88; 24 Digest (Repl.) 1046, **61*.

(4) *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex.D. 441, 46 L.J.Ex. 775; 36 L.T. 761; 42 J.P. 183; 25 W.R. 794, C.A.; 42 Digest 759, *1850*.

(5) *Vallance* v. *Falle* (1884), 13 Q.B.D. 109; 53 L.J.Q.B. 459; 51 L.T. 158; 48 J.P. 519; 32 W.R. 770; 5 Asp.M.L.C. 280, D.C.; 41 Digest 253, *943*.

Also referred to in argument:

Cowley v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290*.

Ross v. *Rugg-Price* (1876), 1 Ex.D. 269; 45 L.J.Q.B. 777; 34 L.T. 535; 24 W.R. 786; 42 Digest 751, *1746*.

Appeal from the decision of GRANTHAM, J., at the trial of the action with a jury.

The plaintiff, a boy of fifteen years of age, was employed at the Dowlais Iron Works, near Cardiff, which was a "factory" within the meaning of the Factory and Workshop Act, 1878, the defendant being the "occupier" within the meaning of the Act. On July 21, 1896, the plaintiff was at work at a steam winch, and, there being, on that day, no efficient fencing of the machinery, his hand was caught between the cogs of two of the wheels, and he was injured. By his statement of claim the plaintiff alleged that the defendant, in breach of his statutory duty, did not securely or at all fence the dangerous part of the machinery, but allowed it to remain in an unfenced condition, whereby the damage complained of was caused to the plaintiff, and, alternatively, that the defendant had negligently and improperly allowed the steam winch to be and remain out of repair and defective, so as to be dangerous to the plaintiff lawfully using the same at the request of the defendant. The defendant pleaded (inter alia) that no action lay for any breach of his statutory duty under the Factory Acts, and that an efficient guard had been provided for the steam winch, the absence of which, at the time of the accident, was due to the negligence of a fellow workman with the plaintiff in the same common employment, and that the foreman entrusted with the duty of superintending the said machinery was a fit and proper person for that purpose. At the trial before GRANTHAM, J., with a jury, the learned judge was of opinion that the provisions of the Factory and Workshop Act, 1878, which were relied on by the plaintiff, should be looked upon as a private legislative bargain with the

people working in factories, and he held that an action could not be maintained for a statutory wrong under that Act. He, therefore, gave judgment for the defendant, but in case it should be held that the plaintiff was entitled to recover in the action he left to the jury the question of the damages which the plaintiff might be entitled to, and the jury gave a verdict for £150. From this decision the plaintiff now appealed.

By the Factory and Workshop Act, 1878, as amended by the Factory and Workshop Act, 1891:

"Section 5. With respect to the fencing of machinery in a factory the following provisions shall have effect. . . . (3) All dangerous parts of the machinery and every part of the mill gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced; and (4) All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion. . . .

"Section 82. If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced, or having neglected to maintain such fencing . . . the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds, the whole or any part of which may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines.

"Section 86. Where an offence for which the occupier of a factory or workshop is liable under this Act to a fine, has in fact been committed by some agent, servant, workman, or other person, such agent, servant, workman, or other person shall be liable to the same fine as if he were the occupier."

Section 87 gave power to the occupier to exempt himself from fine on conviction of the actual offender.

Abel Thomas, *Q.C.*, and *S. T. Evans* for the plaintiff.
Francis Williams, *Q.C.*, and *Bailhache* for the defendant.

A. L. SMITH, L.J.—This is an action brought against the occupier of the Dowlais ironworks, founded upon a breach of the defendant's statutory duty to fence certain machinery at the works, by reason of which breach of duty the plaintiff, in the course of his employment there, suffered personal injuries. At the trial of the action Grantham, J., gave judgment for the defendant upon the ground that no action would lie for the breach of the statutory duty alleged by the plaintiff.

By the Factory and Workshop Act, 1878, certain duties as to fencing machinery are cast upon the occupiers of factories. In imposing these duties that Act has followed the principles of many previous Acts relating to factories and workshops. It is a public Act passed to compel the occupiers of factories to take certain precautions on behalf of their workmen. It is not, as the learned judge at the trial thought it was, in the nature of a private legislative bargain between masters and men, but a legislative enactment in compulsion of the masters. Let us now consider what are the duties imposed by this Act upon occupiers of factories with regard to fencing machinery. Section 5 makes certain provisions "with respect to the fencing of machinery in a factory," and by sub-s. (3) as amended by the Factory and Workshop Act, 1891, s. 6 (2):

"All dangerous parts of the machinery and every part of the mill-gearing shall either be securely fenced or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced."

By sub-s. (4):

"All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion."

In the present case it is conceded that the machinery which caused the injury to the plaintiff was not fenced as required by the Act. Proof that there had been a breach of the statutory duty to fence imposed on the defendant, and that the plaintiff had been thereby injured would prima facie establish the plaintiff's cause of action.

Assuming that the matter depended on s. 5 alone, and that ss. 81, 82, and 86 had formed no part of the Act, could it be doubted that a person injured as the plaintiff has been could sue for the damage caused to him by the breach of the statutory duty imposed on the defendant? Clearly not. Therefore, unless it can be found from the whole purview of the Act that the legislature intended that the only remedy for a breach of the duty created by the Act should be the infliction of a fine upon the master, it seems clear to me that upon proof of such a breach of duty and of an injury done to the workman, a cause of action is given to the workman against the master.

That brings me to the question whether the cause of action which would prima facie be given by the Act has been taken away by any of the provisions enacted in the statute. Reliance has been placed upon ss. 81, 82, and 86, and it has been argued that, under these sections, the only remedy provided in a case where a workman has been injured by a breach of a duty imposed upon the master by the Act is an application to a court of summary jurisdiction for the infliction of a fine. In considering this question, I ask myself in whose favour was the Act passed? As was pointed out by KELLY, C.B., in *Gorris* v. *Scott* (1) the purposes which the legislature had in view in passing the Act are very material. I feel no doubt that the Act was passed for the benefit of workmen in factories, by compelling the masters to do certain things for their protection. I do not think that ss. 81, 82, and 86 can be interpreted so as to take away from an injured workman the remedy which otherwise he would have under the statute against his master. Not one penny of a fine imposed under these sections need ever go into the pocket of the person injured. It is only when a Secretary of State so determines that any part of the fine is to be applied for the benefit of the injured workman. I cannot think that such an enactment was intended to deprive the workman of his right of action. Moreover, upon what grounds are the magistrates to whom application has been made under these sections to estimate the amount of the fine to be imposed? Suppose that a workman has been killed in consequence of a breach of the master's statutory duty to fence his machinery, should the fine be of the same amount whether the breach of duty was a flagrant one or not? It is contended that the magistrates ought to take into consideration the nature of the injury which the workman has suffered, but I do not feel at all clear that that is what the legislature intended by these sections. I am inclined to think that the object of these provisions is the infliction of punishment on the master who has neglected his duty, and that the fine should be in proportion to his offence. The consideration of these points leads me to the conclusion that it was not the intention of the legislature to take away by means of these sections the right which the workman would otherwise have to be properly compensated for any injury caused to him by his master's neglect of duty.

There is also another ground which I should have mentioned which supports me in arriving at that conclusion. It is this. There is no necessity that the fine inflicted under these sections should be payable by the master, who would presumably be a man of some means. Under ss. 86 and 87 the fine may be imposed upon the actual offender, and it is provided that the master may then obtain exemption from the penalty. The actual offender may be a workman earning weekly wages, and yet it is said that the infliction of a fine on him is to be the

only remedy that the injured person is to have. I cannot read this statute in the way in which the defendant seeks to read it. In my opinion, s. 5 gives to a workman a right of action upon the statute, when he has been injured through a breach of the duties created by the statute, and his rights of compensation are not limited by the provisions of the Act with regard to a fine that may be imposed by a court of summary jurisdiction.

A great many cases were cited in the course of the argument, but out of all those decided from the time of the Factory Act, 1844, down to the present day, there is not one which shows that an action will not lie by a workman injured by a breach of a statutory duty. There are, however, two cases much in point which are opposed to the defendant's contention. One is *Britton* v. *Great Western Cotton Co.* (2) which, I think, covers the present case. The breach of duty in that case was the neglect to provide fencing for machinery, while in the present case the breach consists in neglecting to maintain the fencing, but I do not think there is any substantial difference between the two cases. Then there is the Scottish case of *Kelly* v. *Glebe Sugar Refining Co.* (3) which, of course is not binding upon this court, but is directly in the plaintiff's favour. Taking into consideration the matters I have mentioned, I am clearly of opinion that the plaintiff had a good cause of action against the defendant so far as the Factory and Workshop Act, 1878, is concerned.

[HIS LORDSHIP then held that the defence of common employment, abolished by the Law Reform (Personal Injuries) Act, 1948, was not available in an action for a breach of a statutory duty incumbent on the defendant, and concluded:] In my opinion the appeal must be allowed, and judgment entered for the £150 damages assessed by the jury.

RIGBY, L.J.—I agree in all that has been said by A. L. SMITH, L.J. The only question we have to decide arises on the true construction of the Factory and Workshop Act, 1878. The question is whether, having regard to the whole purview of the Act, the clauses providing penalties for a breach of the statutory duties created by the Act are the only ones under which a remedy can be obtained for any such breach.

Section 5 throws on the occupier of a factory or workshop an absolute and unqualified duty to fence dangerous machinery, and to maintain such fencing when placed in position. When a statute throws a duty upon a certain person, he cannot cast that duty upon someone else so as to escape the liability he is under for a breach of the provisions of the Act, on the ground that the other person was negligent. [HIS LORDSHIP referred to the doctrine of common employment and continued:] It is now established that the breach of a statutory duty will give a right of action to the person injured unless the case can be brought within some known exception to the rule, such as where, when a new right or duty has been created by the statute, and a new specific remedy is given at the same time to the person injured in such a way that from the purview of the whole Act it appears plain that the new remedy is intended to be substituted for the cause of action which would otherwise exist. If a plaintiff is driven to allege negligence on the part of the defendant, and cannot prove it otherwise than by showing negligence of a servant of the defendant, such a cause of action may sometimes be met by a plea founded on the doctrine of common employment. But there is no need here for the plaintiff to allege negligence on the part of the defendant. The action is founded upon an alleged breach of a statutory duty imposed on the defendant. The doctrine of common employment can afford no defence here.

Let me now come to the question of the true construction of this Act of Parliament for that seems to me to be really the only point in the case before us. Looking at the purview of the Act, is it an Act which declares in the interests of the general public that a certain line of conduct is to be followed and any deviation from it shall be punishable by fine, but that no one shall have any private right of action for damages caused to him by any such deviation, or is it one which

creates a new duty, and at the same time provides a statutory remedy with the intention that no other remedy shall be available? In my opinion, it is neither one nor the other. The plaintiff in this case was unquestionably one of the class of persons for whose protection s. 5 was enacted. The question then arises whether we ought to come to the conclusion that the legislature intended the provisions with regard to the imposition of fines to be the only remedy for a breach of the statutory duties created by the Act. I think it is impossible to come to any such conclusion. The maximum fine that can be imposed in any one case is only £100, whether the breach of duty causes the death of the workman or only a slight injury to him. The legislature could not have seriously intended that whether the workman suffer death or mutilation the liability of the master should never exceed £100. Moreover, whatever the fine may amount to, there is no provision in the Act that the injured person or his relatives shall be benefited by it. Section 82 only provides that the Secretary of State may, if he thinks fit, order that the fine or some part of it shall be applied for the benefit of the injured person or his family. Again take the case of a very trifling injury being caused to a workman through a gross and deliberate neglect by a master of his duties under the Act. Are the justices to estimate the amount of the fine by the smallness of the damage? Or should they not take into consideration the way in which the employer has deliberately refused to comply with the requirements of the Act, and upon this ground inflict a fine of large amount? On the other hand, the offence may be a comparatively venial one though the damage resulting from it may be great. Should the magistrates inflict a heavy fine upon a defendant who has been most anxious to perform his duty under the Act, but has been guilty of some small oversight or technical violation of duty? In such a case it seems to me that only a small fine should be imposed, but yet it is contended that the workman could not possibly obtain as compensation anything more than this small fine. Again, under s. 87, the occupier may show that he has used due diligence and that his failure to comply with the Act has arisen from the negligence of some other person, and he may under this section escape liability and throw the responsibility on the person who has been guilty of negligence. If that person is a mere workman who would be unable to pay the fine the compensation recovered by the injured person would be reduced to nothing.

Taking the whole Act together I cannot agree with the argument that the penalties recoverable under the Act were intended by the legislature to be the only remedies for damage caused by a breach of the statutory duties created by the Act. For these reasons I think that judgment should be entered for the plaintiff.

VAUGHAN WILLIAMS, L.J.—I agree in the conclusion at which my learned brethren have arrived. I entertain no doubt that, upon the proper construction of the Factory and Workshop Act, 1878, it cannot be said that the legislature intended the remedy or benefit which may be given through the intervention of the Secretary of State to a person injured through a breach of the provisions of the Act as to fencing dangerous machinery should be the only remedy open to a person so injured. I also feel no doubt that the doctrine of common employment affords no defence to the action, but I wish to add a few words on both these points.

With regard to the first point, I think it cannot even be doubted that, when a statute provides for the performance by a certain person of a particular duty, and someone for whose protection the statute was passed is injured by a failure to perform that statutory duty, then, there being nothing more to the contrary, an action will lie by the person so injured against the person who has failed to perform the duty. I have equally no doubt that when in a statute of this sort a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration in determining the question whether or not the remedy provided by the statute was intended by the legislature to be the only remedy available in cases of breach of the statutory duty. But that is by no

means conclusive, nor the only matter to be taken into consideration. If the remedy given by the statute is to enure for the benefit of the person injured, that is an additional matter which ought to be taken into consideration when deciding the question whether or not the statutory remedy was intended by the legislature to be the only remedy. But again, the fact that the remedy was intended by the legislature to enure for the benefit of the person injured is not conclusive of the matter; and, although it may be a cogent and weighty fact, other things have also to be considered. As was said by LORD CAIRNS in *Atkinson* v. *Newcastle Waterworks Co.* (4), one must look at the general scope of the Act and the nature of the duty imposed by the statute. One must look also at the nature of the injuries likely to be caused by a breach of the statutory duties, the amount of the penalty to be imposed, and the person on whom it is imposed, before any proper determination can be arrived at whether the remedy provided by the statute was intended to be the only remedy available in case of a breach of the statutory duties.

I have nothing to add to the observations of my Lord on the provisions of s. 87, which in some cases substitute a servant in the place of the master as the person who is to be liable to the fine imposed under the Act. I agree also with the observations of my brother RIGBY as to the improbability of the £100 fine being the only remedy for a breach of duty which might result in the death or serious injury of a person of the class intended to be benefited by the Act. For these reasons I entirely agree that, upon the true construction of the Act, it is impossible that the legislature intended the penalty provided for in s. 82 should be the only remedy in case of a breach of the duties created by the statute. But though I agree in this, I at the same time think that the point is one by no means free from difficulty. I am not at present aware of any instance in which it has been held that when a statute in terms provides that a penalty unpaid under it shall go to the person injured by a breach of the statutory duty, there is a civil remedy available besides the remedy provided by the Act. However, we have not got to decide that point now, because this Act does not direct that any part of the fine shall go to the person injured. Section 82 merely enables the Secretary of State if he thinks fit to order that the fine or a part of it, shall be applied to the benefit of the injured person. I will only add this remark, that I do not wish to go back in the slightest degree from the general proposition that no hard-and-fast line can be drawn as to what will indicate whether the legislature intended, in the case of any particular statute, that the remedy created by the statute in case of a breach of a statutory duty should be the only available remedy. In each case the whole statute, with all its provisions, must be looked at to see what was the real intention of the legislature. This view of the matter has been very clearly laid down by STEPHEN and MATHEW, JJ., in *Vallance* v. *Falle* (5). [HIS LORDSHIP then said that in the present case it was impossible to set up the defence of common employment, and concluded:] I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Riddell, Vaizey & Smith* for *J. H. Jones*, Cardiff; *William Hurd & Sons* for *Gwilym C. James*, Merthyr Tydvil.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re MACDUFF. MACDUFF *v.* MACDUFF

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), June 4, 5, 1896]

[Reported [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651] B

Charity—Uncertainty—Gift for "some one or more purposes charitable, philanthropic, or [a blank]"

A testator by his will gave £10,000 to be appropriated and allocated "for some one or more purposes charitable, philanthropic, or [a blank]"

Held: on the true construction of the will the £10,000 was to be appropriated and allocated for some purpose or purposes which was, or were, charitable or philanthropic; the meaning of "philanthropic" was uncertain and not confined to that which was "charitable"; therefore, it was possible for the gift to be applied to other than strictly charitable purposes, and so it was invalid. C

Notes. Considered: *Hunter* v. *A.-G.*, [1899] A.C. 309; *Re Allen, Hargraves* v. *Taylor*, [1905] 2 Ch. 400. Distinguished: *Re Verrall, National Trust for Places of Historical Interest or Natural Beauty* v. *A.-G.*, [1914-15] All E.R. Rep. 546. Considered: *Re Tetley, National Provincial and Union Bank of England* v. *Tetley*, [1923] 1 Ch. 258. Distinguished: *I.R. Comrs.* v. *Roberts Marine Mansions Trustees* (1927), 43 T.L.R. 270. Considered: *General Medical Council* v. *I.R. Comrs., English Branch Council of General Medical Council* v. *I.R. Comrs.*, [1928] All E.R. Rep. 252; *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R. Rep. 158; *Re Smith, Public Trustee* v. *Smith*, [1931] 2 Ch. 364; *Re Diplock, Wintle Diplock*, [1941] 1 All E.R. 193; *Williams' Trusts Trustees* v. *I.R. Comrs.*, [1947] 1 All E.R. 513; *National Anti-Vivisection Society* v. *I.R. Comrs.*, [1947] 2 All E.R. 217; *I.R. Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525. Referred to: *Re Good, Harington* v. *Watts*, [1904-7] All E.R. Rep. 476; *Re Sidney, Hingeston* v. *Sidney*, [1908] 1 Ch. 488; *Re Wedgwood, Allen* v. *Wedgwood*, [1914-15] All E.R. 322; *Re Clarke (Deceased), Bracey* v. *Royal National Lifeboat Institution*, [1923] All E.R. Rep. 607; *Re Davis, Thomas* v. *Davis*, [1923] 1 Ch. 225; *A.-G.* v. *National Provincial and Union Bank of England*, [1923] All E.R. 123; *Verge* v. *Somerville*, [1924] All E.R. Rep. 121; *I.R. Comrs.* v. *Yorkshire Agricultural Society*, [1927] All E.R. Rep. 536; *Midland Counties Institution of Engineers* v. *I.R. Comrs.* (1928), 14 Tax Cas. 285; *Keren Kayemeth Le Jisroel, Ltd.* v. *I.R. Comrs.* (1931), 47 T.L.R. 461; *Honourable Co. of Master Mariners* v. *I.R. Comrs.* (1932), 17 Tax Cas. 298; *Peterborough Royal Foxhound Show Society* v. *I.R. Comrs.*, [1936] 1 All E.R. 813; *Tribune Press, Lahore (Trustees)* v. *I.R. Comrs., Punjab, Lahore*, [1939] 3 All E.R. 469; *Roll of Voluntary Workers Trustees* v. *I.R. Comrs.* (1941), 24 Tax Cas. 320; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] 2 All E.R. 60; *Re Coats' Trusts, Coats* v. *Gilmour*, [1948] 1 All E.R. 521; *Re Astor's Settlement Trusts, Astor* v. *Scholfield*, [1952] 1 All E.R. 1067; *Baddeley* v. *I.R. Comrs.*, [1953] 2 All E.R. 233; *Re Shaw, Public Trustee* v. *Day*, [1957] 1 All E.R. 745; *Re Wykes' Will Trusts*, [1961] 1 All E.R. 470. D E F G H

As to the requisites for the creation of a valid charitable trust, see 4 HALSBURY'S LAWS (3rd Edn.) 267 et seq., and for cases see 8 DIGEST (Repl.) 387 et seq. I

Cases referred to:

(1) *Re White, White* v. *White*, [1893] 2 Ch. 41; 62 L.J.Ch. 342; 68 L.T. 187; 41 W.R. 683; 37 Sol. Jo. 249; 2 R. 380, C.A.; 8 Digest (Repl.) 334, *150.*

(2) *Morice* v. *Bishop of Durham* (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836.*

(3) *James* v. *Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, *839.*

(4) *Ellis* v. *Selby* (1836), 1 My. & Cr. 286; 5 L.J.Ch. 214; 40 E.R. 384, L.C.; 8 Digest (Repl.) 395, *871.*

(5) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1.*

(6) *Kendall* v. *Granger* (1842), 5 Beav. 300; 11 L.J.Ch. 405; 6 Jur. 919; 49 E.R. 593; 8 Digest (Repl.) 394, *867.*

(7) *Browne* v. *Yeall* (1791), cited in 7 Ves. 47, 50, n.; 32 E.R. 18, 20, 34, L.C.; 8 Digest (Repl.) 389, *821.*

(8) *Whicker* v. *Hume* (1858), 7 H.L.Cas. 124; 28 L.J.Ch. 396; 31 L.T.O.S. 319; 22 J.P. 591; 4 Jur.N.S. 933; 6 W.R. 813; 11 E.R. 50, H.L.; 8 Digest (Repl.) 389, *826.*

(9) *President of United States* v. *Drummond* (1838), cited in 7 H.L.Cas. 155; 11 E.R. 62; 8 Digest (Repl.) 346, *267.*

(10) *Cocks* v. *Manners* (1871), L.R. 12 Eq. 574; 40 L.J.Ch. 640; 24 L.T. 869; 36 J.P. 244; 19 W.R. 1055; 8 Digest (Repl.) 338, *198.*

Also referred to in argument:

Gill v. *Bagshaw* (1866), L.R. 2 Eq. 746; 35 L.J.Ch. 842; 14 W.R. 1013; 44 Digest 819, *6701.*

Illingworth v. *Cooke* (1851), 9 Hare, 37; 20 L.J.Ch. 512; 17 L.T.O.S. 220; 15 Jur. 572; 68 E.R. 404; 44 Digest 760, *6197.*

Dolan v. *MacDermot* (1868), 3 Ch. App. 676; 17 W.R. 3, L.C.; 8 Digest (Repl.) 399, *902.*

Jones v. *Williams* (1767), Amb. 651; 27 E.R. 422, L.C.; 8 Digest (Repl.) 322, *64.*

British Museum v. *White* (1826), 2 Sim. & St. 594; 4 L.J.O.S.Ch. 206; 57 E.R. 473; 8 Digest (Repl.) 346, *266.*

Nightingale v. *Goulbourn* (1848), 2 Ph. 594; 17 L.J.Ch. 296; 11 L.T.O.S. 169; 12 Jur. 317; 41 E.R. 1072, L.C.; 8 Digest (Repl.) 350, *297.*

Re Jarman's Estate, Leavers v. *Clayton* (1878), 8 Ch.D. 584; 47 L.J.Ch. 675; 39 L.T. 89; 42 J.P. 662; 26 W.R. 907; 8 Digest (Repl.) 395, *872.*

Re Foveaux, Cross v. *London Anti-Vivisection Society*, [1895] 2 Ch. 501; 64 L.J.Ch. 856; 73 L.T. 202; 43 W.R. 661; 11 T.L.R. 540; 39 Sol. Jo. 671; 13 R. 730; 8 Digest (Repl.) 348, *291.*

Re Nottage, Jones v. *Palmer*, [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571, C.A.; 8 Digest (Repl.) 358, *370.*

Nash v. *Morley* (1842), 5 Beav. 177; 11 L.J.Ch. 336; 6 Jur. 520; 49 E.R. 545; 8 Digest (Repl.) 391, *841.*

Re Douglas, Obert v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 399, *906.*

Wrexham Corpn. v. *Tamplin* (1873), 28 L.T. 761; 21 W.R. 768; 8 Digest (Repl.) 344, *256.*

Appeal by the Crown from a decision of STIRLING, J., on an originating summons taken out by the plaintiff, Annie Seton Macduff, against the trustees of the will of her father, John Ross Macduff, and the Attorney-General to determine whether a bequest in the will "for some one or more purposes charitable or philanthropic or [a blank]" was valid. STIRLING, J., held that the gift was invalid for uncertainty.

The Attorney-General (Sir Richard Webster, Q.C.) and *Ingle Joyce* for the Crown. *Hadley* for the plaintiff and the trustees of the will.

LINDLEY, L.J.—We have arrived at the conclusion that the judgment of STIRLING, J., is right. The case is a difficult one, and it arises from the language used in the will of a testator who left his property to his daughter for her life and executed the following document, which was admitted to probate along with the will:

A

> "I, John Ross Macduff, will from my estate the entire sum of £10,000, to be appropriated and allocated for some one or more purposes charitable, philanthropic, or,"

and then there is a blank. He goes on,

B

> "The precise purpose or purposes I would desire to be named by my daughter, Annie S. Macduff, but should she from any cause fail, or be unable to indicate these, I leave the elder surviving sons of my brothers, in co-operation with any others in whose wisdom and experience they can thoroughly rely, to see my wishes carried into effect. I am unable personally to tie myself down to any specific scheme, as many objects supremely claimant today may cease to be so after a series of years, while others at present undreamt of may be found urgent."

C

The question which we have to consider is: What is the effect of those clauses? On the one hand, it is said that, notwithstanding the generality of this language, this sum of £10,000 is appropriated for general charitable purposes, and if so, of course, a scheme can be directed. On the other hand, it is said, and the learned judge has taken that view, that the clause is too general, too uncertain, and too D vague to amount to a valid charitable bequest, and the disposition of the £10,000, therefore, fails. Without going through the cases which have been decided, it appears to me that the first point to be considered is what is the effect of the blank? We have here a will which contains the expression, "For some one or more purposes charitable, philanthropic or ——." At first I was disposed to think that that alone made the purpose of the testator too indefinite to be treated as a charitable E bequest at all, but on re-consideration, and on looking into the authorities and observing that there was a similar blank in *Re White*, *White* v. *White* (1), I have come to the conclusion that the learned judge was right on that point, and that the true construction of this clause is, to put it shortly, that the £10,000 is to be appropriated and allocated for some purpose charitable or philanthropic. That gets over the first difficulty, and I am not prepared to dissent from the view taken F by the learned judge on that point. On the contrary, I think he is right, having regard to the authorities which we have been referred to, especially *Re White*, *White* v. *White* (1).

Having got over that difficulty, the question is: What is the meaning of these words? The first point to observe is that there is nothing definite here at all. It is all indefinite. It is not a gift to some specific institution or for some specific G object with additional words. There is no context here except this, that the £10,000 is to be appropriated and allocated for some one or more purposes charitable or philanthropic, with the additional clause that the testator says,

H

> "I am unable personally to tie myself down to any specific scheme, as many objects supremely claimant to-day may cease to be so after a series of years, while others at present undreamt of may be found urgent."

That is all we have got to guide us.

In dealing with these general bequests—bequests framed in general language like this—without any context to help one, what has one to get at in order to hold such a general indeterminate bequest to be valid? You must get at this—I shall show I presently from the language used by Lord Eldon that the doctrine is quite old—you must get at something sufficiently definite to guide the court as to the kind of trust which it has to execute. It must be of the kind called technically a charitable trust. I am bound to say that, having considered these words and attended to the arguments upon them, I cannot arrive at any definite idea at all of what this testator meant, or of the kind of trust which the court would have to execute. To show that that is the right principle I will refer to what I always consider the leading case on all these questions as to charities, I mean *Morice* v. *Bishop of*

Durham (2). In that case, which came first before SIR WILLIAM GRANT and subsequently before LORD ELDON (whose judgment is one of the most important upon all questions of charities), LORD ELDON incidentally remarks (10 Ves. at p. 538) what unquestionably is true, that this court "has taken strong liberties upon this subject of charity." There is no doubt it has, but, notwithstanding the strong liberties it has taken, there are certain principles which have always guided the court. LORD ELDON said in that case (ibid. at p. 539):

> "As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust, a trust therefore, which in case of mal-administration could be reformed, and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles familiar in other cases, it must be decided that the court can neither reform mal-administration nor direct a due administration."

That principle has been enunciated or repeated from time to time, as will be found on reference to *James* v. *Allen* (3) and *Ellis* v. *Selby* (4). Therefore, when we are dealing with general words, we must see whether there is such an indication of purpose or of trust which the court is to be called upon to execute that the court can see what it has to do, that is to say, see the limits of its own powers.

That brings us to this question of "charitable or philanthropic." "Charitable," I suppose, is there used in the popular sense. I do not suppose that this gentleman, who was a clergyman, used the word "charitable" in the very wide and indefinite sense in which it is used in courts of equity. I do not suppose there is one man in a thousand who understands what that sense is, and the sense itself is an uncommonly indefinite one, as I shall have occasion to show presently. I take it that the testator here uses the word "charitable" in the ordinary popular sense, which is not a very definite sense. Then what is the meaning of the word "philanthropic"? He means by that something distinguished from "charitable" in the ordinary sense, but what he does mean by "philanthropic" is uncommonly vague. I cannot put any definite meaning to that word. All I can say is, that a philanthropic purpose must be a purpose which indicates goodwill to mankind in general. Can anything be looser that that? And here arises the difficulty of which the Attorney-General has availed himself with great skill. He says: "What philanthropic purpose is not charitable?" My answer is: You are dealing with two words of so vague a meaning that it is extremely difficult to say, but I can suggest purposes which might be philanthropic and not charitable, and those would be purposes indicating goodwill to rich men to the exclusion of poor men. I will not go into instances, but I take it they would be philanthropic in the ordinary acceptance of the word—that is to say, in the wide loose sense of indicating some goodwill towards mankind, or a great portion of them—but I do not think that would be charitable. I am quite aware that a trust may be charitable, and yet not be confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor. One can suggest trusts which might be philanthropic, but which would not be charitable. I repeat, I do not know with anything like certainty what is meant by "philanthropic," and not knowing what is meant by "philanthropic," it follows that the trustees of this will could apply this £10,000 to purposes which might or might not be charitable in the technical sense of that expression.

If so, this general disposition cannot be upheld as a charitable bequest. On that point again I return to *Morice* v. *Bishop of Durham* (2), where LORD ELDON says (10 Ves. at p. 541):

> "The question then is entirely, whether this is according to the intention a gift to purposes of charity in general, as understood in this court, such that

this court would have held the bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees, where the gift is to charity in general; or is it, or may it be according to the intention, to such purposes going beyond those, partially or altogether, which the court understands by 'charitable purposes'; and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person created the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this decree, to contend that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and, of course, a part of the property. But the true question is, whether, if, on the one hand, he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this court construes those words; and, if according to the intention it was competent to him to do so, I do apprehend that under any authority upon such words the court could have charged him with maladministration if he had applied the whole to purposes which, according to the meaning of the testator are benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts."

I take it that that principle is as sound now as it was when LORD ELDON announced it. He did not announce it for the first time, and certainly there was nothing said or dropped from the court in *Re White*, *White* v. *White* (1), which in any way trenches upon that principle. *Re White* (1) has been referred to as if it authorised the view that this gift might be upheld, even if some of these philanthropic purposes might not be charitable. That is not a correct view of *Re White* (1). That was a curious and a difficult case. There was a bequest "to the following religious societies," and then there was a blank. At first sight one would say it would be very difficult to uphold that as a valid charitable bequest, but when the authorities were looked into, it was found that it had been decided, not once, but several times, that a bequest for religious purposes was a charitable bequest, and, therefore, the court had to face that as a rule which was settled. Then came the difficulty that the bequest was not even a bequest to religious purposes; it was only a bequest to religious societies, and it was argued that the purpose was indefinite. But upon consideration the court came to the conclusion, rightly or wrongly (it does not matter now), that the bequest to religious societies purported to be a bequest to religious purposes, and having got that far they held that this was a good and valid bequest for charitable purposes. That case does not show, however, that it was competent for the trustees of the fund to apply that fund to religious purposes which were not charitable. They had no option at all about the matter. The question was the true construction of the words "religious societies."

Reliance is placed, and very naturally placed, upon the judgment of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (5), but when we look at that I do not think it helps the Attorney-General in this case. What LORD MACNAGHTEN did is tolerably plain. He took the classification of charities from the argument of SIR SAMUEL ROMILLY in *Morice* v. *Bishop of Durham* (2), and the passage in SIR SAMUEL ROMILLY'S argument runs thus (10 Ves. at p. 531): "There are four objects, within one of which all charity to be administered in this court must fall." That is to say, within one of which they must come, but he does not say that anything which comes within any one of them must be a charity; that may be so or may not be so, but they must all come within one of these four heads. He continues:

A "First, relief of the indigent in various ways, money, provisions, education, medical assistance, etc.; secondly, the advancement of learning; thirdly, the advancement of religion; and fourthly, which is the most difficult, the advancement of objects of general public utility."

SIR SAMUEL ROMILLY did not mean, and I am certain LORD MACNAGHTEN did not B mean, in the passage I will read presently, to say that anything that was an object of public general utility must necessarily be a charity. Some may be and some may not be. That is the true view and true explanation of LORD LANGDALE'S decision in *Kendall* v. *Granger* (6), where the gift was "for encouraging undertakings of general utility," and LORD LANGDALE came to the conclusion that that was not necessarily a charity. I am not aware that *Kendall* v. *Granger* (6) has C ever been overruled or questioned.

What LORD MACNAGHTEN said in *Income Tax Special Purposes Comrs.* v. *Pemsel* (5) is obviously a paraphrase of what SIR SAMUEL ROMILLY said. LORD MACNAGHTEN said ([1891] A.C. at p. 583):

D "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

He leaves out those somewhat significant words which SIR SAMUEL ROMILLY put in in dealing with the fourth head, "which is the most difficult," which showed perfectly plainly that SIR SAMUEL ROMILLY saw, and I do not doubt but LORD E MACNAGHTEN saw also, there might be cases of public general utility which might be charitable and some which might not. In deciding that, we must fall back upon the Statute of Elizabeth [Charitable Uses Act, 1601], not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As LORD ELDON says, this court has taken great liberties with charities, but the liberty is always restricted by falling back, or professing to fall F back, upon the Statute of Elizabeth.

Turning to the present case, can we fairly get out of these words any direction that this £10,000 is to be applied, and applied only, to such purposes as the law says is a charity? My answer is "No." The words are too general and too indefinite, and I think the learned judge was perfectly right, and this appeal, therefore, must be dismissed.

G

LOPES, L.J.—I am of the same opinion. The important words in this will are these:

"I, John Ross Macduff, will from my estate the entire sum of £10,000, to be appropriated and allocated for some one or more purposes charitable, H philanthropic, or"

and then there is a blank. I read those words in this way: "I, John Ross Macduff, will from my estate the entire sum of £10,000, to be appropriated and allocated for some one or more purposes charitable or philanthropic," and I take it that in all probability the words which it was contemplated would be inserted in that blank I would be some other purpose to be indicated hereafter by him in any codicil he might make. I think that was the view taken by STIRLING, J., and with that view I entirely agree.

Very great liberties have been taken with the Statute of Elizabeth, as has been justly said, and a signification attributed to the word "charity" very much larger than ever was intended by that statute, and there have been numbers of decisions on that point which it is no doubt difficult to reconcile. The difficulty in this case arises from the use of the word "philanthropic," a word dealt with, so far as I am aware and have been informed, in no previous decision. It has been argued by

the learned Attorney-General that the word "philanthropic" here is synonymous with "charitable," and that it means nothing more than "charitable," and that it must be construed in the same sense that "charitable" would be construed. I cannot adopt that view. I think we must insert the word "or" between charitable and philanthropic. I cannot help thinking that the testator intended to draw a distinction between the word "charitable" and the word "philanthropic." If the will stopped at the word "charitable," I presume that that would have been a good gift, but it does not stop there. There is in addition the word "philanthropic," and that is the word with which in this will we have to deal.

The principle applicable to this case is not in dispute, and cannot be in dispute. I adopt the words of SIR WILLIAM GRANT in *James* v. *Allen* (3), where he says (3 Mer. at p. 19):

> "The whole property might, consistently with the words of the will, have been applied to purposes strictly charitable. But the question is, what authority would this court have to say that the property must not be applied to purposes, however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute."

Looking at those words, I ask myself whether or not the property might not, consistently with the will, having regard to the word "philanthropic," be applied to other than strictly charitable purposes, and I feel compelled to answer that question in the affirmative. It has been said that nothing can be suggested, no purpose and no object can be suggested, which would come within the meaning of the word "philanthropic" which is not also a charity. If that were so, I think the argument of the Attorney-General could be maintained; but that is not a view that I am able to adopt in regard to that word. I think I could suggest many objects which would come within the word "philanthropic," and to which the trustees would be entitled to apply the money, which are not charitable. I will not again allude to recreation grounds and grounds devoted to sport, which are not for the poorer classes, but are generally for the rich and poor alike. I think that would be a case; but there is an illustration which has occurred to me which seems not to be inapplicable to this case. For instance, a gift to landowners affected by agricultural depression, whose incomes are reduced to the amount of £300 a year. It appears to me that that is an object which clearly would be philanthropic, but at the same time would not be charitable. I come, therefore, to the conclusion that the words used in this will are too wide and too indefinite to support the gift, and I agree with the judgment which has been delivered by STIRLING, J.

RIGBY, L.J.—I am of the same opinion. With reference to the blank I have very little to say, but I am inclined to think that the proper way of looking at it is that where a man leaves a blank in a will and does not choose to fill it up at the time when he executes it, it must be taken that he has deliberately determined not to fill it up, but has left the court to deal with the construction of the instrument as it is found, and that it cannot be properly suggested that he intended to do what we all know would be a perfectly useless thing, namely, to fill up the blank at some time after execution. I treat this as a gift to charitable or philanthropic purposes.

The cases with regard to charities are innumerable, but in the case of charities, as in all other cases, precedents are only useful in so far as they enable us to deduce a principle. No previous will can be treated properly as a precedent for another which is expressed in different language, and no decision on the precise words of a former will can, as a general rule, be of the least service in guiding the court as to the construction of other words. Unless you can get a principle from a case which is applicable generally to other cases the precedent is of little use. What principle do we find that is really applicable to a whole class of cases? First

A of all, a bequest must be sufficiently certain to enable the old Court of Chancery, or this court as succeeding the old Court of Chancery, to superintend and give effect to the trust according to its terms. So far we have nothing to do with charity. That is a general principle that applies to all bequests; they must be sufficiently definite to enable the court to draw the line, and say this matter is within and that matter is outside it. How do charity cases differ from general cases? As it appears B to me in this respect only, that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble of the Statute of Elizabeth, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce other matters which are also C to be treated as charitable. But before you can apply that rule at all you must have the idea of charity sufficiently expressed in the will, and it will not do if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is demised to them are to be charitable or something else. Directly there is an alternative the reference to the statute is of no service, and the general rule comes in that it is too indefinite D for the court to give effect to it.

What is the present case? It is a gift to charitable or philanthropic purposes. I am bound to say that I do not think it is very different to a gift for philanthropic purposes. There may be an argument that, being joined with the word charitable, it must be purposes which are charitable also; but then there is also another argument, that as "philanthropic" is distinguished from "charitable" it shows E that "philanthropic purposes" are to be those which are not charitable. I think the one may be set off against the other, and you can get very little assistance from the fact that the word "charitable" is used together with the word "philanthropic." Suppose the word "philanthropic" stood alone, I am quite sure that as yet no court has defined that word, because, as we know, the case has never come before any court for decision, but suppose we try now to define it. I confess myself unable F to do so, at any rate in any sense which would show that the definition meant the same thing as "charitable." I do not wish to attempt any very precise illustration, but I am inclined to think that a very general illustration may be of service. I can suppose the case of a person in effect saying: "The ordinary objects of charity are in my mind sufficiently provided for, but I regard the position of the well-to-do or moderately well-to-do classes as one also requiring consideration, G and I leave my residue to trustees in order that they may in their discretion do something towards advancing the happiness and the position in life of those who are not really objects of charity, but who may be made happier and in some sense better than they now are upon such incomes as they possess." I doubt whether anyone could say that that was not a philanthropic intention, a very wide desire to improve the position of a large class of persons. Philanthropic, I should H think it was; charitable, I feel pretty certain it would not be; and so we get to the conclusion that the word "philanthropic" may include, not only cases of a totally exceptional character, but cases of a very wide class indeed, and numerous cases which would be within the popular meaning of "philanthropic," and would have nothing to do with charity at all.

It appears to me that that is sufficient to decide the case. I will not go into any I examination of the authorities, but I will refer to one or two of them as showing that the matter has come under the consideration of learned judges, and that the decisions have been in accordance with what I conceive to be the principle which I have endeavoured to express. There is *Kendall* v. *Granger* (6), which included purposes of "general utility," and LORD LANGDALE, a great authority in cases of this kind, thought that was not sufficient and that there were purposes, or might be purposes, of general utility which were not charitable purposes. That was his view, and I see no reason to doubt that, and I do not know that that case has ever been doubted. I consider it an authority for that purpose. I will take the case to

which I think counsel for the plaintiff very properly referred us, notwithstanding the doubts which have been thrown upon the application of the principle in that particular case, I mean *Browne* v. *Yeall* (7). That appears to be a case in which the question considered by LORD THURLOW was whether a gift for the purchase and disposition of books for the happiness of mankind was sufficiently definite, and I consider that LORD THURLOW, as explained by LORD ELDON, came to the conclusion that a gift of that kind (and he treated it as a gift for the happiness of mankind) would not be so definite as to be capable of being administered as a charitable gift. It is true that in that will there were words which I should have thought gave a limitation to the words "happiness of mankind," and that is what I understand to have been the view taken by LORD ELDON. It was on the question whether the words "happiness of mankind" were sufficiently definite that LORD THURLOW decided the case, and I do not gather that LORD ELDON or SIR WILLIAM GRANT would have differed if that case was really raised by the will. The promotion of the happiness of mankind no one would doubt to be a philanthropic purpose, and I think that the learned counsel was right in saying, so far, at any rate, as the cases have been brought before us, that "happiness of mankind" is nearer in its meaning to that of the word philanthropic than any other.

There is one other case which I should like to refer to, and that is *Whicker* v. *Hume* (8) and in doing so I will refer also to *President of United States* v. *Drummond* (9), which is there mentioned. I say nothing about the wide extent of the gift in *Whicker* v. *Hume* (8), because that is beyond question. There is no doubt now that the extensive nature of the gift as regards the range of the objects was no objection to it, but the gift was for the advancement of learning, and counsel who were impeaching the validity of the gift raised an objection to it of this nature. Education is no doubt a charitable purpose within the statute, learning is not —that is to say, learning or the promotion of abstract learning would not be a charitable purpose. That was dealt with by LORD CHELMSFORD, L.C., and by LORD CRANWORTH, and they point out that, reading the word "learning" as you find it in that will in connection with "education," it must mean the advancement of learning as equivalent to teaching, and, therefore, as a branch of education, and I gather from their opinions and from the pains which they took to elucidate the meaning of the word "learning" in that will, that, if they could not have put that interpretation upon it, they would have doubted, at any rate, whether the advancement of learning as an abstract matter would be a charity at all. The Lord Chancellor deals with that point more particularly. He goes with great pains into the matter, and says that the gift was for "education" and for "learning" in the sense of teaching and instruction,

> "and in that sense it appears to me that the case which was cited by the respondents and was printed in the respondents' case, of the *President of United States* v. *Drummond* (9) may be applicable."

It is important to see what the gift was. It appears that it was a gift of residue to found at Washington, under the name of the Smithsonean Institution, an establishment for the increase and diffusion of knowledge among men. LORD LANGDALE held that it was a valid charitable gift.

I have now only to deal with the supposed difficulty arising from the judgment of LORD MACNAGHTEN in *Income Tax Special Purposes Comrs.* v. *Pemsel* (5), and I think it is altogether illogical to ascribe to LORD MACNAGHTEN what is ascribed to him. He says that cases of charity may be divided into four classes, and one of them is benefit to the community. There is one miscellaneous set of charities which can be classed under that head; but to deduce from that that every purpose of general use to the community must be a charity, is just about as logical as if an assurance society for the purposes of its reports says, "Persons insured with us may be divided into men, women, and children." Are you to deduce from that that every man, every woman, and every child is insured in that society?

I have only one word to say about *Re White, White* v. *White* (1) which has been referred to. I consider that the court was there constrained by the authorities to say that "religious" was equivalent to "charitable," not in the sense that there could be no charities which are not religious, but that religious purposes were all charitable; and, although it was suggested that in *Cocks* v. *Manners* (10) it had been shown that a gift to a particular religious society in the terms in which it was given was not a charity, that, to my mind, makes no difficulty at all, because, as far as I know, and for the purpose, at any rate, of this case, I think it is true that when you say: "Gifts to the poor, trusts for the advancement of education, trusts for the advancement of religion, are charities," that does not mean that in every conceivable case where you can bring a gift under one or other of those general words it is necessarily a charity. It means nothing of the kind. It means, as in the case of "for the general benefit of the community," that these are heads or categories under which actual and valid charities may be implied. No one will suggest, for instance, to take only one illustration, that "education" meant the education of pickpockets in a thieves' kitchen to make them fit for their profession. It must be education of a particular kind, and when there is a gift to a religious society you may in the same way say it must not necessarily be taken to be a charity because there may be a religious society, as there was in *Cocks* v. *Manners* (10), which does not attempt to promote religion. The convent in that case was a set of religious people who met together, but who abstained even from good works as regards the outside public, did not attempt to proselytise, or to attend to the sick or the poor, and it was held that under the peculiar circumstances of that case, while it might be a religious society, it could not be called a charity. It was only a gift to particular men and women who happened at the particular moment to form part of the society. I do not consider that *Re White, White* v. *White* (1) laid down in any way any new law, and I do not think LORD MACNAGHTEN's classification of charities lays down any new law whatever. That being so, I think that the cases which have been referred to show that you must have an object sufficiently definite and sufficiently having a charitable meaning according to the standard supplied by the Statute of Elizabeth, and by the analogies of the statute. In my mind, the word "philanthropic" is too wide altogether, and the judgment of STIRLING, J., must be affirmed.

Appeal dismissed.

Solicitors: *Hare & Co.; Thomas Webster.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

NEVILL *v.* FINE ART AND GENERAL INSURANCE CO.

[House of Lords (Lord Halsbury, L.C., Lord Macnaghten, Lord Shand and Lord Davey), December 8, 1896]

B

[Reported [1897] A.C. 68; 66 L.J.Q.B. 195; 75 L.T. 606; 61 J.P. 500; 13 T.L.R. 97]

Libel—Action—Trial—Question for judge—Whether words complained of capable of being defamatory—Publication to be regarded as a whole—Test of opinion of ordinary reasonable man.

C

In a libel action the question whether the words complained of are capable of bearing a defamatory meaning is one for the judge. In deciding that question the judge must take into consideration not only the actual words complained of, but also their context and the person or persons to whom they were published, and the test to be applied is not whether some person might have understood the words as reflecting adversely on the plaintiff, but whether an ordinary, reasonable man would so construe them. If the words are to be held to be defamatory by reason of an inference to be drawn from them, it must be a natural and necessary inference.

D

Decision of Court of Appeal, [1895] 2 Q.B. 156, affirmed.

Notes. Considered: *Empire Typesetting Machine Co. of New York* v. *Linotype Co.* (1898), 79 L.T. 8. Applied: *Adam* v. *Ward*, [1916-17] All E.R. Rep. 157. Followed: *Ware and De Freville* v. *Motor Trade Association*, [1920] All E.R. Rep. 387. Referred to: *Cornford* v. *Carlton Bank*, [1899] 1 Q.B. 392; *Dauncey* v. *Holloway* (1901), 84 L.T. 649; *Mapey* v. *Baker* (1909), 73 J.P. 289; *Watt* v. *Longsdon*, [1929] All E.R. Rep. 284; *Cassidy* v. *Daily Mirror Newspapers*, [1929] All E.R. Rep. 117; *Minter* v. *Priest*, [1930] All E.R. Rep. 431; *Chapman* v. *Ellesmere* (1932), 101 L.J.K.B. 376; *Sim* v. *Stretch*, [1936] 2 All E.R. 1237; *Newstead* v. *London Express Newspaper, Ltd.*, [1939] 4 All E.R. 319; *English and Scottish Co-operative Properties Mortgage and Investment Society, Ltd.* v. *Odhams Press*, [1940] 1 All E.R. 1; *Turner* v. *Metro-Goldwyn-Mayer Pictures, Ltd.*, [1950] 1 All E.R. 449.

E

F

As to the functions of judge and jury in a libel action, see 24 Halsbury's Laws (3rd Edn.) 107-112, and for cases see 32 Digest 71-75, 151, 152, 161.

G

Case referred to:

(1) *Capital and Counties Bank* v. *Henty* (1880), 5 C.P.D. 514; 49 L.J.C.P. 830; 43 L.T. 651; affirmed (1882), 7 App. Cas. 741; 52 L.J.Q.B. 232; 47 L.T. 662; 47 J.P. 214; 31 W.R. 157, H.L.; 32 Digest 21, *121*.

Also referred to in argument:

H

Cooke v. *Wildes* (1855), 5 E. & B. 328; 3 C.L.R. 1090; 24 L.J.Q.B. 367; 25 L.T.O.S. 156; 1 Jur.N.S. 610; 3 W.R. 458; 119 E.R. 504; 32 Digest 157, *1896*.

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex.Ch.; 1 Digest (Repl.) 681, *2425*.

I

British Mutual Bank Co., Ltd. v. *Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590; sub nom. *Mutual Banking Co.* v. *Charnwood Forest Rail. Co.*, 3 T.L.R. 498, C.A.; 1 Digest (Repl.) 686, *2449*.

Whitfield v. *South Eastern Rail. Co.* (1858), E.B. & E. 115; 27 L.J.Q.B. 229; 31 L.T.O.S. 113; 4 Jur.N.S. 688; 6 W.R. 545; 120 E.R. 451; 13 Digest (Repl.) 321, *1288*.

Pullman v. *Hill & Co.*, [1891] 1 Q.B. 524; 60 L.J.Q.B. 299; 64 L.T. 691; 39 W.R. 263; 7 T.L.R. 173, C.A.; 32 Digest 76, *1069*.

A *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 32 Digest 128, *1592*.

Fryer v. *Kinnersley* (1863), 15 C.B.N.S. 422; 3 New Rep. 125; 33 L.J.C.P. 96; 9 L.T. 415; 10 Jur.N.S. 441; 12 W.R. 155; 143 E.R. 849; 32 Digest 122, *1537*.

B *Dawkins* v. *Lord Paulet* (1869), L.R. 5 Q.B. 94; 9 B. & S. 768; 39 L.J.Q.B. 53; 21 L.T. 584; 34 J.P. 229; 18 W.R. 336; 32 Digest 110, *1426*.

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., LOPES and RIGBY, L.JJ.) reversing a decision of POLLOCK, B.

The action was brought by the appellant, Lord William Nevill, against the respon-
C dents to recover damages for an alleged libel. It appeared from the statement of claim that the respondents, who carried on an insurance business in the city of London, had at one time engaged the appellant as their West End agent, and that, the agency having been terminated, they had written and published and sent to their customers a circular in which they stated that

D "The agency of Lord William Nevill, at 27, Charles Street, St. James's Square, has been closed by the directors."

The appellant alleged that this statement was untrue, the engagement having been terminated at his instance, and that the statement was calculated to injure him in his business as an insurance agent. The respondents, in their defence, admitted the publication, but denied that the words had the meaning attributed
E to them or were capable of bearing any defamatory meaning, and said that they published the words bona fide in the honest belief that they were true, and that they were published on a privileged occasion. The action was tried before POLLOCK, B., and a special jury, when the jury found that the circular was a libel upon the appellant, that the statement in the circular was not true, that the privilege, if any, was exceeded, and assessed the damages at £100. On further consideration, the
F learned judge gave judgment for the appellant for £100. The Court of Appeal set aside the judgment for the appellant and entered judgment for the respondents on the ground that there was no evidence of express malice to go to the jury so as to deprive the respondents of the privilege arising from the occasion.

Asquith, *Q.C.*, and *Poyser* for the appellant.

G *Sir Edward Clarke*, *Q.C.*, *Eldon Bankes*, and *Marriott* for the respondents were not called on to argue.

LORD HALSBURY, L.C.—I am of opinion that this appeal must be dismissed, and I am somewhat embarrassed, to say the truth, by the multitude of reasons which appear to me to render success on the part of the appellant hopeless.

H I am of opinion, in the first place, that there was no libel here at all, and I confess that, had I been the judge trying this cause, I should, at the end of the appellant's case, have non-suited him without the smallest hesitation or doubt on the ground that there was no case to go to the jury. The question whether there is or is not a libellous publication is, in the first instance, for the judge. I am not insensible to the controversy which has existed ever since Fox's Act [the Libel Act, 1792, passed
I "to remove doubts respecting the functions of juries in cases of libel": 13 HALSBURY'S STATUTES (2nd Edn.) 1120] was supposed to have settled it, with regard to the proper functions of judge and jury in that respect. Though Fox's Act only applied to criminal cases, undoubtedly it has since the passing of that Act been assumed that the question of libel or no libel is for the jury and not for the judge, but subject always to this—that the matter which is charged as libellous shall be capable of being and apparently is libellous, calculated to bring the person into hatred, contempt, or ridicule, or to cause him some damage. I confess that I have listened with all the attention which it deserved to the argument which has been

presented to us to-day, and I am unable now to know what is the sense in which any ordinary reasonable man would understand the words of this communication to be words exposing the appellant to hatred, or contempt, or ridicule.

In saying that, of course it is necessary to take into consideration not only the actual words used, but also the context of the words, and the persons to whom the communications were made. I will read the whole letter:

> "In forwarding the inclosed renewal notice I beg to inform you that the West End office of this company has been opened at 19, St. James's Street, S.W., under Mr. Murray Faulkner. The agency of Lord William Nevill, at 27, Charles Street, St. James's Square, has been closed by the directors. I shall, therefore, be obliged if you will kindly direct all communications to our West End secretary at 19, St. James's Street, and I shall at all times be pleased to afford you any assistance in all matters relating to insurance against fire, burglary, accident, employers' liability, and all risks."

I think it is desirable that the whole letter should be read together. It is a business communication for a business purpose. The West End agency having been at one place, a business communication is made to a person who has an interest in knowing where communications are to be addressed, the new office is pointed out, and this passage occurs in the letter:

> "The agency of Lord William Nevill, at 27, Charles Street, St. James's Square, has been closed by the directors."

I am wholly unable to understand how any ordinary reasonable man could have construed that one sentence in a business letter as being the smallest reflection on Lord William Nevill's capacity as a business man, or upon his honour, or how it could in any respect expose him to hatred, contempt, or ridicule. I think this is far within *Capital & Counties Bank* v. *Henty* (1), because, as it appears to me, two propositions have been established on authority which it is difficult to question—first of all, that it is not enough to say that by some person or another the words might be understood in a defamatory sense. In the original argument of *Henty's Case* (1) in the Court of Appeal I observe that BRETT, L.J., says this (5 C.P.D. at p. 541):

> "It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. Therefore I am of opinion that this document could not reasonably be taken in a defamatory sense by those to whom it was published according to the primary meaning of the language used in it."

And in this House LORD WATSON affirmed the same proposition in language to which LORD SHAND has already called attention. It would not be enough, therefore, in this case to say that some persons might have understood these words as conveying some reflection upon the honour or business capacity of Lord William Nevill. That stands, therefore, as it appears to me, a long way distant from what was done in *Henty's Case* (1), where a communication was made to the persons who had to make payments to the brewer in that case, and they were informed that the cheques of such and such a bank were not to be received in future. That undoubtedly, as LORD WATSON points out, might possibly, or would probably, by some persons have been understood to convey some reflections upon the solvency of the particular bank upon which the cheques were drawn. But he goes on to confirm what BRETT, L.J., says, which seems to me to be good sense—that because some persons may choose, not by reason of the language itself, but by reason of some fact to which it refers, to draw an unfavourable inference, it does not follow that therefore such matter is libellous.

Under those circumstances, as I have already said, if I had been the judge I should without hesitation have withdrawn the case from the jury, and if I had

A been sitting in a court of review under our old system of pleading, as little should I have hesitated to arrest judgment upon the ground that there was no libellous matter disclosed on the face of the declaration. As I have said, I am overwhelmed by the number of answers that can be made in this case. The sole ground on which the particular phrase in question is cavilled at is that the language of it when it is noted what the real facts are, suggests what is untrue. In the first place, I am
B of opinion that it was true; and if I think it was true, when I read the whole correspondence and see what the facts were, I hope it may be imputed to the gentleman who wrote it that he, at all events, might have been under the impression that it was true because he had only the same means of judging of its truth that I have, namely, the facts. The fact was that the agency was closed by its directors. It is true that the agency in one sense, and in a different sense from that in which I think
C the writer used the language, was continued during the period elapsing between the month of December and the month of March. There were negotiations going on during that time in which it was discussed between the company on the one side and the appellant on the other side, whether or not an agency of a different character should be carried on, but the one agency had been closed, and, as I understand the facts, and no attempt has been made to displace them, it was
D acquiesced in that that form of agency should be finally closed, and the negotiation which proceeded was as to the form in which a personal agency, so to speak, as distinguished from the agency which was established at the branch office at that place, should be continued. It is also true that during those negotiations in the period which elapsed between December and March Lord William Nevill was permitted
E to go on acting as agent for the company, and, as I understand the facts, acting as agent for the company in the new capacity, because, if that were not the fact, I do not understand upon what ground he could possibly have accepted £150 which was given to him, as he duly acknowledges in part of the correspondence.

Therefore, it appears to me that the very ground-work upon which the appellant's argument has been based fails him. I think that the statement was true, and, if
F the statement was true, that ground-work is displaced. But suppose it was not true, suppose it was not accurate in the sense in which people would have understood it, I am obliged to suppose a person of a very extraordinary mind who, looking at this document, misunderstood it. Suppose he did—suppose the persons who wrote that document intended to tell the truth and believed in the truth of what they were writing, even though in the mind of some other person it should be inaccurate in
G form, it seems to me that it would be impossible to contend that that would be evidence of malice, which under the circumstances it would be obviously necessary for the appellant to prove in order to recover—I say obviously because I do not think that anyone has contended that the occasion was not privileged. What has been contended is, that the occasion was abused and the privilege, therefore, did not exist. If what I have stated is true, there is no ground for saying that there
H was any attempt to do anything else than to make a business communication to persons who had the right to receive these communications, the secretary on the one side and the insurers on the other having a common interest in respect of which it was right that these communications should be made.

I am, therefore, of opinion, upon these grounds, that it is impossible to say that there is any evidence here which gives the smallest ground for a jury to find that
I this was malicious. I do not want to proceed to other grounds which might give rise to the suggestion that what I have been now saying is obiter, but one is met with the difficulty that there are so many grounds upon which one feels that this appeal cannot succeed that one is embarrassed in placing reliance particularly on one. But I have no hesitation in saying that there was no verdict here which would justify the entering of judgment for the appellant. The question whether or not this was a privileged communication as apart from the question whether it was a privileged occasion (I will now take the distinction which has been earnestly pressed upon your Lordships) has not been determined by the jury. That would, but for

what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordships' competence to give him, but what puts him out of court in that respect is that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted a new trial, for the obvious reason that, if you thought you had got enough, you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect. I am not imputing neglect or want of astuteness to those who conducted the appellant's case; on the contrary, I think that they were very alert and astute in what they did—because obviously, if that question had been put to the jury the jury would have negatived malice, and, therefore, they thought they had got enough in the words which the jury were supposed to have used. But it is manifest that that might be insufficient, because there might be an excess in the words used, and yet they might not be enough to justify a finding of malice or excess of privilege as distinguished from an excess of words. No one could rely upon the verdict which the jury actually did find as showing that they found such malice on the part of the person who wrote the letter, or on whose behalf it was written, as would justify a judgment for the plaintiff.

On these grounds it appears to me impossible to maintain that the appellant here could succeed. For myself I may perhaps regret that the Court of Appeal did not take the view which I think RIGBY, L.J., did, because I think it is important that parties should know that there is still one question for the court apart from the question of malice, viz., whether the words are susceptible in point of law of being a libellous communication. If it were otherwise, the jurisdiction over and over again exercised by the courts in arresting judgment, even after a verdict in respect of libels, could not have existed. If it is said, because it is suggested that it may be libellous it must go to the jury, I entirely differ from that view—the words must be susceptible of a libellous meaning in this sense, that a reasonable man could construe them unfavourably in such a sense as to make some imputation upon the person complaining. For these reasons I am of opinion that this appeal must be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. I also am unable to see anything libellous in the circular of Mar. 15, when it is fairly read, having regard to the purpose for which it was written. I should also be very sorry to say that there was any statement in that letter which was untrue. I do not think the statement was complete, but, if it had been complete, I do not think it would have made any difference. It would have been complete if it had stated that the directors in December had resolved to close this agency, that negotiations had since been continued which were unsatisfactory, and that Lord William Nevill had written to say that he desired to sever his connection with the company. From a statement of that sort, if it had been reasonable to expect so full a statement in the letter, I think exactly the same inference might have been drawn. When people in business desire to sever their connection it is very easy to suggest that the fault lies on the one side or the other, but I do not think that any reasonable person reading this letter fairly would come to the conclusion that the directors had closed the agency for any reason discreditable to Lord William Nevill. I also think, agreeing with the Court of Appeal to this extent, that there was no evidence of malice. The jury were asked whether the letter was malicious, and they declined to say that it was, or, at any rate, they could not agree in saying that it was. For the reasons the Lord Chancellor has given I do not think the appellant is entitled to say that there ought to be a new trial, and on these grounds, agreeing with the reasons which have been already given, I am of opinion that the appeal ought to be dismissed.

LORD SHAND.—I also am of opinion that the appeal should be disallowed for the reasons which have been already so fully stated. It appears to me that the

document which is founded on as libellous, read in the light of the few surrounding facts which were before the jury, was not of such a character that the judge presiding at the trial should have left it to the jury to say whether it was a libel or not. In the statement of claim, and in the argument which has been submitted by the appellant's counsel, a few words have been taken from the letter of the respondents' secretary of Mar. 15, 1894, as warranting the contention that the latter was libellous—viz., the words,

> "The agency of Lord William Nevill at 27, Charles Street, St. James's Square, has been closed by the directors."

But we must take the document as a whole; and if we take it with the opening message, it appears to me that these words are not calculated to convey or to suggest any imputation against the plaintiff. In the first paragraph there is a notice given to those transacting business with the company that the West End office of the company has been opened at 19, St. James's Street—that is to say, that the company, which had no such office previously, has now got an office of its own in that district under Mr. Murray Faulkner. What follows—viz., that the agency of Lord William Nevill has been closed by the directors—is a statement of the natural sequence of the establishment of this new office. Certainly you cannot extract from those words the meaning, directly, that there is any imputation made against Lord William Nevill. It is said that an imputation may be inferred, but that inference certainly is not a necessary inference; and, as it appears to me, it is neither a natural nor a reasonable inference to draw from the words in the circumstances in which we find them.

The case, therefore, appears to me to be one in which *Henty's Case* (1), decided in this House, is absolutely decisive. In that case the language used in reference to the Capital and Counties Bank, whose cheques, it was said, were to be no longer received, was of a character much more suggestive of an imputation against the soundness of the bank than anything can be represented to be here in the language used as applicable to Lord William Nevill. In the statement of claim there was no averment of extrinsic facts known to those receiving the circular, which would show that the language was fitted to convey to them any secondary meaning injurious to the appellant, and no evidence of such facts, no evidence of circumstances calculated to give the words used a more extended sense than their natural meaning, was presented at the trial. I am of opinion, therefore, that the letter complained of was not a libel, and should not have been allowed to go to the jury as such for the reasons which have been given by your Lordships.

I am further of opinion that the statements in the letter were true, and were certainly made by the secretary in the belief that they were true. The writer obviously had in his mind, not the correspondence which had taken place immediately before with reference to the new arrangement as to the commissions to be allowed to the appellant on business brought by him after the company should have opened their own West End office, but what had occurred with reference to the permanent and important position of agent which the appellant had held at "the agency at 27, Charles Street," when he was really transacting the West End agency business. In that view the writer of the letter was correct in saying that the agency had been closed by the directors, for it was they who had terminated the permanent agency, though there had been a temporary and more limited or different agency or arrangement for payment of commissions for a later period.

I must say that I am further very clearly of opinion that, the occasion on which the letter complained of was issued having been admittedly privileged (for there is no question raised as to this), no evidence was presented to the jury that would establish a case of malice. The jury themselves have not given a verdict of malice, which would be necessary to displace the privilege. It is true that something else was put to the jury by the judge, viz., the question whether the jury thought that the defendants "exceeded the occasion of privilege." The words

"exceeded the occasion," ambiguous as these words seem to me, having been used, the jury no doubt found that the "privilege had been exceeded," or, to put it otherwise, that there had been what they called "sharp practice." I do not think a finding of that kind is enough to entitle the plaintiff to a verdict for damages for libel. The jury shrank from saying there was malice—they declined to say there was malice—they were then asked the question whether there was something short of malice on the part of the respondents, and they said there was. They were not asked whether that excess of privilege was such as to amount to malice. The learned judge was not asked to put this question by the appellant's counsel I suppose for the obvious reason that the jury had already indicated that they would not answer it in the affirmative. As they were not asked that, it appears to me not only that the verdict which the appellant did get did not entitle him to have judgment entered for the damages which were given, but that, in my view on this part of the case, a new trial could not have been granted.

Under these circumstances, and assuming that evidence of malice in the acts or communications of the officials of an incorporation in the conduct of their business would be an answer to a plea of privilege, and concurring with what has been already said by your Lordships, I am of opinion that the appeal should be disallowed.

LORD DAVEY.—I am of the same opinion. I think that the words complained of were not fairly susceptible of any meaning that would have justified the jury in finding them to be libellous. I also think that the words in question were true in fact in the only sense relevant to the context in which they are found, and I agree with the learned judges in the Court of Appeal that there was no evidence of malice to be submitted to the jury.

Appeal dismissed.

Solicitors: *R. C. Ponsonby; Deacon, Gibson & Medcalf.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

BATES *v.* DONALDSON

[Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), June 11, 20, 1896]

[Reported [1896] 2 Q.B. 241; 65 L.J.Q.B. 578; 74 L.T. 751; 60 J.P. 596; 44 W.R. 659; 12 T.L.R. 485]

Landlord and Tenant—Covenant not to assign without consent—Refusal of consent—Ground for refusal—Landlord desiring to obtain possession and willing to pay to tenant same amount as proposed assignee.

A lease contained a covenant by the tenant not to assign without a licence which was "not to be unreasonably withheld in the case of a respectable and responsible person." The tenant applied for a licence to assign to the defendant, who was a respectable and responsible person, but the plaintiff, the then landlord, refused his consent, his reason being that he desired to obtain possession of the premises himself, that he was prepared to pay for a surrender the same amount as the defendant was for an assignment, and that, as the tenant and the defendant were strangers to each other, there was no particular reason why the tenant should prefer the defendant to himself. The plaintiff,

A however, never in fact made an offer to pay this price for a surrender. The tenant thereupon assigned the lease to the defendant without the plaintiff's licence. In an action for forfeiture of the lease for breach of the covenant,

Held: in the circumstances the plaintiff had unreasonably refused his licence to the assignment, and the action, therefore, failed.

Per KAY, L.J.: If the plaintiff had in fact offered to buy at the price the B tenant asked, the case might have been different.

Notes. By s. 19 (1) (a) of the Landlord and Tenant Act, 1927 (13 HALSBURY'S STATUTES (2nd Edn.) 904) in all leases containing a covenant, condition or agreement against assigning, underletting, charging or parting with possession of demised premises or any part thereof without licence or consent, such covenant, C condition or agreement shall be subject to a provision to the effect that such licence or consent is not to be unreasonably withheld.

Applied: *Re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7. Considered: *Re Gibbs and Houlder Bros. & Co., Ltd.'s Lease, Houlder Bros. & Co., Ltd.* v. *Gibbs*, [1925] All E.R. Rep. 128; *Re Swanson's Agreement, Hill* v. *Swanson*, [1946] 2 All E.R. 628. Distinguished: *Swanson* v. *Forton*, [1949] 1 All E.R. 135. D Referred to: *Re Masters and Great Western Rail. Co.* (1901), 84 L.T. 515; *Premier Confectionery (London) Co., Ltd.* v. *London Commercial Sale Rooms, Ltd.*, [1933] All E.R. Rep. 579; *Lee* v. *K. Carter, Ltd.*, [1948] 2 All E.R. 690; *A. Vienit, Ltd.* v. *W. Williams & Son (Bread Street), Ltd.*, [1958] 3 All E.R. 621.

As to grounds of refusal of consent, see 23 HALSBURY'S LAWS (3rd Edn.) 634-635, and for cases see 31 DIGEST (Repl.) 424-427.

E

Case referred to:

(1) *Treloar* v. *Bigge* (1874), L.R. 9 Exch. 151; 43 L.J.Ex. 95; 22 W.R. 843; 31 Digest (Repl.) 420, *5491*.

Also referred to in argument:

Lehmann v. *McArthur* (1868), 3 Ch.App. 496; 37 L.J.Ch. 625; 32 J.P. 660; F 16 W.R. 877; sub nom. *Lechmann* v. *McArthur*, 18 L.T. 806, L.JJ.; 31 Digest (Repl.) 424, *5520*.

Barrow v. *Isaacs & Son*, [1891] 1 Q.B. 417; 60 L.J.Q.B. 179; 64 L.T. 686; 55 J.P. 517; 39 W.R. 338; 7 T.L.R. 175, C.A.; 31 Digest (Repl.) 547, *6696*.

Hyde v. *Warden* (1877), 3 Ex.D. 72; 47 L.J.Q.B. 121; 37 L.T. 567; 26 W.R. 201, C.A.; 31 Digest (Repl.) 476, *6016*.

G *Sheppard* v. *Hong Kong and Shanghae Banking Corpn.* (1872), 20 W.R. 459; 31 Digest (Repl.) 424, *5516*.

Lepla v. *Rogers*, [1893] 1 Q.B. 31; 68 L.T. 584; 57 J.P. 55; 9 T.L.R. 23; 37 Sol. Jo. 11; 5 R. 57; 31 Digest (Repl.) 419, *5487*.

Appeal by the plaintiff from a decision of MATHEW, J., holding that no forfeiture H of a lease had been incurred on account of its being assigned to the defendant without the plaintiff's licence.

The action was brought to recover possession of a house, No. 14, Cavendish Square. On Oct. 15, 1888, a lease of this house was granted by Mr. Stanford to Mrs. Wilson for fourteen years from Sept. 29, 1888. The lease contained a covenant by Mrs. Wilson

I "that she the said lessee, her executors, administrators, or assigns, shall not nor will assign or underlet the premises hereby demised or intended so to be or any part thereof for the whole or any part of the term hereby granted without having first obtained a written permission or licence signed by the said lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee or undertenant."

There was a proviso for re-entry upon breach of covenant.

On July 30, 1889, the reversion expectant upon the lease was conveyed to the plaintiff. In 1895 Mrs. Wilson desired to sell the residue of the term. The plaintiff was anxious to obtain possession of the house. He had bought the reversion with the intention of providing a residence for his wife and grandchildren after his death. An agent for the plaintiff saw Mrs. Wilson, and ascertained that she would sell her interest for £400, but he was not then authorised to agree to buy. Five days afterwards Mrs. Wilson, not having received any further communication from the plaintiff or his agent, agreed to sell her lease to the defendant for £400. Later in the same day the plaintiff's agent saw Mrs. Wilson, and said he was authorised to offer £400 on behalf of the plaintiff. She informed him that she had already sold to the defendant. On Feb. 11 Mrs. Wilson applied to the plaintiff for his licence to assign, and on Feb. 28 the plaintiff refused to give his permission. The defendant was a stranger to Mrs. Wilson and there was no reason why she should prefer to sell to him rather than to the plaintiff. The defendant was a respectable and responsible person, and he did not intend to use the house in any manner to which objection could be made. The only reason which the plaintiff had for refusing his licence to assign, was that he desired to get possession of the house for himself. When the plaintiff refused to give his permission to assign, he did not offer to buy the plaintiff's interest for £400 or any sum. He did not allege in his pleading that he had done so, nor offer to do so. He was, in fact, always willing to buy for £400.

The defendant obtained a decree for specific performance of her contract against Mrs. Wilson, and she assigned her lease to him, and he took possession of the house. The plaintiff thereupon brought this action to recover possession of the house, upon the ground that a forfeiture had been incurred by the assignment without his licence. MATHEW, J., held that the licence had been unreasonably withheld, and gave judgment for the defendant. The plaintiff appealed.

Channell, Q.C., and *C. A. Russell* for the plaintiff.
Bucknill, Q.C., and *Mulligan* for the defendant.

Cur. adv. vult.

June 20, 1896. The following judgments were read.

KAY, L.J.—This is an action of ejectment by a landlord to recover possession of No. 14, Cavendish Square, for breach of covenant by the tenant. The covenant in question, contained in a lease for fourteen years from Sept. 29, 1888, was not to assign

> "without having first obtained a written permission or licence signed by the said lessor, such permission or licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee."

It is plain on the face of that covenant that it is not sufficient that the proposed assignee should be a respectable and responsible person. The words clearly show that the landlord may nevertheless have some reasonable ground for refusing his consent. I shall not attempt to give any exhaustive definition of what would be in every conceivable case an unreasonable withholding of permission. The only question which it is necessary to consider is whether in the circumstances of this case the refusal was reasonable within the meaning of this covenant. Counsel admitted, and I agree, that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was not forbidden by the lease nor by any rule of law, the landlord might reasonably refuse to permit the assignment. So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of this covenant. In this case the plaintiff bought the interest of the original lessor with the intention, he says, of leaving the house to his wife if she survived him, for herself and his grandchildren to live in after his death. With this object he negotiated with the lessee, Mrs. Wilson, to purchase her interest, and

his agent obtained Mrs. Wilson's consent to sell her interest for £400. Not having received any further communication from the plaintiff, five days later Mrs. Wilson agreed to sell her lease to the defendant Donaldson. She did not communicate her intention to do this to the plaintiff, and of course she did not obtain his consent. She did not ask for it. She has no reason for preferring Donaldson to the plaintiff. All that she wants is to get rid of the lease and to get £400 for her interest. The plaintiff says that he has always been willing to give her £400, and he admits that he wishes to compel her to sell it to him, and that this is the reason why, when an application was made for his written consent after the contract to sell to Donaldson, he refused to give it.

It is obvious that, if the plaintiff had a right to refuse his consent, that right cannot be taken away or affected by anything done by the lessee before she asked for it. Donaldson has obtained a decree for specific performance against her. That cannot alter the rights of the plaintiff in any way. The sole question is: Was the plaintiff unreasonable in refusing his consent at the time when he was asked to give it? As the proposed assignee in this case is a respectable and responsible person the plaintiff must show a strong reason for withholding his consent. Clearly it is not sufficient for him to say: "I want to oblige the lessee to sell to me." He must at least be able to show that, at the time when the consent was refused, if that was his motive, the refusal did no harm to the lessee. I cannot find that before or at the time when the plaintiff refused his consent he had offered to buy the lessee's interest for £400 or any sum. He does not allege in his pleading that he did so. He does not offer to do so in his pleading. The plaintiff is, therefore, in the position of asserting simply that he is entitled to eject the defendant because he has not got his written permission. That is not the contract. The lessee had a right to assign without his permission if he withheld it unreasonably. Was it reasonable to refuse without making any offer to buy for himself? If he had answered the request for permission by saying: "I was in treaty with you to buy, and was ready to give the price you asked, and I now offer it to you," the case might have been different, but that at least he ought to have done. He did nothing of the kind. On the contrary, his excuse for refusing permission was that he believed the purchaser intended to carry on at the house his business of a picture dealer, and it was only when this failed that the plaintiff set up the plea on which he now relies. On the whole I am of opinion that the refusal was under the circumstances unreasonable, and that this appeal should be dismissed.

A. L. SMITH, L.J.—This is an action of ejectment brought by Sir Edward Bates against Mr. Donaldson, and the question is: What is the meaning of the phrase that "permission to assign shall not be unreasonably withheld" in a clause in a lease?

In the year 1889 Sir Edward Bates purchased of Mr. Stanford the reversion of 14, Cavendish Square, expectant upon the determination of a lease theretofore granted to Mrs. Wilson, which expires in 1902. In the year 1895 Sir Edward became desirous of obtaining possession of these premises, and through an agent negotiated with Mrs. Wilson for the surrender by her to him of her lease. Mrs. Wilson asked £400 for her unexpired term. The agent was not authorised by Sir Edward Bates to accept this offer, and some days elapsed before he obtained authority from Sir Edward to agree to pay this amount to Mrs. Wilson. In the meantime she, having no contract with Sir Edward that he would give what she asked, on Feb. 7, 1895, entered into a contract with Mr. Donaldson to assign to him the residue of her term for £400. Sir Edward, as it turns out, would have given Mrs. Wilson the £400 which she asked, but when she contracted with Mr. Donaldson she did not know this. It is now admitted that Mr. Donaldson is in every way a respectable and responsible person, and that no objection can be made to him personally, nor is it suggested that he is about to use 14, Cavendish Square in any improper or undesirable manner.

On Feb. 11, 1895, application was made to Sir Edward Bates for his licence to assign to Mr. Donaldson, and Sir Edward took exception to Mr. Donaldson as an assignee, and ultimately on Feb. 28, 1895, declined to give his assent. It must now, however, be taken that the sole reason he had for refusing his assent was because he wanted possession of the house himself, and he now seeks to eject Mr. Donaldson, who has entered into possession of the house, upon the ground that the following covenant in the lease to Mrs. Wilson has not been complied with by her. There is in the lease a power to re-enter in case of breach of any of the covenants therein. It will be seen that it is only when a respectable and responsible person is proposed as assignee or under-tenant that this clause—as to the permission not being unreasonably withheld—comes into play. If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission; if, however, the person proposed be respectable and responsible, then the lessor cannot unreasonably withhold his permission. This stipulation as to the permission not being unreasonably withheld (if a respectable and responsible person is obtained) releases the lessee from the covenant not to assign without permission, if the permission is unreasonably withheld, and this was so held in *Treloar* v. *Bigge* (1).

What is an unreasonable withholding of permission within the meaning of this clause? It is conceded by counsel, who appeared for Sir Edward Bates, that, if a tenant was desirous of assigning to a friend, it would be unreasonable for the lessor to withhold his assent for the purpose of breaking the lease; but, it was said, if it was not to a friend, but to a stranger, and the lessor was willing to pay what the lessee wanted and as much as he could get from a stranger, it was not unreasonable to withhold his assent in order, if possible, to break the lease, if he wanted the premises for himself. This is not my reading of the clause. It is admitted that there is no case in the books which covers the present. When the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable and responsible assignee, in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. This clause was inserted, in my judgment, alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor, if possible, to coerce a tenant to surrender the term, so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld. For these reasons I think that MATHEW, J., came to a right conclusion, and that this appeal must be dismissed.

LORD ESHER, M.R., concurred.

Appeal dimissed.

Solicitors: *Witham, Roskell, Munster & Weld; Norris & Norris.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

HINDLE *v.* BIRTWISTLE

[Queen's Bench Division (Wills and Wright, JJ.), December 16, 1896]

B [Reported [1897] 1 Q.B. 192; 66 L.J.Q.B. 173; 76 L.T. 159; 61 J.P. 70; 45 W.R. 207; 13 T.L.R. 129; 41 Sol. Jo. 171; 18 Cox, C.C. 508]

Factory—Dangerous machinery—"Dangerous"—Question of fact—Test of danger—Contingency of carelessness by workman.

C The question whether a part of a machine is dangerous within the meaning of the Factory and Workshops Act, 1878, s. 5 [now the Factories Act, 1961, s. 14] is one of fact in each case and will depend on whether there is a substantial probability that accidents will result from the use of the machinery. A part of a machine will be dangerous if in the ordinary course of human affairs danger may reasonably be anticipated from it when it is worked without protection. In determining whether machinery is dangerous consideration must be D given to the contingency of carelessness on the part of the workman in charge of it, the frequency with which that contingency is likely to occur, and all other matters likely to make the machine dangerous.

Notes. The Factory and Workshop Acts, 1878 and 1891, have been repealed. Section 5 of the 1878 Act, as amended, has been substantially re-enacted by the E Factories Act, 1961, s. 14. The latter section applies to "every dangerous part of any machinery, other than prime movers and transmission machinery" (to which special provisions apply).

Considered: *Higgins* v. *Harrison* (1932), 25 B.W.C.C. 113; *Peacock* v. *Gyproc Products, Ltd.* (1935), 79 Sol. Jo. 904; *Sowter* v. *Steel Barrel Co., Ltd.*, [1935] All E.R. Rep. 231; *Walker* v. *Bletchley Flettons, Ltd.*, [1937] 1 All E.R. 170; *Carey* v. F *Ocean Coal Co., Ltd.*, [1937] 4 All E.R. 219; *Wing* v. *Soar*, [1938] 1 K.B. 379, n.; *Stimpson* v. *Standard Telephones and Cables, Ltd.*, [1939] 4 All E.R. 225; *Carr* v. *Mercantile Produce Co.*, [1949] 2 All E.R. 531; *Smithwick* v. *National Coal Board*, [1950] 2 K.B. 335; *Dickson* v. *Flack*, [1953] 1 All E.R. 236; *Frost* v. *John Summers & Sons, Ltd.*, [1954] 1 All E.R. 901; *Williams* v. *Sykes and Harrison, Ltd.*, [1955] 3 All E.R. 225; *Close* v. *Steel Co. of Wales*, [1961] 2 All E.R. 953. Referred to: G *Atkinson* v. *London and North-Eastern Rail. Co.*, [1925] All E.R. Rep. 346; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co.*, [1934] 2 K.B. 132; *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1938] 3 All E.R. 21; *Sutherland* v. *James Mills, Ltd.*, [1938] 1 All E.R. 238; *Vowles* v. *Armstrong-Siddeley Motors, Ltd.*, [1938] 4 All E.R. 796; *Kinder* v. *Camberwell Corpn.*, [1944] 2 All E.R. 315; *Carroll* v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; *John Summers &* H *Sons, Ltd.* v. *Frost*, [1955] 1 All E.R. 870; *Eaves* v. *Morris Motors, Ltd.*, [1961] 3 All E.R. 233.

As to the safeguarding of machinery in factories, see 17 Halsbury's Laws (3rd Edn.) 70 et seq., and for cases see 24 Digest (Repl.) 1053 et seq. For the Factories Act, 1961, s. 14, see 41 Halsbury's Statutes (2nd Edn.) 256.

I Case referred to in argument:

Redgrave v. *Lloyd & Sons*, [1895] 1 Q.B. 876; 64 L.J.M.C. 155; 72 L.T. 565; 59 J.P. 293; 43 W.R. 527; 11 T.L.R. 326; 39 Sol. Jo. 382; 18 Cox, C.C. 149; 15 R. 403, D.C.; 24 Digest (Repl.) 1053, *206.*

Appeal by Case Stated from a decision of the Recorder of Blackburn, reversing a decision of the justices of Blackburn.

On Oct. 3, 1895, Ephraim Hindle and George Hindle appeared before the justices of Blackburn on an information under the Factory and Workshop Acts, 1878 and 1891, laid by Birtwistle, one of Her Majesty's inspectors of factories, charging

"that they on Aug. 7, 1895, at the said borough, being then and there the occupiers of a certain cotton factory, the same being a factory within the true intent and meaning of the said Acts did unlawfully fail to keep such factory in conformity with the said Acts by then and there neglecting to fence a certain dangerous part of the machinery in such factory, to wit shuttles, such shuttles not being in such a position or of such construction as to be equally safe to every person employed in the said factory as they would be if they were securely fenced."

The justices convicted the defendants, and fined them 20s. The defendants appealed to quarter sessions where the recorder quashed the conviction subject to a Case Stated.

The Factory and Workshop Act, 1878, s. 5, provided:

"With respect to the fencing of machinery in a factory the following provisions shall have effect. . . . (3) Every part of the mill gearing shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced."

By the Factory and Workshop Act, 1891, s. 6:

"(2). In sub-s. (3) of the same section [i.e., s. 5 of the Factory and Workshop Act, 1878], before the words 'every part' shall be inserted the words 'all dangerous parts of the machinery and. . . .' "

The appellants, Ephraim Hindle and George Hindle, were on Aug. 7, 1895, and had been for several years previously, the occupiers of a certain weaving shed in Blackburn, in which there were the ordinary looms and shuttles used in weaving cotton cloth. It was admitted that the shed was a factory within the meaning of the Factory and Workshop Acts, 1878 and 1891. On Aug. 7, 1895, a shuttle flew out of the shuttle race of one of the looms in work in the said factory, and in its flight struck and seriously injured a weaver in the employment of the appellants. The accident was caused by the negligence of the said weaver in fastening the picking band of the loom too taut, whereby the shuttle was deflected from its proper course in the shuttle race, and so flew out. In addition to this accident there were during the years 1891 to 1895, both inclusive, three other serious accidents caused by shuttles flying from looms in the appellants' factory, but to what cause or causes the said accidents were to be attributed there was no evidence to show. During that period and down to Aug. 7, 1895, there were 1,400 looms or thereabouts in work during most working days in the factory; and it was agreed, so far as the looms and shuttles were concerned, that the appellants' machinery was substantially in the same condition all through the said period up to and including Aug. 7, 1895.

It was proved that while the shuttle is working in due course it is not dangerous, but occasionally shuttles do fly out from the shuttle race during the process of weaving under circumstances which do render such flying shuttles dangerous to any person who may chance to be in the line of their flight, and the evidence went to show that the flying out of the shuttles from the shuttle race is due to one or other of the following causes: (i) in consequence of the shuttle not being true; (ii) in consequence of the negligence of the weaver in fastening the picking band too taut, or some other act of negligent user of the machinery by the person in charge of it; (iii) in consequence of some foreign substance accidentally getting into the shuttle race; (iv) in consequence of some defect in the yarn or thread used in the loom. It was not suggested that the appellants' looms or any of them were at any time during the period before mentioned, or on Aug. 7, 1895, fitted with shuttles that were not true, nor was there any evidence that the appellants omitted any reasonable precaution to prevent foreign substances getting in the yarn or thread,

or that there was in fact any foreign substance in the shuttle race of any of the appellants' looms, or any defect in any of the yarn or thread used in their looms, during the same period or on Aug. 7.

The questions for the court as stated by the learned recorder were as follows: If the court was of opinion that the fact that the appellants' looms and shuttles were on Aug. 7 liable to become temporarily dangerous (a) either by some negligent act of the person in charge of the said looms, or (b) by some foreign substance getting into the shuttle race, or (c) by some defect in the yarn or thread used in the process of weaving, rendering the said looms or shuttles dangerous machinery, or dangerous parts of machinery, or dangerous parts of any machinery within the meaning of the Factory Acts, 1878 and 1891, the learned recorder's decision was to be reversed. If the court was of a contrary opinion, it was to stand.

The Attorney-General (*Sir R. Webster, Q.C.*) (*H. Sutton* and *L. Sanderson* with him) for the respondent.

Sir E. Clarke, Q.C. (*E. Sutton* with him) for the appellants.

WILLS, J.—This case is no doubt one of considerable importance. Still I can see no benefit in reserving judgment since the enactment seems to be plain and intelligible, and I feel no difficulty in construing it, nor would I in applying it if the facts of the case were fully before me.

The learned recorder gives the reason of his decision in one sentence in which he says that

> "the manufacturer is only responsible for machinery which is in itself dangerous in the ordinary course of careful working."

He appears to think that no machinery can be dangerous within the Act unless it is dangerous in itself however carefully worked. I altogether disagree with such an interpretation, which would limit materially and disastrously the operation of a most beneficial Act of Parliament. It seems to me that machinery is dangerous, if in the ordinary course of human affairs danger may reasonably be anticipated from it when it is worked without protection. To say that because accidents have happened through its use therefore it must be dangerous, is wrong. To say that because no accidents would happen if it were worked with absolute care therefore it cannot be dangerous, is also wrong. In considering whether machinery is dangerous, the contingency of carelessness on the part of workmen in charge of it, the frequency with which such contingency is likely to occur, and all other matters likely to make the machine become dangerous, are to be taken into consideration. If, taking what is reasonably certain to happen, the court thinks there is a substantial probability that accidents will result from the machinery, the machinery is dangerous within the Act, and the court should convict. That whole thing is a question of degree. The court must in each case decide on the facts as proved before it. As the learned recorder does not seem to have applied his mind to this point, I think the Case must go back to him for reconsideration.

WRIGHT, J.—I am of the same opinion. The justices, who are presumably persons acquainted with these matters, came to the conclusion that these shuttles were dangerous. The recorder reversed their decision on a view of the law which I think is erroneous. The chance of foreign matter getting into the machinery, the chance of defects in the yarn or negligence in the workers, are all to be taken into consideration, but none of them is in itself conclusive. The mere fact that any of these may cause the shuttle to fly out, and that when it flies out it is dangerous, is not conclusive either. The court must consider whether the tendency it has to fly out is a tendency to fly out often enough to satisfy a reasonable interpretation of the word "dangerous." The whole question is one of degree and of fact in all cases.

Case remitted to the recorder.

Solicitors: *Rowcliffes & Rawle*, for *Carter*, Blackburn; *Solicitor to the Treasury.*

[*Reported by* J. A. STRAHAN, ESQ., *Barrister-at-Law.*]

ST. MATTHEW, BETHNAL GREEN, VESTRY *v.* LONDON SCHOOL BOARD

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Morris and Lord Shand), November 19, 25, 26, 1897]

[Reported [1898] A.C. 190; 67 L.J.Q.B. 234; 77 L.T. 635; 62 J.P. 116, 532; 46 W.R. 353; 14 T.L.R. 68]

Sewer—Pipe laid to connect with sewer belonging to vestry—Liability to repair —Metropolis Management Act, 1855 (18 & 19 *Vict.*, *c.* 120), *s.* 250.

By s. 250 of the Metropolis Management Act, 1855 [repealed]: "The word 'drain' . . . shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board, and the word 'sewer' shall mean and include sewers and drains of every description except drains to which the word 'drain' interpreted as aforesaid applies."

In 1866 the owner of a row of houses in London drained them by laying down a line of pipes which were connected with a sewer belonging to the vestry in an adjoining street. There was no evidence that this was done by the order or with the sanction of the vestry or of the Metropolitan Board of Works as required by the Metropolis Management Act, 1855.

Held: the probable inference of fact was that the laying down of the pipes was done with the sanction and authority of the vestry and of the Metropolitan Board of Works as there were ample powers of interference to prevent its being done unlawfully, but, even if this were not so, the pipes constituted a "sewer" within the meaning of the Metropolis Management Act, 1855, s. 250, and the vestry was liable for their repair.

Notes. The Metropolis Management Acts, 1855 and 1862 have been repealed. Statutory provisions relating to sewage and drainage in London are now to be found in the Public Health (London) Act, 1936, ss. 14-81 (15 Halsbury's Statutes (2nd Edn.) 896 et seq.). For s. 250 of the 1855 Act, see now s. 81 of the 1936 Act.

The vestries and district boards constituted by the Metropolis Management Act, 1855, were the predecessors of the borough councils. Their powers were transferred to the metropolitan borough councils by the London Government Act, 1899 (15 Halsbury's Statutes (2nd Edn.) 644). The Metropolitan Board of Works was the predecessor of the London County Council.

Considered: *Appleyard* v. *Lambeth Vestry* (1896), 66 L.J.Q.B. 27; *Holland* v. *Lazarus* (1897), 66 L.J.Q.B. 285; *Kershaw* v. *Paine* (1913), 78 J.P. 149. Referred to: *R.* v. *Hastings Corpn.* (1896), 66 L.J.Q.B. 80; *Geen* v. *St. Mary, Newington, Vestry*, [1898] 2 Q.B. 1; *Greater London Property Co.* v. *Foot* (1899), 68 L.J.Q.B. 628; 238 *Old Ford Road, Owner* v. *Foot* (1899), 47 W.R. 541; *Woodthorp* v. *Spencer and Husbands* (1899), 63 J.P. 246; *Pakenham* v. *Ticehurst R.D.C.* (1903), 67 J.P. 448; *George Legge & Son, Ltd.* v. *Wenlock Corpn.*, [1938] 1 All E.R. 37.

As to sewers and drains in London, see 31 Halsbury's Laws (3rd Edn.) 197 et seq., and for cases see 41 Digest 11 et seq.

Cases referred to in argument:

Bateman v. *Poplar District Board of Works* (1886), 33 Ch.D. 360; 56 L.J.Ch. 149; 55 L.T. 374; 2 T.L.R. 860, C.A.; 41 Digest 11, *82*.

Kershaw v. *Taylor*, [1895] 2 Q.B. 471; 64 L.J.M.C. 245; 73 L.T. 274; 57 J.P. 726; 44 W.R. 28; 14 R. 698, C.A.; 41 Digest 14, *107*.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., and A. L. Smith, L.J.), reported [1896] 2 Q.B. 319, affirming an order of the Divisional

Court (LORD RUSSELL, C.J., and WRIGHT, J.), reported [1896] 2 Q.B. 95, making absolute a rule nisi for a mandamus.

In July, 1894, the School Board for London acquired certain lands in Tyrell Street, in the parish of St. Matthew, Bethnal Green. At that time there was a row of houses on the land, which were drained by pipes which had been laid down by the former owner in 1866, along the back of the houses, and carried the sewage into a sewer under a neighbouring street called Turin Street. The School Board pulled down the existing houses and erected other buildings, and proposed to connect them with the existing pipes in Tyrell Street; but these pipes turned out on examination to be in a defective state, and the School Board called upon the vestry to repair them. This the vestry declined to do on the ground that they were not a sewer vested in them which they were liable to repair. There was no evidence that the pipes in Tyrell Street had been laid down by the order, or with the sanction, of the vestry, or of the Metropolitan Board of Works within s. 74 of the Metropolis Management Act, 1855, or s. 47 of the Metropolis Management Act, 1862. It was admitted that the sewer under Turin Street was vested in the vestry. The School Board obtained a rule nisi for a mandamus to the vestry to repair the drain, which was made absolute as above mentioned.

Sir E. Clarke, *Q.C.*, *Asquith*, *Q.C.*, and *Beven* for the appellants.
Bosanquet, *Q.C.*, and *R. Cunningham Glen* for the respondents.

LORD HALSBURY, L.C.—I cannot forbear from saying that I think that the circumstances under which this case comes before your Lordships are a little unsatisfactory in this respect, that we have not all the facts that we might have had, and all the light which might have been thrown on the position of affairs by a more accurate description of the premises in respect to which this matter arises. But now that the matter has been explained and the affidavits carefully looked to, the question of fact appears to be clear that, apart from the definitions which are contained in the Acts referred to, this is undoubtedly what everybody would understand by and call a sewer.

Assuming that there is a distinction between a sewer and a drain apart from that which the Act of Parliament has made, I have always understood that a drain was a private thing, but that a sewer was a public thing to serve the purposes of the public; and the word "drain" appears to have been selected under the statute in order to mark that distinction. As a matter of fact, this is some contrivance, ditch, drain, call it what you will (I mean apart from the technical meaning of the word "drain" in the statute), which is an artificial construction, and carries the sewage of a very large number of houses into a pre-existing sewer in Turin Street; and, first of all as to the question of fact, I cannot entertain the smallest doubt that when that was made, by whomsoever it was made, everybody in the neighbourhood, certainly the surveyor of highways, the proper officer of the vestry, must have perfectly well known what was being done. It is not a small operation: it is an operation which must have been done certainly with public notice to everybody; they must have taken up some part of the public highway, and there must have been considerable work done for the purpose of connecting that drain with what is admitted on all hands to be an old sewer in Turin Street. I am, therefore, clearly of opinion that the inference I should draw is that it must have been known to the local authority.

We come back now to the Act of Parliament. If this is a sewer, apart from what has been described as the artificial system, a combined drain, it is impossible to avoid the application of the language of the Act of Parliament that it is vested in the vestry and is to be repaired by them. There are two things, and only two things so far as I see, which can prevent its being vested in the vestry, and which, if they were established, would—I think not in favour of the private proprietor, but rather against his will—subject to certain restrictions, make things which may to

some extent serve a public purpose be nevertheless repairable by him and at his expense. One, of course, is, naturally and justly, that where it only applies to the drainage of a single house the proprietor must connect his private property with the public sewer, and must make and maintain that drain which runs into the public sewer.

Then comes an additional provision that if a particular block of houses, a certain number of houses, may be more conveniently and economically drained by one combined system or operation, then, not in aid of the proprietor, but rather imposing an additional burden on him, though it is in one sense a sewer draining more than one house, nevertheless, if an order is made by the vestry that there shall be a combined operation for drainage, then, notwithstanding that that does to some extent fulfil what I would call a public function, it is to remain a drain, and, therefore, to be repaired by the private proprietor. It is not denied here that there is no evidence of any such order making that combined operation into a drain and not a sewer; and inasmuch as undoubtedly the fact that it drains more than one house gets rid of the ordinary meaning of the word "drain," indeed of any meaning of the word "drain" even by this Act of Parliament except by that operation, it is manifest that those who insist upon its being a drain and not a sewer must establish as matter of proof that the order of the vestry has been made; and I know of nothing which can avoid the exigency of the Act of Parliament in impressing upon the property that particular quality unless an order of the vestry be properly made. It cannot be denied that there is no such order; and I, for one, decline to draw the inference of fact that any such order was made, because I do not believe that it was made; and no tribunal, I think, ought to draw an inference contrary to what they believe to be the fact.

But it is said the vestry themselves would have no authority to do this thing and make this drain without the sanction of the Metropolitan Board of Works. As to that, it depends to my mind, upon totally different considerations, because in that case the vestry, if they did it, would be in one way fulfilling the duty cast upon them by the Act of Parliament. From the description of these houses given by some of the witnesses in the affidavits, they were certainly calculated to be very deleterious to the health of the inhabitants generally. There were cesspools immediately behind the houses, the liquid slops were thrown into the street, and no one could doubt that, invested as the vestry were with the powers of insisting upon what was necessary for the health and comfort of the inhabitants, it was their duty in some way or other to provide for the drainage of these different houses. What we know as a fact is that the drainage was altered from the system which had been previously pursued, and that between thirty and forty years ago the cesspools were filled up and this long line of conduit constructed which goes into the sewer in Turin Street. I should myself draw the inference that that was done either by the vestry itself or by some other person, very likely by agreement between the vestry and the proprietor, each of them being desirous, the one to make the houses convenient and habitable, and the other, the vestry, in fulfilment of their duty to provide for the health and sanitation of the inhabitants of their district. By whomsoever it was done, it was done, and as a sewer.

It is said that the vestry themselves would not have power to do it without the authority of the Metropolitan Board of Works. I will assume for this purpose that as the regular and proper course of procedure they ought to have received the sanction of the Metropolitan Board of Works; but, if they did not do so, I think, that although they were not fulfilling their strict administrative duty, it could not be said that it was unlawful. They were providing for a duty which they had to discharge, and they ought to give notice, to get the sanction in that sense, of the Metropolitan Board of Works; and I should be disposed, if it were necessary, to presume that they did, though perhaps not in the regular way, get the sanction and authority; but the fact remains that something or another was done at a distance of time between thirty and forty years from the present time, which, if it were done

by the vestry and by the authority of the Metropolitan Board of Works, was lawfully and properly done; and, inasmuch as there are ample powers of interference to prevent its being done if it was unlawful in the sense in which I have described the word unlawful, and no such interference was ever suggested, though from the nature of the thing done it was necessarily a thing which must have been known and publicly known to the authorities, I should come to the conclusion that it was done with the sanction and authority both of the vestry and of the Metropolitan Board of Works.

It seems to me, therefore, that one has exhausted the whole ground; it must be either a sewer or a private drain. I have pointed out what appears to me to be a fatal blot in the effort to make it a private drain. Therefore the only other alternative is that it must be a sewer; and if it is a sewer it is to be repaired by the proper local authority. I think, therefore, that a mandamus ought to issue, and that this judgment ought to be affirmed, and I move your Lordships accordingly.

LORD HERSCHELL.—I am of the same opinion. The sewer as to which this question arises clearly comes within the definition of sewer in the Act of 1855, unless it be shown that it is taken out of that definition by being within the definition of "drain." That can only be shown if it be shown that it was constructed by reason of an order of the vestry under the provisions of s. 74. If all construction of a sewer had been illegal unless by virtue of such an order, how far in that case, in view of the time that has elapsed, it would have been right to presume an order it is not necessary to inquire. But it is perfectly manifest that such an order is not the only way in which this sewer could be legally made. I think that there is strong evidence that no such order was made, because an order is a thing of which a record would almost certainly be kept. Therefore I think it is not shown, and there is no ground for presuming, that this combination was made by any order of the vestry. If that be so, it is a sewer within the meaning of the Act.

Then s. 68 provides that all sewers thereafter to be made shall be vested in the vestry. It is not disputed that if vested in the vestry this is to be repaired by the vestry. Therefore, the only question is, whether it is so vested in the vestry. The words are absolutely wide and unlimited, "all sewers" thereafter to be made, and it is only sought to cut down those words by suggesting that it must mean all sewers lawfully made. First of all it is said that this sewer could not be lawfully made without the sanction of the vestry to its connection with their drainage system, and, further, without the approval of the Metropolitan Board of Works.

The only evidence upon the subject of whether there was sanction and approval is an affidavit by a gentleman who has been vestry surveyor since 1884 in which he says that he can find no record either of sanction or of an application to the Metropolitan Board of Works in the vestry records. I do not think that sufficient to justify a conclusion that this drainage arrangement connecting with the Turin Street sewer was constructed without any such sanction or approval as the statute refers to. I think that when you have such a sewer as this draining this street existing for thirty years and more, and especially in view of the fact that there is power in the vestry for the health of the neighbourhood to compel owners of houses within 100 feet of a sewer to drain into that sewer, and that therefore there was power in the vestry to insist upon the owners of these houses in Tyrell Street, or at all events such as were within 100 feet of Turin Street, draining into the Turin Street sewer each by a separate drain (which under the circumstances would manifestly be inconvenient), there is every reason for supposing that the vestry would sanction a combined system of drainage which should drain not only the houses in Tyrell Street, which they could have compelled them to drain into the Turin Street sewer, but also the general row of houses which it might well have been thought it was for the advantage of the neighbourhood should be drained, and of which there was perhaps no means of compelling the drainage in so far as they were beyond 100 feet from the Turin Street sewer so far as we know. Therefore, I think there is in

this case good ground for presuming that the connection of this sewer for draining the houses in Tyrell Street with the sewer in Turin Street received the sanction of the vestry, and, in the absence of any distinct proof to the contrary, received the sanction of the Metropolitan Board of Works. But, even if that could not be made out, I do not think that it would follow, if the sanction of the vestry was given, that the sewer could be held not to be a sewer within the meaning of s. 68 merely because the vestry had failed to perform their statutory duty of first submitting the plans to the Metropolitan Board of Works and obtaining their sanction.

It is quite true that the statute of 1855 says that no new sewer is to be made—I think there it means made by the vestry—without the sanction of the Metropolitan Board of Works. The Act of 1862 carries it further, and provides that no person other than the vestry shall make a new sewer without the sanction of the vestry, and the vestry shall not sanction the construction of such sewer till the Metropolitan Board of Works have approved. But it does not follow that because the requisite sanctions have not been obtained the thing constructed is not a sewer. The statute does not say "all sewers thereafter constructed with the sanctions and approvals required by this Act." If it did, of course the matter would have been clear that, unless such sanction or approval had been given, or was to be presumed to have been given, the construction could not be deemed a sewer within the meaning of the Act. But the legislature has not said that, and of course there are many instances in which certain consents are requisite, and the failure to procure those assents may be a wrongful Act on the part of those who ought to have obtained them, where, nevertheless, the thing when done is none the less done, and regarded as a matter which cannot be treated as absolutely void and a nullity because the requisite consents have not been obtained. So here, I think, when one looks at the very words of the Act of 1862 itself it speaks of the thing, as to which the consents are to be obtained, as a sewer; and in the language of this legislation I think it is none the less a sewer within the meaning of the Act even though that sewer may have come into existence without certain assents and approvals which, as between public bodies, the statute requires. For these reasons I think that the judgment appealed from ought to be affirmed.

LORD MORRIS and **LORD SHAND** concurred.

Appeal dismissed.

Solicitors : *Robert Voss; C. E. Mortimer.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

TATHAM, BROMAGE & CO. *v.* BURR.
THE ENGINEER

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris and Lord James of Hereford), April 28, 1898]

[Reported [1898] A.C. 382; 67 L.J.P. 61; 78 L.T. 473; 46 W.R. 530; 14 T.L.R. 369; 8 Asp.M.L.C. 400]

Insurance—Marine insurance—Collision clause—Clause in no case to extend to any sum which assured might become liable to pay for removal of obstructions under statutory powers—Liability of underwriters under clause.

The appellants insured their ship by a policy of insurance which contained a collision clause to which a proviso was appended: "Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers consequent on such collision." The appellants' ship came into collision with another ship which sank, became a total loss, and was removed by river commissioners under the statutory powers. Both vessels were to blame for the collision, and by agreement the appellants paid to the owners of the sunken vessel a moiety of the sum which they had paid for the removal of their ship. The appellants claimed this sum from the underwriters.

Held: the proviso must be construed as a document between business men, and so read any payment for the removal of obstructions was excluded; accordingly, the underwriters were not liable.

The North Britain (1), [1894] P. 77, approved.

Notes. Considered: *Hall Brothers Steamship Co.* v. *Young*, [1939] 1 All E.R. 809. Referred to: *Burger* v. *Indemnity Mutual Marine Assurance* (1899), 4 Com. Cas. 328; *Saqui and Lawrence* v. *Stearns* (1910), 80 L.J.K.B. 451.

As to collision clauses, see 22 Halsbury's Laws (3rd Edn.) 85, 86; and for cases see 29 Digest 212 et seq.

Case referred to:

(1) *The North Britain*, [1894] P. 77; 10 T.L.R. 104; sub nom. *The North Britain*, *Roberts & Sons* v. *Ocean Marine Insurance Co.*, 63 L.J.P. 33; 70 L.T. 210; 42 W.R. 243; 7 Asp.M.L.C. 413; 6 R. 673, C.A.; 29 Digest 214, *1712*.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), affirming a decision of Bruce, J., in favour of the respondent.

The following was the agreed statement of facts: On June 14, 1895, the appellants, as owners of the steamship *Engineer*, effected with the respondent (inter alios) a policy of insurance subscribed by the respondent in the sum of £100 on the hull and machinery of the steamship *Engineer*, valued at £8,500, for twelve months from noon June 14, 1895, to noon June 15, 1896. Attached to the said policy was a clause as follows:

"And it is further agreed that, if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding, in respect of any such collision the value of the ship hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability with the consent in writing of two-thirds of the subscribers to this policy in amount we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to

pay; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels shall become limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel or for loss of life or personal injury."

On April 19, 1896, whilst the policy was in full force and effect, the *Engineer* came into collision with the steamship *Harraton* near to the entrance to the river Tees, and by reason of the collision the *Engineer* was considerably damaged, and the *Harraton* sank and became a constructive total loss. The place at which the *Harraton* sank was within the limits of the jurisdiction of the Tees Conservancy Commissioners, who thereupon, under their statutory powers in that behalf, took the necessary steps to remove the obstruction caused by the wreck of the *Harraton*. The total of the charges and expenses incurred by the commissioners amounted to £1,346. An action was begun in the Admiralty Division by the owners of the *Harraton* against the owners of the *Engineer*, and a counterclaim was entered on behalf of the respondent, but, by agreement between the parties in that action, both ships were deemed to have been in fault, and the damages suffered by both parties to the suit respectively as assessed by the registrar of the Admiralty Division, assisted by merchants, were duly paid by each to the other. The appellants, as owners of the *Engineer*, properly paid to the owners of the *Harraton* under the said agreement £673, being a moiety of the £1,346 for removing the obstruction caused by the wreck as being a loss or damage sustained by the owners of the *Harraton* incidental to and arising out of the collision, and thereafter the appellants sought to recover that moiety from their underwriters (including the respondent), but they declined to pay any part thereof, alleging that they were expressly excepted from liability in respect of that sum by the terms of the proviso.

The question for the determination of the court was whether the respondent was liable under the policy to pay to the appellants such proportion of the three-fourths of the sum of £673 as the respondent's subscription bore to the value of the ship. Bruce, J., held that the case could not be distinguished from *The North Britain* (1) and gave judgment for the respondent, and his judgment was affirmed by the Court of Appeal.

Cohen, *Q.C.*, and *Carver*, *Q.C.*, for the appellants.
J. Walton, *Q.C.*, and *Scrutton* for the respondent.

THE EARL OF HALSBURY, L.C.—I certainly am not desirous of hearing this discussion prolonged, because for some time I have arrived at a very clear conclusion in my own mind, and I confess that I adopt the paraphrase of this contract which Davey, L.J., put on it in *The North Britain* (1). He says ([1894] P. at p. 89) that the clause means something of this kind:

"I will reimburse you, the injuring vessel, the bill which you have to pay the injured vessel for damages; but mind, I am not to be called upon to pay, directly or indirectly, for the removal of obstructions under statutory powers."

That I believe to be a very proper reading of the language which was actually used by the parties.

I agree with what Davey, L.J., appears to have said in respect to the mode in which that contract should be construed. In looking at a document between

A business men, I do not think that it is wise to look at technical rules of construction. I think it well to look at the whole document, to look at the subject-matter with which the parties are dealing, and then to take the words in their natural and ordinary meaning, and construe the document in that way. I have come to the conclusion that what the underwriters did mean to exclude in their contract of liability was any payment of money for the removal of obstructions to B navigation. These damages, or this money payable, whichever it is to be called, comes practically within the description. It was a payment actually made by reason of the removal of an obstruction. Therefore, applying the test which I have suggested to the contract, I cannot doubt that it was what the underwriters intended to exempt from the contract into which they entered. Under those circumstances, I think that *The North Britain* (1) which is supposed to have C governed this case now before your Lordships does govern it. I think that that case was rightly decided, and I, therefore, move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN, LORD MORRIS, and **LORD JAMES OF HEREFORD** concurred.

D

Appeal dismissed.

Solicitors : *Holman, Birdwood & Co.; Waltons, Johnson, Bubb & Whatton.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

E

F

BLAKE *v.* WOOLF

[QUEEN'S BENCH DIVISION (Wright and Darling, JJ.), July 14, 1898]

[Reported [1898] 2 Q.B. 426; 67 L.J.Q.B. 813; 79 L.T. 188; 62 J.P. 659; 47 W.R. 8; 42 Sol. Jo. 688]

G *Nuisance—Rylands v. Fletcher doctrine—Application—Escape of water from cistern supplying premises—Damage to property of tenants.*

Landlord and Tenant—Liability of landlord—Escape of water from cistern—Plumber employed to repair leakage—Negligence of plumber—Damage to goods of tenants through escape of water.

The defendant was the landlord of premises let out in rooms to which he H had laid on a supply of water by means of a cistern on the fourth floor with piping leading to each room. After the water had been so laid on, the plaintiff became tenant of the ground floor and basement of the premises. One Friday a leak from the cistern was discovered. The defendant was informed of the leak on the same day and immediately employed a skilled plumber to repair the cistern. The plumber did the work negligently with the consequence that I when the premises were opened on the following Monday morning the ground floor and the basement were found to be flooded, and the plaintiff's goods were damaged.

Held: (i) bringing the water on the premises and maintaining a cistern there was a usual and reasonable user of the premises, and, therefore, the rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, did not apply, and, in the absence of negligence or wilfulness by the owner of the cistern he was not liable; moreover, the plaintiff had consented to the water being kept on the premises in the cistern since they had taken the ground floor and basement

after the water had been laid on; (ii) the defendant, as landlord, had not been negligent since he had done all that he could do to remedy the defect and was not responsible for the acts of an independent contractor such as the plumber; accordingly, the defendant was not liable to the plaintiff.

Notes. Considered: *Rickards* v. *Lothian*, [1911-13] All E.R. Rep. 71. Distinguished: *Cockburn* v. *Smith*, [1924] All E.R. Rep. 59. Considered: *Noble* v. *Harrison*, [1926] All E.R. Rep. 284. Referred to: *Charing Cross, West End and City Electricity Supply Co.* v. *London Hydraulic Power Co.*, [1913] 3 K.B. 442; *Performing Right Society* v. *Mitchell and Booker, Palais de Danse*, [1924] 1 K.B. 762; *Pontardawe Rural District Council* v. *Moore-Gwyn*, [1929] 1 Ch. 656; *Western Engraving Co.* v. *Film Laboratories, Ltd.*, [1936] 1 All E.R. 106; *Collingwood* v. *Home and Colonial Stores, Ltd.*, [1936] 3 All E.R. 200; *Peters* v. *Prince of Wales Theatre (Birmingham), Ltd.*, [1942] 2 All E.R. 533; *Prosser & Son, Ltd.* v. *Levy*, [1955] 3 All E.R. 577.

As to the rule in *Rylands* v. *Fletcher*, see 28 Halsbury's Laws (3rd Edn.) 145 et seq.; and for cases see 36 Digest (Repl.) 282 et seq.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Carstairs* v. *Taylor* (1871), L.R. 6 Exch. 217; 40 L.J.Ex. 129; 19 W.R. 723; 36 Digest (Repl.) 284, *337*.

(3) *Ross* v. *Fedden* (1872), L.R. 7 Q.B. 661; 41 L.J.Q.B. 270; 26 L.T. 966; 36 J.P. 791; 36 Digest (Repl.) 293, *393*.

(4) *Anderson* v. *Oppenheimer* (1880), 5 Q.B.D. 602; 49 L.J.Q.B. 708, C.A.; 36 Digest (Repl.) 296, *412*.

(5) *Gill* v. *Edouin* (1894), 71 L.T. 762; 11 T.L.R. 93; 39 Sol. Jo. 98; 15 R. 109; affirmed (1895), 72 L.T. 579; 11 T.L.R. 378, C.A.; 36 Digest (Repl.) 295, *411*.

(6) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, *1234*.

(7) *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 42 Digest 982, *124*.

Also referred to in argument:

Miller v. *Hancock*, [1893] 2 Q.B. 177; 69 L.T. 214; 57 J.P. 758; 41 W.R. 578; 9 T.L.R. 512; 37 Sol Jo. 558; 4 R. 478, C.A.; 31 Digest (Repl.) 100, *2471*.

Hardaker v. *Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, *1255*.

Tarry v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 34 Digest 163, *1274*.

Appeal from a decision of the deputy-judge of the City of London Court in an action by the plaintiff, Blake, against his landlord, Woolf, claiming damages of £15 for injury caused by the escape of water from a cistern.

The landlord owned 74, Wood Street in the city of London which he let out in rooms. He had laid on water to the premises, and had a cistern on the fourth floor which supplied all the rooms with water. After the water had been laid on and the cistern installed, the plaintiff became a tenant of the ground floor and basement of the premises. On a certain Friday a leakage from the cistern was discovered and on the same day the plaintiff gave notice to the defendant to repair the cistern. The defendant employed a plumber to repair the cistern but the plumber failed to repair it adequately with the consequence that when the premises were opened the following Monday morning it was found that water from the cistern had overflowed into the ground floor and basement occupied by the plaintiff, damaging his goods. The deputy-judge found that the defendant had not been negligent in employing the

particular plumber he did; that the damage to the plaintiff's goods was caused by the plumber's negligence in failing to repair the defect in the cistern on the Friday, but that on the defendant receiving notice of the leakage on the Friday he became under an absolute duty to get the cistern repaired and having failed to do this he was liable to the plaintiff even though he had not himself been negligent. The defendant appealed.

Ritter for the defendant.
H. Tindal Atkinson for the plaintiff.

WRIGHT, J.—I am not at all clear that this case is covered by any of the authorities. The question that arises is whether the landlord is liable for the damage. The first observation I make is that counsel for the plaintiff has not put his case upon any obligation arising from any express contractual liability from the relation between the parties of landlord and tenant, and there was no evidence of the terms of their tenancy. What then is the position at common law? Apart from contractual liability the rule of the common law is, I think, that laid down in *Rylands* v. *Fletcher* (1), that prima facie an occupier of land has an absolute proprietary right not to have his premises invaded by injurious matter which his neighbour keeps upon his land, and which comes from his neighbour's land otherwise than in the course of nature. That general rule is, however, qualified by some exceptions, one of which is that where a person uses his land in an ordinary and reasonabe manner of use, and damage ensues to the adjoining property of his neighbour, without wilfulness or negligence, then there is no liability for such damage, and no action lies. Here the bringing of the water on to these premises and the maintaining a cistern in the usual way, seems to me to be a usual and reasonable user of the house; and, therefore, if the water escapes without any negligence or wilfulness on the part of the owner of the cistern who has brought the water there, as between the owner and the occupier, the owner is not liable.

Another exception to the general rule laid down in *Rylands* v. *Fletcher* (1), is where the party who has sustained the damage has consented to the dangerous matter being brought upon the premises, and in such a case he cannot recover. Here the plaintiff took these premises with the water laid on, and must be taken to have consented to the water being brought there, and he also consented to the water being supplied to his own part of the premises, so that he must be taken to have consented to the water being kept on the premises by the defendant in the way it was kept. Instances of this kind occur in *Carstairs* v. *Taylor* (2), *Ross* v. *Fedden* (3), *Anderson* v. *Oppenheimer* (4), and *Gill* v. *Edouin* (5).

That being so, the defendant would not be liable unless this damage was caused by his wilful default or neglect. Is there enough here to show negligence by the defendant as between landlord and tenant? It sems to me there is not. There is nothing to show that the defendant did not do all a man could do to remedy the defect. If he had attempted to repair the leakage himself he would have been guilty of the worst negligence. He, however, employed a skilled plumber to do the work, and it was in consequence of the negligence of this man or his servants that the damage was caused. Counsel for the plaintiff has contended that where the doing of anything to property is concerned a person cannot, by employing an independent contractor, get rid of liability, but is just as liable for damage caused by the negligence of the contractor as if the work were done by his own servant. I do not know of any case in which that doctrine is established. In *Dalton* v. *Angus* (6), and *Hughes* v. *Percival* (7), and the other cases cited, the person was held liable because the act complained of was the breach of an absolute right, such as the right of support, and such a right is infringed at the peril of the person infringing it. It seems to me clear from *Rylands* v. *Fletcher* (1) that there is no such absolute right here, as this case falls within the exceptions to the general rule there laid down. The ordinary doctrine, therefore, that a person is not responsible for the acts of an independent contractor, applies here, and the defendant is not liable.

It is not like the case in which the duty is a statutory duty, where, of course, the person who performs it is liable whether he performs it himself or by an independent contractor. The test in these cases is, was there negligence on the part of the defendant? I think there was none, and on that ground I think that the judgment of the learned county court judge cannot be sustained.

DARLING, J.—I agree.

Appeal allowed.

Solicitors : *Phelps, Sidgwick & Biddle; H. Dade & Co.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

WILMOT *v.* ALTON AND ANOTHER

[Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), November 18, 1896]

[Reported [1897] 1 Q.B. 17; 66 L.J.Q.B. 42; 75 L.T. 447; 45 W.R. 113; 13 T.L.R. 58; 4 Mans. 17]

Bankruptcy—Property available for distribution—After-acquired property—Executory contract—Obligation to perform services.

A theatrical costumier, in consideration of the payment of a fixed sum weekly, let out on hire theatrical dresses for a fixed period, agreeing that during such period she would keep the dresses in repair and would also supply such wigs as might be required. After she had supplied the dresses to the hirer, she mortgaged her rights under the contract, but before any money had become due under the contract she was adjudicated bankrupt.

Held: as there was no liability on the hirer to pay the money unless the duties imposed by the contract on the bankrupt were fulfilled, the mortgage gave no title as against the trustee in bankruptcy to any money becoming due from the hirer after the commencement of the bankruptcy.

Re Jones, Ex parte Nichols (1) (1883), 22 Ch.D. 782, applied.

Notes. Applied: *Re Collins, Ex parte Salaman*, [1925] All E.R. Rep. 215. Distinguished: *Earle* v. *Hemsworth R.D.C.* (1928), 44 T.L.R. 605. Referred to: *King* v. *Michael Faraday and Partners, Ltd.*, [1939] 2 All E.R. 478; *Re Tout and Finch, Ltd.*, [1954] 1 All E.R. 127.

As to assignment of bankrupt's after-acquired property, see 2 Halsbury's Laws (3rd Edn.) 324, and for cases see 5 Digest (Repl.) 749 et seq.

Cases referred to :

(1) *Re Jones, Ex parte Nichols* (1883), 22 Ch.D. 782; 52 L.J.Ch. 635; 48 L.T. 492; 31 W.R. 661, C.A.; 5 Digest (Repl.) 751, *6465*.

(2) *Re Davis & Co., Ex parte Rawlings* (1888), 22 Q.B.D. 193; 37 W.R. 203; 5 T.L.R. 119, C.A.; 5 Digest (Repl.) 750, *6460*.

Also referred to in argument :

Re Isaacson, Ex parte Mason, [1895] 1 Q.B. 333; 64 L.J.Q.B. 191; 71 L.T. 812; 43 W.R. 278; 11 T.L.R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C.A.; 7 Digest (Repl.) 36, *182*.

Appeal from a decision of LORD RUSSELL, C.J., at the trial of an interpleader issue without a jury, reported [1896] 2 Q.B. 254.

On June 10, 1895, Mrs. Ruthven, who carried on business as a theatrical costumier, entered into a contract with the Blackpool Winter Gardens and Pavilion Co. to supply dresses for a forthcoming ballet according to sketch,

> "the terms to be £40 per week for twelve weeks commencing July 8, 1895, and wigs as may be required for the sum of £3 per week for the same period. You [Mrs. Ruthven] to find all materials and to keep in repair during the run."

The dresses were duly supplied under this contract. On July 4, by an indenture made between Mrs. Ruthven and Charles Wilmot, the plaintiff in the interpleader issue, she mortgaged to him for the consideration therein mentioned "all that her beneficial right, title, and interest," in her contract with the said company. On July 13 a receiving order was made against Mrs. Ruthven on her own petition, and on July 26 she was adjudicated bankrupt. On Oct. 1, the company admitted that a sum of £318 18s. had become due under their contract with Mrs. Ruthven, and this sum they paid into court, an interpleader issue being directed in which Wilmot, the claimant, was plaintiff and the trustees in bankruptcy were the defendants. At the trial of the issue before LORD RUSSELL, C.J., without a jury, no evidence was given as to whether any repairs to the dresses had become necessary during the hiring, nor, if any repairs had been in fact done, as to who did them, nor was there any evidence with regard to the requirement of any wigs by the company. The Lord Chief Justice held that the case was governed by the principle of *Re Jones, Ex parte Nichols* (1), and he gave judgment for the defendants. The plaintiff appealed.

Cooper Willis, Q.C. (*Hawtin* with him) for the plaintiff.
Herbert Reed, Q.C. (*Scarlett* with him) for the defendants.

LORD ESHER, M.R.—In this case Mrs. Ruthven, a theatrical costumier, and the Blackpool Winter Gardens and Pavilion Co., entered into a contract which was concerned with the trade which she was carrying on. The business of a theatrical costumier is one of a well-known character. By this contract she agreed to design, make up, and supply to the company the costumes for a forthcoming ballet, and to keep the dresses in repair for a period of twelve weeks. She was also to supply any wigs that might be required for the same period, and was to be paid £40 a week for the dresses, and £3 a week for the wigs. Soon after entering into this contract she became bankrupt. But supposing that she had not become bankrupt, and had been compelled to sue the company for money payable under the contract, what would she have had to prove? To succeed in the action she would have been obliged to show not only that she had supplied the costumes, but that she had repaired, or was ready and willing to have repaired them, during the agreed period, and that she had supplied, or was ready and willing to have supplied, wigs as required during that period. Her claim to payment under the contract would depend upon her proving that. The date of payment being at the end of each week during the twelve weeks, it seems to me that she would have been entitled to payment at the end of each week if, at that date, she had done or had been ready and willing to do all that she had agreed to do under the contract. But after having supplied the dresses, the contract still remained onerous on her to this extent, that she was bound to be ready and willing to do any necessary repairs to the dresses, and to supply wigs if required so to do. Those were matters to be done by her in her business as a theatrical costumier, and they would require from her the use of that talent and skill which is necessary for the carrying on of such a business. The company were entitled under the contract to require her to exercise her skill as a theatrical costumier, and she could not have transferred her duties under it to anyone else. That being so, she became bankrupt just after she had supplied the dresses, and before the company had required from her the performance of any other duties under the contract.

What was the effect of her bankruptcy? She was prevented from fulfilling the rest of her duties under the contract, and from accepting any payment under it. A trustee in bankruptcy may carry on a bankrupt's business and contracts if he thinks it beneficial to the estate, but he is not bound to do so. In this case the trustees had no talent to design and mend costumes for a ballet. They would be entitled, if they thought it beneficial to the estate, to refuse to carry on the bankrupt's business, and to disclaim the contract. Supposing that they had elected not to go on with this contract, what would have been the result? Any money due at the end of the week would perhaps have been a debt due, but it is impossible to say that the company would have been bound to pay in subsequent weeks, though they could not obtain the fulfilment of the duties which the bankrupt had agreed to perform. Since it would be only in consideration of that fulfilment that any payment would become due, the company would not be bound to pay unless the trustees had elected to go on with the performance of the contract. Therefore, at the moment of the bankruptcy no debt was due from the company. Money might or might not become payable according as certain conditions were or were not fulfilled. That seems to me to be the true view of the result of this bankruptcy. I agree with the Lord Chief Justice that the case is governed by the decision in *Re Jones, Ex parte Nichols* (1), and that no debt was due, because there was no liability upon the company to pay unless certain duties imposed on the bankrupt by the contract were fulfilled. *Re Jones, Ex parte Nichols* (1) seems to me to show decisively that these future payments, which were not debts due at the time of the bankruptcy and which would only become debts if certain conditions were fulfilled, could not be assigned by the bankrupt so as to deprive the trustees in bankruptcy of their claim under the contract. I think that this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion, and I base my decision upon two grounds. If this money had been a debt due at the date of the bankruptcy, I think that the argument put forward on behalf of the plaintiff would have been correct. But, in order to determine whether it was, we must consider the words of the contract which the Master of the Rolls has already fully explained. It seems to me that the money might, or might not, have become a debt due in the future, and that the case therefore comes within the decision in *Re Jones, Ex parte Nichols* (1). I should like to refer also to *Re Davis & Co., Ex parte Rawlings* (2). FRY, L.J., at the end of his judgment says (22 Q.B.D. at p. 199):

> "Then it is said that the payments which became due from the hirers under the hiring agreements after the bankruptcy were not capable of being validly assigned as against the trustee on the authority of *Ex parte Nichols* (1). But that case has no bearing on the present, for that which was assigned in the present case was a debt due at the date of the assignment, though it was not payable until a future time. In *Ex parte Nichols* (1) nothing was due to the bankrupts at the date of the assignment, but they attempted to assign a debt which might become due to the trustee in their bankruptcy at a future time. They had nothing to assign."

Those observations seem to me to be most applicable in the present case. But it appears to me that there is another ground upon which this case may be decided. Assuming that the goods referred to in the contract were in existence at the date of the bankruptcy, the general property in them would pass to the trustees in bankruptcy, while the special property would remain in the hirers. The result is that the bankrupt had no property at all in them. That also seems to me to be a strong reason why we should affirm the judgment of the Lord Chief Justice, and dismiss this appeal.

RIGBY, L.J.—I agree. I rest my judgment exclusively on the reasons that have been given by the Lord Chief Justice. I think that the present case is decided by

the judgment in *Re Jones, Ex parte Nichols* (1), with which it is identical in principle. This is not a case in which the bankrupt has assigned her interest in a contract of which her part had been executed, so that the whole amount which she could claim under the contract must become payable to her. Here the contract is executory, so that the consideration would not be earned by her unless she continued to carry on her business of theatrical costumier, so that she might be able to perform her duties under the contract. The carrying on of her business was an important factor. Where, as here, only part of the bankrupt's duties under the contract have been performed, the bankrupt cannot create any greater rights in favour of an assignee than she already has. The trustees in bankruptcy were, therefore, entitled to claim the moneys which might ultimately become due under the contract. I think that that is a fair statement of the matter.

On looking at the terms of the contract it is clear that the bankrupt could not have fulfilled her part of the bargain without continuing to carry on a costumier's business. She was prevented by her bankruptcy from carrying on that business, because it passed into the hands of her trustees. If any repairs to the dresses had been required they would have been done, if at all, by the trustees who would in such a case be entitled to the whole consideration. But there is no need to inquire what did in fact happen with regard to repairs to the dresses. I think that the nature of the contract is to be determined from the terms of the contract itself, and not from the mode in which it accidentally happened to be carried out. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Henry Reid; J. C. Button.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

PASMORE *v.* OSWALDTWISTLE URBAN DISTRICT COUNCIL

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, and Lord James of Hereford), April 26, 28, 1898]

[Reported [1898] A.C. 387; 67 L.J.Q.B. 635; 78 L.T. 569; 62 J.P. 628; 14 T.L.R. 368]

Statutory Duty—Breach—Specific remedy given by statute—Statutory remedy sole means of enforcement.

Sewer—Duty of local authority to provide adequate sewers and drains—Breach of duty—Liability—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *ss.* 15, 299.

Where an obligation is created by a statute and a specific remedy is given by that statute, the person seeking the remedy is deprived of any other means of enforcement.

A complaint to the Local Government Board under s. 299 of the Public Health Act, 1875, [repealed] **held** to be the exclusive remedy for neglect by the local authority of their duty to provide sufficient sewers for draining their district under s. 15 of the Act [now s. 14 of the Public Health Act, 1936], a mandamus not being granted to compel them to perform that duty.

Notes. Section 15 of the Public Health Act, 1875, has been repealed and replaced by s. 14 of the Public Health Act, 1936. Section 299 of the 1875 Act has also been

repealed and the functions of the Local Government Board have been transferred to the Minister of Health by the Ministry of Health Act, 1919, s. 3 and First Schedule (4 HALSBURY'S STATUTES (2nd Edn.) 473). A

Considered: *Baron* v. *Portslade-by-Sea Urban Council* (1899), 68 L.J.Q.B. 949. Distinguished: *R.* v. *Stepney Corpn.*, [1902] 1 K.B. 317. Applied: *Devonport Corpn.* v. *Tozer*, [1902] 2 Ch. 182. Considered: *West Riding of Yorkshire Rivers Board* v. *Butterworth and Roberts* (1908), 72 J.P. 193. Applied: *Hulme* v. *Ferranti*, [1918] 2 K.B. 426; *R.* v. *Poplar Borough Council*, [1921] All E.R. Rep. 429; *Waghorn* v. *Collison* (1922), 127 L.T. 8. Considered: *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] All E.R. Rep. 127; *Clark* v. *Epsom Rural Council*, [1929] 1 Ch. 287; *Musical Performers Protection Association, Ltd.* v. *British International Pictures, Ltd.* (1930), 46 T.L.R. 485. Distinguished: *R.* v. *Hurle-Hobbs, Ex parte Simmons*, [1945] 1 All E.R. 273. Applied: *Badham* v. *Lambs, Ltd.*, [1945] 2 All E.R. 295; *Wilkinson* v. *Barking Corpn.*, [1948] 1 All E.R. 564. Considered: *Cutler* v. *Wandsworth Stadium, Ltd.*, [1949] 1 All E.R. 544. Referred to: *St. Mary, Islington, Vestry* v. *Hornsey Urban District Council* (1899), 80 L.T. 746; *Eastwood* v. *Houley Urban Council*, [1900] 1 Ch. 781; *Southall, Norwood Urban District Council* v. *Middlesex County Council* (1901), 83 L.T. 742; *West Riding of Yorkshire Rivers Board* v. *Gaunt* (1902), 67 J.P. 183; *Haedicke* v. *Friern Barnet Urban Council*, [1904] 2 K.B. 807; *West Riding of Yorkshire Rivers Board* v. *Preston* (1904), 92 L.T. 24; *Harrington* v. *Derby Corpn.*, [1905] 1 Ch. 205; *Brook* v. *Meltham Urban Council*, [1908] 2 K.B. 780; *Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (1910), 103 L.T. 192; *Turner* v. *Kingsbury Collieries*, [1921] 3 K.B. 169; *Stepney Borough Council* v. *J. Walker & Sons, Ltd.*, [1934] A.C. 365; *Arbon* v. *Anderson*, [1943] 1 All E.R. 154; *George* v. *Mitchell and King*, [1943] 1 All E.R. 233; *Clark* v. *Brims*, [1947] 1 All E.R. 242; *Biddle* v. *Truvox Engineering Co.*, [1951] 2 All E.R. 835; *Pride of Derby Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1952] 1 All E.R. 1326; *Solomons* v. *Gertzenstein, Ltd.*, [1954] 2 All E.R. 625; *Watt* v. *Kesteven County Council*, [1954] 3 All E.R. 441. B C

As to enforcement of statutory duty, see 36 HALSBURY'S LAWS (3rd Edn.) 440 et seq.; and for cases see 42 DIGEST 748 et seq. As to provision of public sewers, see 31 HALSBURY'S LAWS (3rd Edn.) 205 et seq.; and for cases see 41 DIGEST 19 et seq. For the Public Health Act, 1936, s. 14, see 19 HALSBURY'S STATUTES (2nd Edn.) 322. D F

Cases referred to:

(1) *Doe d. Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. 847; 9 L.J.O.S.K.B. 113; 109 E.R. 1001; 42 Digest 750, *1737*.

(2) *Glossop* v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 38 Digest (Repl.) 35, *178*. G

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., LOPES and CHITTY, L.JJ.), reported [1897] 1 Q.B. 625, reversing a decision of CHARLES, J., reported [1897] 1 Q.B. 384. H

The action was for a mandamus commanding the defendants (respondents in the present appeal) to cause to be made such sewers as might be necessary for effectually draining their district for the purposes of the Public Health Act, 1875, and to give facilities for enabling the plaintiffs to carry the liquid proceeding from their factories or manufacturing processes into the sewers under their control. The action was begun by Philip Cadell Peebles (since deceased) who owned and carried on the business of paper making at a factory called the Whiteash Paper Mill, and before it was instituted Mr. Peebles requested the respondents, and the respondents refused, to provide sewers for the reception of the liquids from the paper mill. I

The claim was based on the Public Health Act, 1875, ss. 15 and 21 of which imposed on a local authority the duty of providing a proper sewage system. The respondents, however, contended that such obligation was not one towards the appellants or any individual occupier, but for the benefit and purposes of the whole district. They also relied upon s. 299 of the Act, which prescribed, as the remedy

in such a case, complaint to the Local Government Board. That remedy, the respondents urged, was the only and exclusive one in case of any default by them.

The relevant sections of the Act were as follows:

"Section 15. Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Section 21 entitled owners and occupiers within the district to cause their drains to empty into the sewers, subject to certain conditions as to notice and otherwise.

"Section 299. Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers . . . the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty. . . ."

The case came before CHARLES, J., in November, 1896, when it was arranged that the question of law should be argued before any evidence was gone into. CHARLES, J., granted the mandamus, but his decision was reversed on appeal.

Cozens-Hardy, Q.C., and *C. A. Russell, Q.C.*, appeared for the appellants.
J. Walton, Q.C., and *Danckwerts* for the respondents.

Their Lordships took time for consideration.

April 28, 1898. The following opinions were read.

THE EARL OF HALSBURY, L.C.—The question on this appeal is whether a mandamus which was ordered to issue by CHARLES, J., can be supported. According to that learned judge's views it was a mandamus

"commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district under the Public Health Act, 1875, and in particular the plaintiffs' premises."

I think it right to call attention to the language the learned judge uses, because I am of opinion that it is the key to what I consider to be the error which the learned judge committed in the course of the judgment which he delivered in this case. Your Lordships will observe that the first part of that mandamus, "for effectually draining their district under the Public Health Act, 1875," follows the language of the statute. Then he has put in this in addition—"and in particular the plaintiffs' premises." In the view which I take of the statute, that was a provision which there was no authority to add to the mandamus at all. There is no such provision in the statute, and it appears to me that the whole purview, object, and purpose of the statute is one which would not justify such an addition to the language of the mandamus.

The principle upon which the question arises that where a specific remedy is given, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law. I think LORD TENTERDEN, C.J., accurately states that principle in *Doe d. Bishop of Rochester* v. *Bridges* (1). He says (1 B. & Ad. at p. 859):

"Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

The words which the learned judge uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is

created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper government department.

It seems to me that, if it were possible to conceive a case in which it would be extremely inconvenient that each suitor in turn should be permitted to apply for a specific remedy against the body charged with the care of the health of the inhabitants of the district in respect of drainage, it is such a case as this; and it is illustrated by the form of the mandamus. When I called the attention of the learned counsel to the form of the mandamus, he treated the observation as if it were a question of some mistake made in the pleadings which would be remedied as a matter of course in these days. But that was not the object of the observation, nor is it the importance of the observation. It is that the obligation itself is such that the form of the mandamus becomes of the substance of the argument. You cannot get out of the form of the mandamus. I know no other form which could be adopted than that which has been adopted. But then that shows how important it is that the particular jurisdiction to call upon the whole district to reform their mode of dealing with sewage and drainage should not be in the hands, and should not be open to the litigation, of any particular individual, but should be committed to a government department.

It appears to me that that is enough to dispose of this appeal, because I entirely concur in the judgment of the Court of Appeal, in which it is pointed out that this comes within the very familiar principle of law to which I have called attention. But counsel for the respondents undoubtedly raised another question, upon which I will say a word, although I should be sorry to rest my judgment upon that different head of inquiry; and for this reason: it involves a question of fact. Looking at the pleadings, it is logically impossible to deny that upon the pleadings the appellants put themselves out of court by their own allegations, namely, that the insufficiency of the drainage here is an insufficiency which only applies to the particular applicant for a mandamus by reason of its being insufficient for him, and therefore brings the matter within the exact words of the Rivers Pollution Prevention Act, 1876. But although I think that is logically irresistible upon the pleadings—and it is impossible for the appellant to deny that on the face of the pleadings he has put himself out of court in that respect by showing that it is only because of his additional manufactory that the system of drainage is insufficient—yet I should be reluctant to base my judgment on that argument, because it involves really a question of fact which ought not to be concluded by a mere logical application of the pleadings. I confess, however, that I am wholly unable to see the answer to the argument at present, if the facts are what the pleadings appear to admit them to be, because, instead of the Rivers Pollution Prevention Act having, as counsel for the appellants ingeniously argued, reference to a different subject-matter, this appears to me to be the very subject-matter that the legislature was dealing with there.

The preamble of that Act recites that it is expedient to make "provision for the prevention of the pollution of rivers," and having that object before it, the legislature has obviously intended to look at the system by which the public health is preserved in respect of sewers and drains. What does it then provide? It provides that there shall be an outlet in some form or other for what I may call manufactory refuse; but contemplating the case which might readily arise where some manufacturer would be very glad to throw upon the rates the necessity of getting rid of his own refuse, it provides also, with reference to that obligation to get rid of the refuse, that where the drainage system of a district is "only sufficient for the requirements of their district," there shall not be an obligation to get rid of the refuse of a manufacturer who ought to get rid of the refuse which he is himself creating. That seems to me to be a very intelligible provision, and a very just

one; otherwise a manufacturer might come to some very small district, might establish a large manufactory there which would involve, with reference to the law of nuisance, the necessity of getting rid of the refuse created by that manufactory, and there would be no individual obligation upon the person creating it. But if this section in the Public Health Act could be applied in the way in which it is sought to apply it here, nothing could be easier than for a manufacturer to establish a manufactory for his own profit and throw upon the rates, paid by all the inhabitants, who have no concern with the manufactory at all, the necessity for providing for that great source of expense to the manufacturer of getting rid of his own refuse.

It seems to me, therefore, that the legislature very wisely and prudently provided against such a condition of things as that, and if that condition of things exists here as a fact—as upon the pleadings I think it is admitted that it does—I see no answer to the argument that the section in question would not entitle anybody to call upon the particular district to provide for the extra amount of refuse created by the manufacturer. But, as I have said, I wish to rest my judgment upon the familiar ground upon which the Court of Appeal proceeded—that this is the only remedy provided by the statute for a new obligation created by the statute itself. At the same time I thought it right to go into the other point also, because I see no answer to the argument counsel for the respondents presented. For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. Assuming that the appellants have a just cause of complaint against the Oswaldtwistle Urban District Council, founded on s. 15 of the Public Health Act, 1875, it seems to me to be plain that they can have no remedy outside that Act. The law is stated nowhere more clearly, nor, I think, more accurately, than by Lord Tenterden, C.J., in the passage cited by the Lord Chancellor. Whether the general rule is to prevail, or an exception to the general rule is to be admitted in any particular case, must depend on the scope and language of the Act, and considerations of policy and convenience. It would be difficult to conceive any case in which there could be less reason for departing from the general rule than one like the present. And I must say I am much more impressed by the forcible language of James, L.J., in *Glossop* v. *Heston and Isleworth Local Board* (2), where he is pointing out the waste of time and money and the great inconvenience which would result from recourse to ordinary legal proceedings in such a case, than by his suggestion of the propriety of an application to the Queen's Bench Division for a mandamus. The evils of litigation would, I think, be much the same in the one case as in the other.

Besides relying on the expressions which fell from James, L.J., in reference to a remedy by mandamus, the learned counsel for the appellant pointed out that Lord Esher, M.R., was not strictly accurate in saying that the obligation imposed by s. 15 of the Act of 1875 was a new obligation. The obligation, he said, existed under the earlier Acts relating to public health. That is quite true. The Act of 1866, indeed, provided a special remedy by an application to the Secretary of State. But in the previous legislation there seems to have been no special remedy provided. Whether the absence of a special remedy in the particular case would justify recourse to legal proceedings is, I think, at least doubtful. The case, perhaps, would properly be an exception to the general rule laid down in Lord Tenterden's second proposition in the passage which follows that which my noble and learned friend has just read, in which he says (1 B. & Ad. at p. 859):

> "If an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case."

But, however that may be, the real answer to counsel for the appellants' argument is, that the obligation from the first was a statutory obligation—it did not exist at common law—and the view of Lord Esher that it was a new obligation imposed by

the Act of 1875 is substantially accurate. The earlier legislation in relation to public health was tentative and experimental. The Act of 1875 is not a consolidating and amending Act. It sweeps away all the previous legislation, and makes a fresh start. It is not, therefore, incorrect to say that the obligation is a new obligation. There is nothing, I think, in the point that the Local Government Board might have to determine a question of construction. I do not see why they should not. I agree that the appeal must be dismissed with costs.

LORD MORRIS and **LORD JAMES OF HEREFORD** concurred.

Appeal dismissed.

Solicitors: *Soames, Edwards & Jones; Pritchard, Englefield & Co.*, for *C. Costeker*, Darwen.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

BULKELEY *v.* STEPHENS

[CHANCERY DIVISION (Stirling, J.), March 26, April 28, 1896]

[Reported [1896] 2 Ch. 241; 65 L.J.Ch. 597; 74 L.T. 409; 44 W.R. 490; 12 T.L.R. 350; 40 Sol. Jo. 458]

Will—Apportionment—Tenant for life and remainderman—Sale of investments after death of tenant for life—Apportionment of proceeds of sale—Apportionment Act, 1870 (33 & 34 *Vict.*, *c.* 35), *ss.* 2, 3, 4, 5.

Where a dividend is received by trustees after the death of a tenant for life it is apportionable between the tenant for life and the remainderman in accordance with the Apportionment Act, 1870, but where the trustees sell the investments after the death of the tenant for life and before receiving the dividend in general the proceeds of sale will not be apportionable either in equity or under the Apportionment Act. If, however, the trust instrument directs the distribution of the investments in specie after the death of the tenant for life (so that, if the trust were carried out, his estate would be entitled to an apportionment of the next dividend received), but the court orders the trustees to sell the investments with the result that no such dividend is in fact received, an apportionment of the proceeds of sale ought to be made by the trustees.

Notes. Distinguished: *Re Peel's Settled Estates*, [1908-10] All E.R. Rep. 168; *Re Sale, Nisbet* v. *Philp*, [1913] 2 Ch. 697. Considered: *Re Walker, Walker* v. *Patterson* (1934), 177 L.T.Jo. 325; *Re Winterstoke's Will Trusts, Gunn* v. *Richardson*, [1937] 4 All E.R. 63; *Re Firth's Estate, Sykes and Lacey* v. *Hall*, [1938] 2 All E.R. 217; *Re Henderson, Public Trustee* v. *Reddie*, [1940] 1 All E.R. 623. Referred to: *Re Maclaren's Settlement Trusts, Royal Exchange Assurance* v. *Maclaren's*, [1951] 2 All E.R. 414.

As to apportionment on the sale of investments, see 34 HALSBURY'S LAWS (3rd Edn.) 636; and for cases see 40 DIGEST (Repl.) 738-739. For the Apportionment Act, 1870, see 13 HALSBURY'S STATUTES (2nd Edn.) 867-869.

Cases referred to:

(1) *Scholefield* v. *Redfern* (1863), 2 Drew. & Sm. 173; 1 New Rep. 465; 32 L.J.Ch. 627; 8 L.T. 487; 9 Jur.N.S. 485; 11 W.R. 453; 62 E.R. 587; 40 Digest (Repl.) 738, *2261*.

(2) *Freman* v. *Whitbread* (1865), L.R. 1 Eq. 266; sub nom. *Freeman* v. *Whitbread*, 35 L.J.Ch. 137; 13 L.T. 550; 14 W.R. 188; 40 Digest (Repl.) 738, *2262*.

(3) *Lord Londesborough* v. *Somerville* (1854), 19 Beav. 295; 23 L.J.Ch. 646; 23 L.T.O.S. 291; 52 E.R. 363; 40 Digest (Repl.) 739, *2266*.

(4) *Bulkeley* v. *Stephens* (1863), 3 New Rep. 105; 10 L.T. 225; 40 Digest (Repl.) 739, *2267*.

Also referred to in argument:

Re Clarke, Barker v. *Perowne* (1881), 18 Ch.D. 160; 50 L.J.Ch. 733; 44 L.T. 736; 29 W.R. 730; 40 Digest (Repl.) 739, *2271*.

Application on behalf of the surviving trustee of the will of the testator, Mr. Lyne-Stephens, that he might be at liberty, out of funds in his hands, being income of the said testator's residuary estate, to pay to the legal personal representative of Mrs. Lyne-Stephens, the late tenant for life, the sum of £61 1s. 6d., being the proportionate part of £5,525, the dividend of 4½ per cent. on £130,000 bank stock, part of the said residuary estate, which accrued from Aug. 31, 1894, to Sept. 2, 1894, and that he might also be at liberty to pay to such legal personal representative a proportionate part of the dividends on £12,000 Royal Exchange Assurance Corpn. Stock, further part of the said residuary estate, which was sold by order of the court, which accrued up to the said Sept. 2, 1894. As to the bank stock no difficulty occurred.

The testator, who made his will in 1851 and died in 1860, gave all his residuary estate to trustees upon trust for sale and conversion, and for investment in certain specified securities, namely, parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England or Wales, with power to vary such investments. Then followed a beneficial trust in favour of his wife during her life, which continued thus:

> "And from and immediately after the decease of my said wife upon trust to pay, transfer, and assign my said residuary estate, and the stocks, funds, and securities upon which the same shall be invested, unto and among such of the issue of my uncle, William Lyne, and of my deceased uncles, the Rev. Richard Lyne, Edward Lyne, and Joseph Lyne, as shall be living at my decease (excepting two therein mentioned), share and share alike."

Then followed a power to retain moneys in existing investments.

Mr. Lyne-Stephens, the tenant for life, died on Sept. 2, 1894, and on Nov. 12 an order was made, on the application of the trustees, that certain inquiries should be made, and it was ordered that the trustees be at liberty to sell the £12,000 Royal Exchange Stock and to pay the proceeds of such stock into court. On Dec. 31, 1894, a dividend was declared by the assurance corporation, which was an interim dividend at about £4 per cent. on that stock. That dividend came to the hands of the trustees, and on Jan. 29, 1895, the stock was sold pursuant to the order of Nov. 12, 1894. In the following June a dividend was declared by the corporation at £10 per cent. (amounting therefore to £1,200) on the stock for the year ending Dec. 31, 1894. The question arose whether the legal personal representative of Mrs. Lyne-Stephens was entitled to participate in these dividends.

Hastings, Q.C., and *Methold* for the summons.

Buckley, Q.C., and *Baines* for the remaindermen.

Cur. adv. vult.

April 28, 1896. **STIRLING, J.**, stated the facts and continued: As regards the bank stock the dividends came to the hands of the trustees, and it is not disputed that the legal personal representative of Mrs. Lyne-Stephens is entitled to a proportionate part so come to the hands of the trustees. Neither is it disputed that the Royal Exchange Corpn. is a public company within s. 5 of the Apportionment Act, 1870, and that the interim dividend actually came to the hands of the trustees so

far as to make it apportionable under the Act, and therefore that a proper share ought to be paid to the legal personal representative of the tenant for life.

As regards the dividend which was declared in June, 1895, it is contended on behalf of the legal personal representative that the price received by the trustees includes that dividend, and that as much thereof as represents that dividend down to the death of the tenant for life ought to be paid to him. From an abstract point of view there is much to be said in favour of it, but there is considerable difficulty in its practical application.

This is not the first time the point has been considered by the court; at least a similar one as to apportionment of income on change of investment has been twice considered, first in *Scholefield* v. *Redfern* (1), and second in *Freman* v. *Whitbread* (2). In the former case the Vice-Chancellor says (2 Drew. & Sm. at p. 182):

> "There is another question of a peculiar kind, and one which is novel to me. The point will be best explained by putting an example. Suppose part of the testator's property to consist of certain American stock, bearing interest or dividends payable at half-yearly periods, say January and July, and the trustees sell it in order to invest the proceeds on consols, if they sell it at any other time than precisely the period at which a dividend has just accrued, the money realised by the sale is so much more in proportion to the time which has elapsed since the last dividend day. Therefore the amount realised by the sale is compounded partly of the value of the stock itself, and partly of the value of that proportionate part of the current half-year's dividend, which may be considered to have accrued since the last dividend day. It is contended that the tenant for life ought to have this latter portion as income. Now it is certain that, in the multitude of cases of administration of estates in modern times where similar directions have been given by testators, the court has never been in the habit of administering any such equity. When we consider a little further, it is obvious, that, if the tenant for life is to have something out of the sale money, as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend on the consols, and add that to the capital, in order to make things equal as between him and the remainder-man. It is clear that if there is an equity one way there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this court is that, by attempting it, a grievous burden would be imposed upon the estates of testators by reason of the complex investigation which it would lead to. The gain to either party would be far more than compensated by the expense which might be incurred in a complicated case, and for that reason no doubt the thing has never been done. I will not be the first to introduce the practice."

In the second case of *Freman v. Whitbread* (2), the Vice-Chancellor delivered a long and elaborate judgment, in which the subject may be said to be exhausted. I simply refer to it because it amplifies the reasoning contained in the first case.

Both these decisions were before the Apportionment Act, 1870, and it is necessary therefore to consider the effect of that Act. Section 2 provides, among other things, that dividends

> "shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

So far as that is concerned I think that the judgment of the Vice-Chancellor is not affected, because at the conclusion of *Scholefield* v. *Redfern* (1) he says (2 Drew. & Sm. at p. 183):

> "But it was suggested that, though this may be so with regard to stock, the dividends of which are payable at the end of each successive half-year,

a different rule is applicable to the case of railway debentures and other property of that description yielding interest de die in diem. If anything is received as interest, that interest will belong to the tenant for life; but if the debenture is sold for a given sum, that sum must be treated as capital."

But the matter does not stop there. The Act not merely declares that they shall be apportionable, but provides for the time of payment and the remedies for their recovery. Section 3 runs:

"The apportioned part of any such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part shall form part shall become due and payable and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined and not before."

Section 4:

"All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively. . . ."

It is said that the trustees have received the dividends within the meaning of these sections, and so that they are liable to account to the legal personal representative of the tenant for life for a proportionate part. But, in point of fact, they were received by the purchaser, and it is admitted by the applicant that, the stock having been sold with the dividend, the legal personal representative has no rights against the purchaser. What the trustees have received is purchase money. The stock was sold cum dividend. This is not an actual dividend, and so these sections do not apply directly.

Therefore the legal personal representative is entitled to insist as against the trustees on an equity merely, which is what the Vice-Chancellor declined to enforce in the cases before him. The reasons given by him were, first, the absence of any practical scheme for giving effect to it; and, second, the great burden it would put on trust properties. The first applies here, and no case has been cited in which effect has been so given. I have inquired as to the practice in the registrar's office, and I am informed that no such practice is recognised in dealing with ordinary funds directed to be sold on the death of the tenant for life. As to the second reason, the burden is not so great as it would be on a change of investment, because, first, the alleged right would arise on re-investment, both as to the original investment and the re-investment; and, secondly, because a change of investment is different from the distribution of the trust fund. Still, the burden will be considerable. If the legal personal representatives were to receive so much of the purchase money as represents the value of the proportionate part of the dividend, it would mean that the dividend would have to be treated as if it were actually paid. This might in many cases entail considerable labour, and the evidence of stockbrokers and other experts would be necessary in order to ascertain the price at which the stock would be sold ex dividend, and the difference between that and the actual price would represent the dividend. It would become necessary to obtain and to preserve such evidence. And if, as in this case, the tenant for life were dead, and had a legal personal representative, other difficulties might possibly arise. The consequence is, that in many cases they would have to come to the court for protection. Again, in cases of companies, payment would almost always be delayed, or the amount might not in certain

circumstances be payable for a long time. Looking at all these circumstances, I am not prepared to introduce any novel practice on the sale of shares consequent on the death of the tenant for life.

It is, however, upon the whole clear that in some cases, such as those dealt with by the Vice-Chancellor, effect has been given to such a scheme under special circumstances; e.g., as in *Lord Londesborough* v. *Somerville* (3), and *Bulkeley* v. *Stephens* (4). I think here that it is a material circumstance that the trust is on the death of the tenant for life

> "to pay, transfer, and assign my said residuary estate and the stocks, funds, and securities upon which the same shall be invested, unto and amongst"

a particular class of beneficiaries. There is also a trust for sale, but that is varied by a power to retain in existing investments for so long as his trustees in their absolute discretion should think fit. But it occurs to me that the trust or power for sale is given not at the death of the tenant for life, but that the proper mode then for executing the trust is to transfer in specie the stocks, funds, and securities, etc., to the beneficiaries. The Apportionment Act would have applied directly if that had been done on the death of the tenant for life, and the legal personal representative would have been entitled to a proportionate part. But it so happened in this case that the beneficiaries were very numerous, the estate being divided into ninety-thirds, and consequently the trust cannot be carried out in that way. If, however, it had been so carried out, the duty of the trustees was to transfer, so that the legal personal representative of the tenant for life should be able either directly or through the intervention of the trustees to obtain payment of the proportionate part of the dividend to which he is entitled.

Now the order of Nov. 12, 1894, was made, and I doubt not properly made, for the sale and division of the proceeds of the estate. It was made in the interest and for the benefit of the persons who then became entitled to receive that estate. But it was made in the absence of the legal personal representative of Mrs. Lyne-Stephens. If he had been present it seems to me it would have been urged by him that her estate ought not to be placed in a worse position than if the trust had been carried out in the proper mode by transfer. That being so, I do not see why, as the estate is not finally wound-up, he may not still assert the same right, and under these circumstances I have come to the conclusion that the application ought to be acceded to, assuming that the parties are all satisfied that the proper sum, which would have been allowed on such an application, is that which is mentioned in the summons.

Solicitors: *Tathams & Pym; Robins, Billing & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

STRICKLAND *v.* HAYES

[Queen's Bench Division (Lindley and Kay, L.JJ.), February 11, 12, 1896]

[Reported [1896] 1 Q.B. 290; 65 L.J.M.C. 55; 74 L.T. 137; 60 J.P. 164; 44 W.R. 398; 12 T.L.R. 199; 40 Sol. Jo. 316; 18 Cox, C.C. 244]

Local Authority—Byelaw—Reasonableness—Prohibition of obscene language on "land adjacent" to public place—No requirement of proof of annoyance to public.

A county council acting under the powers conferred by s. 16 of the Local Government Act, 1888 [now s. 249 of the Local Government Act, 1933], to make byelaws "for the good rule and government of the county" passed the following byelaw: "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language."

Held: the application of the byelaw to "land adjacent" to a public place went beyond what was necessary for the "good government" of the county, for a person singing or reciting on such land might be out of the hearing of the public; those words were severable, but even if they had been struck out, there was nothing to require that the doing of the prohibited acts must be an annoyance to the public, as was required for similar provisions in the Town Police Clauses Act, 1847, and, therefore, the byelaw was unreasonable and invalid.

Notes. The Municipal Corporations Act, 1882, and the Local Government Act, 1888, s. 16, have been repealed and replaced by the Local Government Act, 1933, s. 249.

Considered: *Burnett* v. *Berry*, [1896] 1 Q.B. 641; *Teale* v. *Harris* (1896), 60 J.P. 744. Explained: *Thomas* v. *Sutters*, [1900] 1 Ch. 10. Considered: *Gentel* v. *Rapps*, [1900-3] All E.R. Rep. 152. Referred to: *Brownscombe* v. *Johnson* (1898), 78 L.T. 265; *Mitcham Common Conservators* v. *Cox*, *Mitcham Common Conservators* v. *Cole*, [1911] 2 K.B. 854; *A.-G.* v. *Hodgson*, [1922] All E.R. Rep. 186; *Powell* v. *May*, [1946] 1 All E.R. 144.

As to validity of byelaws, see 24 Halsbury's Laws (3rd Edn.) 515 et seq., and for cases see 38 Digest (Repl.) 164, et seq. For the Local Government Act, 1933, s 249, see 14 Halsbury's Statutes (2nd Edn.) 484.

Cases referred to in argument:

Johnson v. *Croydon Corpn.* (1886), 16 Q.B.D. 708; 55 L.J.M.C. 117; 54 L.T. 295; 50 J.P. 487; 2 T.L.R. 371, D.C.; 38 Digest (Repl.) 171, *66*.

Everett v. *Grapes* (1861), 3 L.T. 669; 25 J.P. 644; 2 Digest (Repl.) 336, *254*.

R. v. *Thallman* (1863), Le. & Ca. 326; 3 New Rep. 141; 33 L.J.M.C. 58; 9 L.T. 425; 27 J.P. 790; 12 W.R. 88; 9 Cox, C.C. 388, C.C.R.; 15 Digest (Repl.) 893, *8608*.

Innes v. *Newman*, [1894] 2 Q.B. 292; 63 L.J.M.C. 198; 70 L.T. 689; 58 J.P. 543; 42 W.R. 573; 10 T.L.R. 479; 38 Sol. Jo. 492; 10 R. 348, D.C.; 38 Digest (Repl.) 182, *125*.

Edmonds v. *Watermen and Lightermen Co.* (*Master and Senior Warden*) (1855), 24 L.J.M.C. 124; 1 Jur.N.S. 727; 13 Digest (Repl.) 242, *675*.

Case Stated by justices of Worcester.

At a petty sessions held for the petty sessional division of Worcester at the Shirehall, on Aug. 20, 1895, an information was preferred by the respondent, Alfred Hayes, a police sergeant of the county of Worcester, against the appellant, Henry Strickland, alleging that the said Strickland, on July 2, 1895, did unlawfully

use certain obscene language in a public place at North Hallow, in the county of Worcester, contrary to the byelaws of the Worcestershire County Council. It was proved on behalf of the informant that the obscene language complained of was used by the appellant on a footpath in a field, and that a large number of persons were present.

In 1894 the Worcestershire County Council, under the powers conferred by s. 16 of the Local Government Act, 1888, made certain byelaws expressed to be "for the good rule and government of the county," and such byelaws were sent to a Secretary of State for approval, under s. 23 of the Municipal Corporations Act, 1882, and not disallowed. No. 3 of such byelaws, under which the present information was laid, was as follows:

> "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language."

Byelaw 11 was as follows:

> "Any person who shall offend against any of the foregoing byelaws shall be liable on a summary conviction to a penalty not exceeding forty shillings for each such offence."

At the hearing several objections to the validity of the byelaw were raised by the appellant, but for the purposes of this case two only were material, viz.: (i) that the byelaw was unreasonable on the ground that it included land adjacent to a public place; and (ii) that it was unreasonable and repugnant to the general law of the land, inasmuch as it contained an absolute prohibition of profane and obscene language under all circumstances without qualification, and was not limited, as were the offences mentioned in s. 28 of the Town Police Clauses Act, 1847, to cases where annoyance is caused to the public by such language.

By s. 16 of the Local Government Act, 1888, a county council had the same power of making byelaws in relation to their county as the council of a borough had of making byelaws in relation to their borough under s. 23 of the Municipal Corporations Act, 1882. By s. 23 (1) of the Municipal Corporations Act, 1882, the council might from time to time make such byelaws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough.

The magistrates decided that the byelaw under which the information was laid was not ultra vires, not unreasonable, and not repugnant to the general law of the land, and they convicted and fined the appellant subject to this Case.

Crump, Q.C., for the appellant.
Channell, Q.C. (*Brooke Little* with him) for the respondent.

LINDLEY, L.J.—In this case the question is whether a byelaw under which the appellant was convicted is valid or not. Several objections were raised against the byelaw, some of which are untenable. For example, it was said that the sanction of the Local Government Board was required under s. 184 of the Public Health Act, 1875 [repealed]. That objection is disposed of by the Act under which this byelaw was made, viz., the Municipal Corporation Act, 1882, by s. 28 of which the consent of a Secretary of State is made sufficient.

The really important point, however, was this. This byelaw, it was said, was unreasonable, and not in accordance with the existing law of the land, because it goes too far and constitutes an entirely new offence. That is a formidable objection, for, although we have no sympathy with people who want to sing obscene songs, it is nevertheless important for us to see that any byelaws made to prevent it do not go beyond the powers given by the legislature for that purpose. The Act of Parliament, under the authority of which this byelaw was framed, is the

Municipal Corporation Act, 1882, s. 23, and I am unable to find that the county council has any power under that Act to make byelaws beyond what are required "for the good rule and government" of the county. Byelaws are not to be made merely to spell out the dislikes of members of the council. They must be really for the better government of the county. I have no hesitation in saying that the byelaw in question goes too far. The words "on land adjacent" to a public place go far beyond what is necessary for the good government of the county. The effect of such a law might be that a person might be convicted of using bad language in a stable or any other place near a highway, although no person could possibly have heard him. Such a provision might open the door to considerable tyranny, and in my judgment it goes too far.

It does not follow, however, that the rest of the byelaws must be bad also. There is plenty of authority to show that a byelaw may be severed, and if one part of it is good, that part may be enforced although the rest may be bad. There is no difficulty in striking out the words "or on land adjacent thereto," and reading the byelaw with those words omitted. But if that is done, one is immediately struck by the fact that there is not a word in the byelaw to require that the doing of the prohibited thing must be in any way an annoyance to the public. Some such words invariably form part of any similar provisions in Acts of Parliament, as in the Town Police Clauses Act, 1847, s. 28. That Act shows that the legislature did not intend to make the singing of an objectionable song in a public place an offence, if it were sung, as it easily might be, in a place where there was not a soul to hear it. It has been suggested that the byelaw implies of necessity that the offence causes annoyance to the public. But I agree with the answer of counsel for the appellant, that all that is required for a conviction is to prove that the offence specified in the byelaw has been committed, and that offence is complete under this byelaw, whether any person could hear or not. I think, therefore, that it cannot be supported in its present form, although a slight alteration in the wording might put it right.

KAY, L.J.—I confess I should have been glad if this byelaw and conviction could have been supported, because in this case the foolish person who was convicted did in fact use the obscene language in the presence of a large number of people; and if the byelaw had been so worded as to confine its operation to persons behaving like the appellant, I should have said it was a perfectly proper byelaw. But we have to deal with an Act of Parliament which enables the county council to frame byelaws for the "good rule and government" of the county, and if we were to hold that this byelaw was valid, we should have similar byelaws made by county councils throughout the country. If we compare this byelaw with the provisions of Acts of Parliament dealing with similar subjects we find that words which are always present in those Acts are omitted in the byelaw.

Take for example s. 28 of the Town Police Clauses Act, 1847. The prohibitions in that section are guarded by such words as "to the annoyance of the public." That Act does not make the utterance of obscene language in streets an offence unless it is done to the annoyance of the public. Can it be right that, rejecting the ordinary form of laws on this subject, a county council should make a byelaw in these wide terms when they have only power to make byelaws for the better government of the county? It appears to me impossible to avoid the conclusion that it would be an infringement of the byelaw although no human being heard or could hear what was said. If a man were to give himself up and confess having used such language when alone, that would be sufficient evidence of an infringement of this byelaw.

And then, again, when we compare it with Acts of Parliament dealing with streets, we find that the words requiring the condition of annoyance are omitted. Why are they omitted, but because it was intended that the byelaw should be in wider terms than the statute? Counsel for the respondent has ingeniously argued

that the presence of words making annoyance of the essence of the offence ought to be implied in such a byelaw as this. But the fact remains that no such words are to be found in this byelaw, although such words do appear in the Acts of Parliament. Moreover, I think counsel for the appellant was right in his contention that the man has a right to insist that the offence of which he is convicted should be clearly stated in the byelaw. There are no words in it making annoyance a condition of the offence, and he has a right to demand that they shall not be implied. I think, therefore, the conviction must be set aside, and I can only express a hope that the council will reframe their byelaw in more careful language.

Solicitors: *Tree*, Worcester; *Clarke & Blundell*, for *S. Thorneley*, Worcester.

[*Reported by* G. H. Grant, Esq., *Barrister-at-Law.*]

PENNY *v.* WIMBLEDON URBAN COUNCIL

[Court of Appeal (A. L. Smith, Vaughan Williams and Romer, L.JJ.), May 4, 1899]

[Reported [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 64 J.P. 406; 47 W.R. 565; 15 T.L.R. 348; 43 Sol. Jo. 476]

Highway—Negligence—Work done negligently by contractor employed by local authority under statutory powers—Liability of local authority.

A district council, in exercise of their powers under s. 150 of the Public Health Act, 1875 [now ss. 189, 190 of the Highways Act, 1959] employed a contractor to make up a street which was not a highway repairable by the inhabitants at large. The contractor in the course of the work left heaps of soil by the side of the street without any protection or lights. The plaintiff at night fell over one of the heaps and was injured. In an action for damages brought by the plaintiff against the district council and the contractor,

Held: it was the duty of the district council to take precautions to prevent the work which was being done by their order from being dangerous to the public, and, therefore, they were liable for the neglect of that duty by the contractor.

Per Vaughan Williams, L.J.: In cases such as this in which the local authority has statutory powers to do something to a road, e.g., stopping it or opening it up, so as to make it dangerous for use, it is clear that there is a duty upon the local authority to take care that, whatever they are doing under their statutory authority, the Queen's subjects are not injured by a careless performance of the work.

Practice—Payment into court—Separate defences by two defendants—Payment-in by one defendant—Sum recovered by plaintiff less than payment-in—Liability of other defendant for costs—R.S.C. Ord. 22, r. 1.

Where there are two defendants to an action and both deny liability and put in separate defences, but one defendant with his denial pays a sum of money into court which exceeds the sum eventually recovered by the plaintiff in the action, the other defendant cannot avail himself of his co-defendant's payment-in in satisfaction of the cause of action against himself, and the plaintiff will be entitled to an order against him for costs if the defence fails.

The district council and the contractor delivered separate defences. The contractor denied liability and paid £75 into court; the district council denied liability and further pleaded that the contractor, "while denying liability, has

paid £75 into court, and these defendants say that that sum is sufficient to satisfy the plaintiff's claim." The plaintiff obtained a verdict for £50.

Held: the district council could not rely upon the payment into court by the contractor and judgment must be entered against them for costs.

Notes. Section 150 of the Public Health Act, 1875, has been repealed. See now ss. 189 (1), (3), (4), 190 (1), (2), and 213 (1), (2) of the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 402 et. seq.).

Considered: *Holliday* v. *National Telephone Co.*, post p. 359. Applied: *Hill* v. *Tottenham U.D.C.* (1898), 79 L.T. 495; *The Snark*, [1900] P. 105; *Robinson* v. *Beaconsfield U.D.C.*, [1911-13] All E.R. Rep. 997; *Wilson* v. *Hodgson's Kingston Brewery Co.* (1915), 85 L.J.K.B. 270; *Knight* v. *Sheffield Corpn.*, [1942] 2 All E.R. 411; *Walsh* v. *Holst & Co., Ltd.*, [1958] 3 All E.R. 33. Referred to: *Mileham v. Marylebone Corpn. and Latter* (1903), 66 J.P. 110; *Hurlstone* v. *London Electric Railway* (1913), 20 T.L.R. 514; *Kimber* v. *Gas Light and Coke Co.*, [1918-19] All E.R. Rep. 123; *Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] All E.R. Rep. 48; *British Thomson-Houston Co.* v. *Sterling Accessories, Ltd., Same* v. *Crowther and Osborn, Ltd.*, [1924] All E.R. Rep. 294; *Kent and Porter* v. *East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207; *Fox* v. *Newcastle-upon-Tyne City Council*, [1941] 2 All E.R. 563; *Foster* v. *Gillingham* Corpn., [1942] 1 All E.R. 304; *Fisher* v. *Ruislip-Northwood U.D.C.*, [1945] 2 All E.R. 458; *Spicer* v. *Smee*, [1946] 1 All E.R. 489; *Darling* v. *A.-G.*, [1950] 2 All E.R. 793; *Mulready* v. *J. H. & W. Bell, Ltd.*, [1953] 2 All E.R. 215; *Balfour* v. *Barty King*, [1956] 2 All E.R. 555.

As to misfeasance or negligence in the repair of the highway, see 19 HALSBURY'S LAWS (3rd Edn.) 150 et seq.; and for cases see 26 DIGEST (Repl.) 436, 437.

Cases referred to:

(1) *King* v. *Hoare* (1844), 13 M. & W. 494; 2 Dow. & L. 382; 1 New Pract. Cas. 72; 14 L.J.Ex. 29; 4 L.T.O.S. 174; 8 Jur. 1127; 153 E.R. 206; 21 Digest (Repl.) 243, *591.*

(2) *Brinsmead* v. *Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex. Ch.; 21 Digest (Repl.) 296, *610.*

(3) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 36 Digest (Repl.) 72, *384.*

(4) *Gray* v. *Pullen* (1864), 5 B. & S. 970; 5 New Rep. 249; 34 L.J.Q.B. 265; 11 L.T. 569; 29 J.P. 69; 13 W.R. 257; 122 E.R. 1091, Ex. Ch.; 34 Digest 165, *1279.*

(5) *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 34 Digest 164, *1275.*

(6) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, *1234.*

(7) *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, *1255.*

Also referred to in argument:

Thurman v. *Wild* (1840), 11 Ad. & E.L. 453; 3 Per. & Dav. 289; 113 E.R. 487; 43 Digest 414, *367.*

Duck v. *Mayeu*, [1892] 2 Q.B. 511; 62 L.J.Q.B. 69; 67 L.T. 547; 57 J.P. 23; 41 W.R. 56; 8 T.L.R. 737; 4 R. 38, C.A.; 42 Digest 978, *93.*

Black v. *Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 6 R. 394, P.C.; 34 Digest 162, *1266.*

Reedie v. *London and North Western Rail. Co., Hobbit* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 159, *1243.*

Hole v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, *1263.*

Appeal by the defendants, the Wimbledon Urban District Council, from a decision of BRUCE, J., [1898] 2 Q.B. 212, on further consideration, after trial with a jury in Middlesex. A

The action was brought by the plaintiff to recover damages for personal injuries sustained by her through falling over a heap of soil placed by the defendant Iles in the Queen's Road, Wimbledon. The Queen's Road was a road within the district of the Wimbledon Urban District Council. For some considerable time B before the accident to the plaintiff this road had been set out as a road by the owner of the land, and had been used by the public, but it had not become a highway repairable by the inhabitants at large. The district council had given notice, under s. 150 of the Public Health Act, 1875, to the owner requiring him to sewer, level, pave, metal, flag, channel, and make good the road. The requirements of that notice were not complied with, and the district council proceeded C to carry out the work under the powers conferred on them by s. 150.

The district council entered into a contract with the defendant Iles, who was a contractor, to do the work. In the course of doing the work Iles placed heaps of soil, which had been removed from the surface of the road, by the side of the road. These heaps of soil were not lighted or in any way protected. The plaintiff was crossing the road at night in order to get to the road in which she lived, and fell D over one of the heaps and was injured.

This action was brought against the district council and Iles. The defendant Iles delivered a separate defence, denying that the accident was caused by his negligence, and with his defence paid £75 into court with a denial of liability. The district council in their defence denied the negligence, and further alleged that they were not liable for any negligence of Iles; they further said : E

> "The defendant Iles, while denying liability, has paid into court £75, and these defendants say that that sum is sufficient to satisfy the plaintiff's claim."

The action was tried before BRUCE, J., with a jury, and the jury found a verdict for the plaintiff for £50. The learned judge then ordered judgment to be entered for the defendant Iles. Upon further consideration BRUCE, J., held that the F defendant Iles was the agent or servant of the district council and was not an independent contractor, that the district council were liable even if Iles was an independent contractor, and that the district council could not avail themselves of the payment into court by Iles. The learned judge ordered judgment to be entered against the district council, to be confined to costs. The Wimbledon Urban District Council appealed. G

Macmorran, *Q.C.*, and *C. Tyrrell Giles* for the defendants, the Wimbledon Urban District Council.

Lord Coleridge, *Q.C.*, and *Stephen Lynch* for the plaintiff.

A. L. SMITH, L.J.—This is an appeal from the decision of BRUCE, J., after the H trial of the action with a jury. The result of the trial was a verdict for the plaintiff for £50. What happened was this: The plaintiff was at night crossing a road which was being obstructed by a contractor employed by the Wimbledon Urban District Council. The jury have found that there was negligence in leaving the obstructions unfenced and unlighted. The plaintiff fell over one of the obstruc- I tions and was injured. This action was brought against the contractor and the district council to recover damages.

The first question which arises is upon the form of the pleadings, which is somewhat novel. The contractor, in his defence, pleaded that there was no negligence, and while denying liability paid into court the sum of £75 as sufficient to satisfy the plaintiff's claim. The district council set up the defence that there was no negligence, and also a quite different defence that Iles was an independent contractor, and that they were not liable for his negligence; they also pleaded that :

A "The defendant Iles, while denying liability, has paid into court £75, and these defendants say that that sum is sufficient to satisfy the plaintiff's claim."

The action went to trial. The plaintiff succeeded on the issue as to negligence and got a verdict for £50. The contractor then said that he had paid £75 into court and thereupon became entitled to judgment; and BRUCE, J., ordered judgment to be B entered for him.

Then came the question as to the defence of the district council that they had employed an independent contractor. That point was argued before BRUCE, J., who gave a considered judgment and came to the conclusion that the defence was not a good defence. What was then the position of the district council? They had, as principals, been guilty of negligence, and were responsible for the acts C of their contractor. They had not paid any money into court. What answer could they then have to the plaintiff? In my opinion, none. If Iles had not paid the money into court, the plaintiff could have recovered the £50 from the district council. The plaintiff could not get the money twice over, but she had a good cause of action against the district council and succeeded against them.

Therefore, BRUCE, J., was quite right in his judgment upon that point. Then D there is the other point raised by the council, that they are not liable for the acts of the contractor, because he was an independent contractor, and what was done by him was casual or collateral negligence for which the principal could not be made liable. In my opinion BRUCE, J., stated the case with perfect accuracy when he said:

E "The district council employed the contractor to do work upon the surface of a road which they knew was being used by the public, and they must have known that the works which were to be executed would cause some obstruction to the traffic, and some danger, unless means were taken to give due warning to the public."

That is a perfectly accurate and good statement. Then as to the law BRUCE, J., F said:

"The principle of the decisions, I think, is this—that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the necessary G precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor."

I agree with every word of that statement, and would add to it, unless the acts done were mere casual or collateral acts of negligence, such as the dropping of a hammer by a workman. I cannot hold that leaving heaps of material about the H street was either casual or collateral negligence within the above exception. For these reasons I think that the decision of BRUCE, J., was right both as to the form of the judgment and as to the liability of the district council. The appeal fails and must be dismissed.

I **VAUGHAN WILLIAMS, L.J.**—I entirely agree. As to the first point, the fallacy lies very much in the words by which it is attempted to define the so-called defence in this case. When a defendant pays money into court with a denial of liability, that is done in pursuance of Ord. 22, r. 1. Let us then see what that rule says. It provides that:

"Where an action is brought to recover a debt or damages, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of

which the payment is made; or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into court which shall be subject to the provisions of r. 6."

I desire to point out that the defence is the denial of liability, and not, as has been assumed by the defendant council, the payment into court. The importance of that is this. Both defendants have delivered statements of defence; each of them has denied liability; one of them chose also to pay money into court, and, according to the terms of the rule, he had to do that with his defence. What is the result? The result is not that he sets up a defence by the payment into court, but that the legislature for the sake of peace has enabled a defendant to make an offer of terms of peace. The result of that procedure is that, if at the trial the defendant who has paid money into court is defeated upon his denial of liability, yet he is not placed in the position of a defeated defendant if the plaintiff does not recover more than the amount paid into court. In that case, notwithstanding his defeat on the denial of liability, the defendant saves the costs of the action and gets judgment for his costs. It is therefore a mistake to say that there is a defence of payment into court. The only defence is the denial of liability. Here the one defendant by his payment into court has improved his position, because he gets the benefit of that payment into court, the plaintiff not having recovered more. I cannot, however, see any reason why the other defendant, who did not make any payment into court, should be placed in the same position as the defendant who did pay money into court. It is quite plain, therefore, that *King* v. *Hoare* (1) and *Brinsmead* v. *Harrison* (2) have no application to the present case. There never was any satisfaction of the cause of action before or during the trial; there was always a good cause of action against the Wimbledon District Council. In my judgment, BRUCE, J., was perfectly right in entering judgment against the district council.

As to the other point, there is rarely any question of liability upon which the authorities are so clear and so uniform as they are with regard to the liability of a local authority which has employed a contractor as in the present case. The principle was first laid down in *Pickard* v. *Smith* (3). That was a case in the Court of Common Pleas, where in the judgment it was said (10 C.B.N.S. at p. 480):

> "Unquestionably, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of negligence, the employer is not answerable. To this effect are many authorities which are referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned."

Those principles were subsequently applied in *Gray* v. *Pullen* (4), *Bower* v. *Peate* (5), and *Dalton* v. *Angus* (6). Then, last of all, the principle was again applied in *Hardaker* v. *Idle District Council* (7).

In all those cases the principle applied was that, if a contractor was intrusted with the performance of the duty of the employer, the employer could not rely upon the employment of the contractor in order to escape liability if the duty was not performed. In cases such as this, in which the local authority has statutory powers to do something to a road, e.g., stopping it or opening it up, so as to make it dangerous for use, it is clear that there is a duty upon the local authority to take care that, whatever they are doing under their statutory authority, the Queen's subjects are not injured by a careless performance of the work. Apply that prin-

ciple to the present case. This road was being made up, and that work must at some time give rise to danger. It was, therefore, the duty of the statutory authority to take care, by providing fencing, lights, or watchmen, that persons coming there were not injured. Here it happened that those precautions were not taken, and the plaintiff was injured. Therefore I think that here, as in *Pickard* v. *Smith* (3), there was a duty incumbent upon his employer which was intrusted to the contractor, who neglected its fulfilment, whereby an injury was occasioned to the plaintiff. BRUCE, J., has expressed the law tersely, and with absolute accuracy, and I entirely agree with his judgment. The appeal fails, and must be dismissed.

ROMER, L.J.—Having regard to the present state of the authorities, I think that the following statement accurately expresses the law upon this question: Where a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such dangers, and he does not escape liability for the discharge of that duty by employing a contractor if the contractor does not take those precautions. I desire to point out that what has been called in some cases casual or collateral negligence refers to accidents which cannot be guarded against beforehand. Applying that rule to the present case I think that this work from its very nature was likely to cause danger to the public, because it became necessary, and indeed inevitable, in doing the work that heaps should be made. It is well known that, in works like this, it is a usual precaution to put up lights or other warnings. In my opinion it would not be reasonable not to take such precautions.

As to the second point, I have nothing to add except to call attention to the fact that this case is not one in which the district council have set up substantially the same defence as the other defendant, and have submitted to the same consequences as if money had been paid into court by them. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. H. Whitfield; S. A. Jones.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

HARTOPP *v.* HARTOPP AND AKHURST

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), November 7, December 19, 1898, January 27, 1899]

[Reported [1899] P. 65; 68 L.J.P. 33; 80 L.T. 297; 15 T.L.R. 168]

Variation of Settlement—Power of appointment—Divorced wife—Wife's power of appointment to husband—Remainder to children in default of appointment—Matrimonial Causes Act, 1859 (22 & 23 Vict., c. 61), s. 5.

Under a marriage settlement the wife, whose marriage had been dissolved on the ground of her adultery, had a power to appoint by will the annual income of a fund to the husband for life if he should survive her, and in default of appointment and on the wife's death, the fund would go to the children of the marriage. This was the husband's only interest under the settlement in the wife's property.

Held: when the breaking up of the family life had been caused by the fault of the respondent (in this case the wife), the court, exercising its powers under s. 5 of the Matrimonial Causes Act, 1859 [now s. 25 of the Matrimonial Causes Act, 1950], ought to place the petitioner and the children in a position, as nearly as circumstances might permit, as if the family life had not been broken up; accordingly, as the wife, had the marriage continued, would in all probability have exercised the power of appointment in the husband's favour, the court had power to order that the income of the fund be paid to the husband for his life after the wife's death.

Notes. Applied: *Matheson* v. *Matheson*, [1935] All E.R. Rep. 414. Referred to: *Blood* v. *Blood*, [1902] P. 78; *Lorriman* v. *Lorriman and Clair*, [1908] P. 282; *Webster* v. *Webster and Williamson*, [1926] All E.R. Rep. 562; *Scollick* v. *Scollick*, [1927] All E.R. Rep. 523; *Egerton* v. *Egerton*, [1949] 2 All E.R. 238; *Compton* (*Marquis of Northampton*) v. *Compton* (*Marchioness of Northampton*), [1960] 2 All E.R. 70

As to variation of marriage settlements, see 12 Halsbury's Laws (3rd Edn.) 451 et seq; and for cases see 27 Digest (Repl.) 641 et seq. For the Matrimonial Causes Act, 1950, s. 25, see 29 Halsbury's Statutes (2nd Edn.) 412.

Cases referred to:

(1) *Noel* v. *Noel* (1885), 10 P.D. 179; 54 L.J.P. 73; 33 W.R. 552; 27 Digest (Repl.) 654, *6160*.

(2) *Crisp* v. *Crisp* (1872), L.R. 2 P. & D. 426; 42 L.J.P. & M. 13; 27 L.T. 428; 21 W.R. 79; 27 Digest (Repl.) 643, *6061*.

(3) *Forsyth* v. *Forsyth*, [1891] P. 363; 61 L.J.P. 13; 65 L.T. 556; 27 Digest (Repl.) 643, *6062*.

(4) *Pollard* v. *Pollard*, [1894] P. 172; 63 L.J.P. 104; 70 L.T. 815; 6 R. 594; 27 Digest (Repl.) 655, *6164*.

(5) *Hipwell* v. *Hipwell*, [1892] P. 147; 61 L.J.P. 84; 67 L.T. 396; 27 Digest (Repl.) 663, *6275*.

Also referred to in argument:

Re Armstrong, *Ex parte Gilchrist* (1886), 17 Q.B.D. 521; 55 L.J.Q.B. 578; 55 L.T. 538; 51 J.P. 292; 34 W.R. 709; 2 T.L.R. 745, C.A.; 27 Digest (Repl.) 118, *867*.

Jones v. *Skinner* (1835), 5 L.J.Ch. 87; 44 Digest 658, *4976*.

Motion on behalf of the petitioner Edward H. Hartopp, to confirm with certain alterations the registrar's report on a petition for the variation of a marriage settlement made on the petitioner's marriage with the respondent, Helen Margaret Georgiana Hartopp.

The report was as follows:—On June 13, 1898, the decree nisi obtained by the petitioner dissolving his marriage with the respondent by reason of her adultery was made absolute. There were now living eight children, issue of the marriage, in the custody of the petitioner, none of whom had attained the age of twenty-one or married. By an indenture of settlement, bearing date Aug. 12, 1878, made in contemplation of the marriage, certain trust funds and interests were held by the trustees in trust for the respondent for life, and on her death for the children as she should appoint, and in default of appointment for the children equally. There were further trusts in the event of no child of the marriage attaining the age of twenty-one years. It was therein further provided that, if the respondent should survive the petitioner, it should be lawful for her, after the death of the petitioner but without prejudice to any appointment in favour of the children of the marriage, to appoint in favour of a future husband and the children of a second marriage to the extent of one-third of the trust funds in the event of more than one child, issue of the marriage between the petitioner and the respondent, attaining the

age of twenty-one years. In the event of the petitioner surviving the respondent, the respondent had power to appoint by will a sum not exceeding £500 a year to the petitioner for life, but, in default of the exercise of that power, the petitioner had no interest in the trust funds on the death of the respondent. Her interest in that fund came to her on her mother's death under the will of her grandfather. It consisted of £10,452 consols, producing £277 a year. No property was brought into settlement by the petitioner.

Counsel on behalf of both parties and of the trustees of the settlement attended before the registrar, and it was agreed that the respondent's present income was £997 per annum, to be increased to £2,274 on the death of her mother, who was now seventy years of age, and that the income of the petitioner, apart from any profit derived from his business as a South African merchant, was about £200 per annum. It was sworn by the petitioner that since the commencement of his business in partnership in January, 1895, he had only been able to draw £409 6s. 10d., and that there was little prospect of any further receipts owing to the depression of business in South Africa. The petitioner attended pursuant to notice, but counsel on behalf of the respondent did not cross-examine him. If the petitioner was charged with the average receipts from the business, his income would be about £340 per annum. It was contended by counsel on behalf of the petitioner that *Noel* v. *Noel* (1) was an authority for appropriating half the respondent's income for the benefit of the petitioner (being the husband) and the children, regardless of the amount of the petitioner's income.

It was submitted that, although in *Noel* v. *Noel* (1) the trustees were ordered to pay half the income arising from the wife's trust funds to the husband, it was after consideration of their several incomes and other circumstances, and that the decision was not a general authority for the proposition; but in this case, having regard to the number of the children, it was submitted that it would be right that the court should order that, until the death of the mother of the respondent, the trustees should pay to the petitioner half the income arising from the trust funds, and from and after the death of the respondent's mother and during the lifetime of the respondent the annual sum of £1,000, and on the death of the respondent the annual sum of £500, and further order that the respondent should not be at liberty to appoint in favour of a second husband whom she might marry during the petitioner's life, nor in favour of children of a subsequent marriage born during the lifetime of the petitioner, and that the respondent's power of appointment amongst the children of the marriage between the petitioner and respondent be extinguished, and that the trustees be at liberty to exercise the powers of advancement in favour of the children without the consent of the respondent, provided that the loss of capital be borne proportionately by the petitioner and respondent.

By s. 45 of the Matrimonial Causes Act, 1857 :

> "In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

By s. 5 of the Matrimonial Causes Act, 1859 :

> "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion

of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

Bargrave Deane, *Q.C.*, and *W. T. Barnard* for the petitioner.

Inderwick, *Q.C.*, and *Priestley* for the respondent.

Norton and Willock for the guardian ad litem of the children.

Cur. adv. vult.

Jan. 27, 1899. **GORELL BARNES, J.**, read the following judgment.—In this case, the marriage between the petitioner and respondent has been dissolved on the ground of the respondent's adultery, the decree absolute having been pronounced on the husband's petition on June 13, 1898, and the petitioner was given the custody of the children of the marriage. The husband having presented a petition for the variation of an ante-nuptial marriage settlement made on Aug. 12, 1878, with the sanction of the Court of Chancery, the respondent being at that time a ward of court, the registrar has made his report recommending as follows: That the court should order that, until the death of the mother of the respondent, the trustees should pay to the petitioner half the income arising from the trust funds, and from and after the death of the respondent's mother and during the lifetime of the respondent, the annual sum of £1,000; that the respondent should not be at liberty to appoint in favour of a second husband whom she may marry during the petitioner's life, nor in favour of children of a subsequent marriage born during the lifetime of the petitioner; that the respondent's power of appointment amongst the children of the marriage be extinguished; and that the trustees be at liberty to exercise the powers of advancement in favour of the children without the consent of the respondent, provided that the loss of capital be borne proportionately by the petitioner and respondent.

On motion before me, the petitioner desired to have the report varied by increasing the amount to be paid to him after the death of the respondent's mother from £1,000 per annum to half of the annual income of the trust funds. He was willing, however, that the amount to be paid to him from time to time should be paid to him as to one-third for his own use and two-thirds for the benefit of the children. The increase was, however, opposed by the respondent. After due consideration of all the circumstances of the case, and especially of the fact that the petitioner has to support and bring up the children, I am of opinion that the £1,000 should be increased to one-half of the annual income of the trust funds, with a direction that the amount to be paid is to be applied in manner aforesaid. The respondent sought to have the report varied in so far as it deals with her power of appointment in favour of any future husband and children of a future marriage, but I am of opinion that the report should be confirmed on this point. If the power of appointment can be read as giving the respondent power to appoint in favour of any husband she may marry during the petitioner's lifetime and of any children of a future marriage born in his lifetime it is not desirable that the respondent should be able to exercise the power in question to the detriment of her present children in a manner which she could not have done had she remained the wife of the petitioner. I may refer on this point to the observations of Lord Hannen in *Noel* v. *Noel* (1) (10 P.D. at p. 182). The respondent also objected to the extinguishment of her power of appointment among the children of the marriage, and to the exercise by the trustees of the power of advancement in favour of the children without her consent; but, as she will no longer have charge of the children, she has not the same opportunity of exercising a judgment as to the propriety of making any particular disposition of her property among them, or as to the exercise of the powers of advancement, as if she had continued in charge of them, and the report must be confirmed on this point also.

The principal difficulty in the case arose from an application by the petitioner on the motion that the settlement be varied by ordering that the petitioner should be entitled to receive after the respondent's death the income derived from a fund coming under the will of the respondent's grandfather, referred to in the settle-

ment, which is now represented by a sum of about £10,000 in consols. Under the settlement, the respondent takes a life interest in it, and after her death it goes to the children of the marriage, subject to a power given by the settlement to the respondent to appoint by will or codicil the annual income of this fund in favour of the petitioner for his life. If this power should not be exercised, the petitioner has no interest under the settlement in the settled property. It was objected by the respondent that the court had no power to make such an order, as it would affect the interests of the children under the settlement, and the case was adjourned in order that a representative of the children should appear and argue the matter on their behalf.

A guardian ad litem of the children was, accordingly, appointed, and the case was re-argued on this point. Counsel on behalf of the children took the same objection, and relied on *Crisp* v. *Crisp* (2); *Forsyth* v. *Forsyth* (3); and *Pollard* v. *Pollard* (4). The petitioner's counsel maintained that the court has power to make the order prayed, and relied on s. 45 of the Matrimonial Causes Act, 1857, and s. 5 of the Matrimonial Causes Act, 1859. I do not propose to comment on s. 45 of the first Act, but to base my judgment on s. 5 of the second Act. Section 5 is as follows: [HIS LORDSHIP read the section, and continued:] This section is in very general terms, and under it the court is expressly given power to make such orders with reference to the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court may seem fit. I feel little doubt that, under this section, the court has power to make the order prayed for, and, indeed, counsel for the children seemed to feel the difficulty of maintaining that the language of the section is not sufficient to give the court this power; but it was urged that, in the cases above mentioned, a construction has been placed on the section to the effect that the court has no power to vary a marriage settlement so as to deprive children of the marriage of any interest secured to them by the settlement, and that the petitioner is asking the court to make an order which will deprive the children of the petitioner and respondent of interests secured to them by the settlement in question.

The guiding principle which will be found running through the cases is, in my opinion, this. When the breaking up of the family life has been caused by the fault of the respondent, the court, exercising its powers under the above section, ought to place the petitioner and the children in a position, as nearly as circumstances will permit, the same as if the family life had not been broken up. It follows that, when the trust funds are settled, as is usual, on the parents successively, or on one of them for life, with remainder to the children, the court, while it might extinguish the whole or a part of the guilty parent's life interest and his or her power of appointment, if any, amongst the children, would not interfere to deprive the children of those interests to which they are entitled under the settlement. In such cases, whether the home is broken up or not, the children, on attaining the age fixed by the settlement, or sometimes, in the case of daughters, on their marrying, have interests which will certainly come to them as soon as the prior life interests end. *Crisp* v. *Crisp* (2) was a case which may have been determined from this point of view, though it is possible that, if that case had been heard since the passing of the Judicature Acts, the court might have considered it had power to make the order agreed on, had it chosen to do so. In *Forsyth* v. *Forsyth* (3), the children who might attain twenty-one or marry became absolutely entitled to the trust funds after the death of the respondent. In *Pollard* v. *Pollard* (4), the settlement gave the wife, on the death of her husband, a power of appointment in favour of a second husband and the children of a second marriage, and the wife, who had obtained a divorce against her husband, sought to have the settlement varied, so as to enable her to exercise the power before her husband's death, but the President declined to do so. In *Hipwell* v. *Hipwell* (5), the children's reversionary interests were affected by an order that the petitioner's costs should be paid out of the corpus.

In the present case, the children became entitled to the fund aforesaid on attaining twenty-one, or, if daughters, on marrying, subject, however, to the wife's life interest, which will have been partially dealt with by the order of the court, and subject to her power of appointment aforesaid. So that, if the respondent should exercise that power, to the extent to which she does so the benefit to be derived by the children from the fund is postponed till after their father's death—that is to say, the children's interests vary according as the power is exercised or not. If the family life had continued, it is most natural to expect, in the petitioner's circumstances and as he had no interest in his wife's money conferred by the settlement except so far as she might give him a benefit by the exercise of the power in question, that, if she should have died before him, she would have left a will exercising the power in his favour.

The position, then, is that, if no order be made, the children will, after what has happened, almost certainly obtain their full interests after their mother's death, whereas, if the marriage had continued in the ordinary way, they would most likely only have obtained those interests on the death of both parents. At any rate, it may be said that the children's interests, as conferred by the settlement, are not absolute, but are liable to be affected by the exercise of the power in question. There is a state of uncertainty which, in the position of the parties to this suit, it is reasonable to expect would have been determined in favour of the husband had the family life continued, and, in my opinion, the court has power, and it is reasonable, to determine it in his favour in the circumstances which have happened. The trustees of the settlement did not appear and argue the point before the court, but counsel for the respondent stated that he was authorised on their behalf to say that they did not desire to be heard.

In the result, the sum of £1,000 must be increased to one-half of the respondent's income after her mother's death during the respondent's lifetime, and one-third of the amounts to be paid to the petitioner during his life is to be paid to him for his own use, and two-thirds of the said amounts are to be paid to him for the use of the children while he has the custody of them. As each child attains twenty-one or, if a daughter, marries, the proper share of the said two-thirds applicable to such child, according to the number of the children, shall be paid to him or her. The income of the fund coming under the will of the grandfather of the respondent, not exceeding £500 a year, must be paid, after the respondent's death and subject to any interests prior to hers, to the petitioner during his lifetime. The report will be varied in this way, and in other respects confirmed.

Solicitors: *Pollock & Co.; Layton, Sons & Lendon; Clarke & Calkin.*

[*Reported by* H. M. Giveen, Esq., *Barrister-at-Law.*]

A

KERRISON *v.* SMITH

[Queen's Bench Division (Lawrance and Henn Collins, L.JJ.), August 3, 1897]

[Reported [1897] 2 Q.B. 445; 66 L.J.Q.B. 762; 77 L.T. 344]

B *Licence—Breach—Licence not coupled with an interest—Grant by parol agreement—Use of wall for erection of hoarding for advertising—Annual rent paid to owner—Right of licensee to maintain action for breach of contract.*

The defendant verbally agreed to let the plaintiff have the use of a wall for advertising by bill posting on a yearly tenancy at an annual rent, the plaintiff to erect a hoarding. The plaintiff erected a hoarding, displayed posters C thereon, and paid the rent for some years. The defendant gave the plaintiff notice to remove the hoarding and soon afterwards he removed it himself. In an action by the plaintiff for breach of contract,

Held: although the plaintiff had a mere licence not coupled with an interest which the defendant could revoke at any time without being liable to an action for trespass, the right of the defendant as licensor to revoke and the right of D the plaintiff as licensee to sue for breach of contract in respect of such revocation, were co-existent, and, therefore, the plaintiff could maintain an action for breach of contract.

Notes. Considered: *Hurst* v. *Picture Theatres, Ltd.*, [1914-15] All E.R. Rep. 836. Referred to: *Thompson* v. *Park*, [1944] 2 All E.R. 477; *Winter Garden* E *Theatre (London), Ltd.* v. *Millenium Productions, Ltd.*, [1947] 2 All E.R. 331. As to the nature of a licence, see 23 Halsbury's Laws (3rd Edn.) 430 et seq., and for cases see 30 Digest (Repl.) 539 et seq.

Cases referred to:

(1) *Wood* v. *Leadbitter* (1845), 13 M. & W. 838; 14 L.J.Ex. 161; 4 L.T.O.S. 433; 9 J.P. 312; 9 Jur. 187; 153 E.R. 351; 30 Digest (Repl.) 542, *1771*. F

(2) *Wells* v. *Kingston-upon-Hull Corpn.* (1875), L.R. 10 C.P. 402; 44 L.J.C.P. 257; 32 L.T. 615; 23 W.R. 562; 30 Digest (Repl.) 537, *1717*.

(3) *Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q.B.D. 207; 57 L.J.Q.B. 564; 60 L.T. 89; 52 J.P. 612; 36 W.R. 726; 4 T.L.R. 607, C.A.; 8 Digest (Repl.) 124, *802*.

G Also referred to in argument:

Wood v. *Lake* (1751), Say. 3; 96 E.R. 783; 30 Digest (Repl.) 537, *1713*.

Bryan v. *Whistler* (1828), 8 B. & C. 288; 2 Man. & Ry.K.B. 318; 6 L.J.O.S.K.B. 302; 108 E.R. 1050; 19 Digest (Repl.) 26, *118*.

Fentiman v. *Smith* (1803), 4 East, 107; 102 E.R. 770; 19 Digest (Repl.) 21, *80*.

R. v. *Horndon-on-the-Hill (Inhabitants)* (1816), 4 M. & S. 562; 105 E.R. 942; H 19 Digest (Repl.) 21, *81*.

Cornish v. *Stubbs* (1870), L.R. 5 C.P. 334; 39 L.J.C.P. 202; 22 L.T. 21; 18 W.R. 547; 30 Digest (Repl.) 540, *1745*.

Mellor v. *Watkins* (1874), L.R. 9 Q.B. 400; 23 W.R. 55; 30 Digest (Repl.) 540, *1746*.

Hewlins v. *Shippam* (1826), 5 B. & C. 221; 7 Dow & Ry.K.B. 783; I 4 L.J.O.S.K.B. 241; 108 E.R. 82; 19 Digest (Repl.) 6, *2*.

Rymer v. *McIlroy*, [1897] 1 Ch. 528; 66 L.J.Ch. 338; 76 L.T. 115; 45 W.R. 411; 19 Digest (Repl.) 25, *105*.

Vaughan v. *Hampson* (1875), 33 L.T. 15; 43 Digest 438, *661*.

Appeal by the plaintiff from the county court of Surrey, held at Wandsworth, in an action brought to recover damages for breach of contract.

The plaintiff, an advertising agent, proved that the defendant, in March, 1892, verbally agreed to let him have the use of a wall for advertising by bill posting, as a

yearly tenant, at £2 10s. a year, upon the plaintiff agreeing to board it and erect the hoarding. The plaintiff agreed to these terms, and erected the hoarding, and paid the rent, down to October, 1896. In November, 1896, the defendant gave to the plaintiff notice to remove the hoarding, and at the end of December the defendant removed the hoarding himself. The plaintiff brought an action for damages for breach of contract for terminating the agreement.

The county court judge held, on the authority of *Wood* v. *Leadbitter* (1), that, as the plaintiff was a mere licensee, no action was maintainable; and he gave judgment for the defendant with costs. The plaintiff appealed.

Turrell for the plaintiff.
Randolph for the defendant.

LAWRANCE, J.—In this case I am of the opinion that the county court judge was wrong. He seems to have decided the case on the authority of *Wood* v. *Leadbitter* (1), and to have thought that, as the plaintiff had only a licence granted to him, *Wood* v. *Leadbitter* (1) was an end of the whole case, and that he could go no further. There is no case exactly on all-fours with this, as all the cases referred to are for trespass on the case, or such like causes of action. The present action, however, is for breach of contract, and I think upon the facts the plaintiff would be entitled to maintain such an action. Under these circumstances the case must go back to the county court judge to say what the contract was, and to assess the damages.

HENN COLLINS, J.—I am of the same opinion. The county court judge in this case assumed that the right to revoke the licence which existed was in itself enough to determine this action. The case was argued on the basis that this was a licence and nothing more, and I, therefore, deal with it on that ground. It was a licence or a contract by which the plaintiff was to put up certain hoarding, and the defendant was to allow it to remain there if the plaintiff paid for it annually. That was the evidence on which the licence was set up for the plaintiff. That being so, and it being conceded that the person who granted this right has the right to revoke it, the point arises whether, if it has been revoked, the plaintiff, to whom such right was granted, can maintain an action, not for revoking the licence, but for breach by the defendant of his contract. It is rather curious that there is no case which has decided that these two rights—the right on the one hand to revoke the licence, and the right, on the other hand, to maintain an action for breach of contract for doing so—co-existed. It seems to me, however, on principle that these two rights must exist, and that several of the authorities really involve this principle. Turning to *Wood* v. *Leadbitter* (1), ALDERSON, B., in delivering the judgment of the court, says (13 M. & W. at p. 855):

> "It was suggested that, in the present case a distinction might exist, by reason of the plaintiffs having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorised its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil."

In fact I read that as showing that that cause of action, namely, an action for breach of contract, would exist, and there are two cases which seem to me to proceed on that footing.

The first is *Wells* v. *Kingston-upon-Hull Corpn.* (2). In that case the facts were that the defendants were possessed of a graving dock, of which they allowed the use to ships needing repairs under certain regulations. The plaintiff entered

into a parol agreement with the defendants for the use of the dock upon the terms of such regulations. By those regulations it was provided that the dock should be "let" to parties requiring the same for the repair of vessels, at such rates as should be sanctioned, and that vessels should be allowed to enter the dock as far as possible according to order of entry in a book kept for that purpose. The defendants did not admit the plaintiff's vessel into the dock in her turn, and in an action for breach of contract by the plaintiff against the defendants, it was held that the contract was not for an interest in land within s. 4 of the Statute of Frauds, and therefore, need not be in writing. In the argument for the defendants it was put in this way: "The plaintiff is in this dilemma: If the licence to occupy the dock is revocable, it was revoked. If it was irrevocable, it must be because it was a licence coupled with an interest. What interest can there be but an interest in the land?" In dealing with this argument, LORD COLERIDGE, C.J., in his judgment says (L.R. 10 C.P. at p. 409):

> "Here I think the defendants did not intend to confer any interest in land, though they did give the plaintiff a right to go on to the land in order to carry out the contract. I do not think we are called on to discuss the nice question raised upon the effect of *Wood* v. *Leadbitter* (1) in counsel's ingenious argument, namely, as to whether the plaintiff was a licensee without an interest, and so must fail, because the licence had been revoked; or a licensee with an interest, and so the licence, being irrevocable, amounted to an interest in land. The dilemma suggested does not, as I think, arise. The contract did not relate to the possession or enjoyment of the land, or any right over it, but only to the use of it under very stringent regulations, the defendants retaining themselves complete possession of and all rights over it."

That seems to me to narrow down the right of the plaintiff in that case to that of a mere licensee, and it seems to me, therefore, that the actual decision in that case is a decision in favour of the plaintiff's contention in this case.

There is also another case in which the same point arose, namely, *Butler* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (3), where the plaintiff was a passenger by the defendant's railway, and where the ticket issued to him incorporated by reference certain conditions, one of which was that every passenger should show and deliver up his ticket when required by a servant of the company to do so, or failing or refusing to show or deliver up such ticket, should be required to pay the fare from the station whence the train originally started. The plaintiff, having lost his ticket, was unable to produce it when required to do so, and he was thereupon required to pay the fare from the station whence the train had started, and, on his declining to do so, he was forcibly removed from the carriage, no more force being used than was necessary for his removal. He thereupon sued the defendants for assault, and the court held that the contract between the plaintiff and the defendants did not authorise the defendants to remove the plaintiff under the circumstances, and that the action was maintainable. That being an action for assault, *Wood* v. *Leadbitter* (1) was accordingly referred to and relied on in the argument of defendants' counsel, and was dealt with by the court. LORD ESHER, M.R., says (21 Q.B.D. at p. 211):

> "To say that a passenger by railway from London to Liverpool is to have an easement all over the line between those places seems to me really ridiculous. . . . It seems to me, therefore, that the considerations upon which the case of *Wood* v. *Leadbitter* (1) turned are not applicable in this case";

and, in a previous part of his judgment, he says (ibid.):

> "What is the nature of the relation between the plaintiff and the defendants? It is, as it appears to me a contractual relation."

LINDLEY, L.J., says (ibid. at p. 213):

> "It seems to me to be a totally different thing from a contract for an interest in land; and it seems to me absurd to treat the case as one of revocable licence. It is a case of a contract for carriage. The doctrine of *Wood* v. *Leadbitter* (1) does not appear to me to be at all applicable to the case of such a contract;"

and LOPES, L.J., gives judgment to the same effect, and they all distinguish the case from *Wood* v. *Leadbitter* (1).

From that it appears that what the court has to look at is, what is the whole contract between the parties? The cases cited for the defendant differ from the present, and are easily distinguishable. They were actions of trespass, or on the case, and they seem to me to be no authority for the proposition that the right to maintain an action for the wrongful interference with the plaintiff's rights under the contract may not subsist with the defendant's right to revoke the licence. In CLERK AND LINDSELL ON TORTS (1st Edn.) at p. 278 [see now 12th Edn. at para. 1166] it is said, when dealing with such a revocable licence:

> "The licensee cannot after revocation justify entering upon the land for the purpose of using the privilege; his only remedy against his licensor, where the revocation is wrongful, is upon the contract."

In the case of a licence not coupled with an interest, it would be a strong thing to say that when such a licence is revoked the licensee would have no cause of action on the contract. The mere fact that the licence was revoked does not exclude the right to sue upon the contract.

Appeal allowed.

Solicitors: *Seeley & Son; Maitlands, Peckham & Co.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

LORD ADVOCATE *v.* FLEMING (OR ROBERTSON) AND ANOTHER

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten, Lord Morris and Lord Shand), February 18, 1897]

[Reported [1897] A.C. 145; 66 L.J.P.C. 41; 76 L.T. 125; 61 J.P. 692; 13 T.L.R. 216; 45 W.R. 674]

Estate Duty—Property passing—Money received under policy of assurance—Policy kept up for donee—Assignment of policy to donee—Subsequent premiums paid by donee.

Succession Duty—Money received under policy of assurance—Assured beneficially entitled on death—Assignment of policy—Subsequent premiums paid by assignee—Succession Duty Act, 1853 (16 & 17 *Vict.*, *c.* 7), *s.* 2.

F. held two policies of assurance on his life, one effected by himself in 1840 and the other acquired by right of assignment in 1860, and he regularly paid the premiums himself. In 1883 F. gratuitously assigned both policies to his daughter and thereafter she paid the premiums until F. died in 1890.

Held: the daughter did not "become beneficially entitled . . . upon the death of any person" within s. 2 of the Succession Duty Act, 1853, nor were the policies "kept up for the benefit of the donee" within s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889, and, therefore, she was not liable to succession duty or to account duty.

Notes. Account duty was superseded by estate duty in connection with deaths after Aug. 1, 1894, by the Finance Act, 1894, see 9 HALSBURY'S STATUTES (2nd Edn.) 348. Succession duty has been abolished in the case of a testator or intestate dying on or after July 30, 1949, by s. 27 of the Finance Act, 1949, see 28 HALSBURY'S STATUTES (2nd Edn.) 522. As to obsolescent duties, see 15 HALSBURY'S LAWS (3rd Edn.) 5 et seq.

Considered: *A.-G.* v. *Lethbridge* (1904), 92 L.T. 88. Distinguished: *A.-G.* v. *Adamson*, [1932] 2 K.B. 159; *Lord Advocate* v. *Inzievar Estates, Ltd.*, [1938] 2 All E.R. 424. Considered: *Re D'Avigdor-Goldsmid, D'Avigdor-Goldsmid* v. *I.R. Comrs.*, [1951] 2 All E.R. 543. Referred to: *Tilling-Stevens Motors* v. *Kent County Council and Transport Minister* (1928), 97 L.J.Ch. 371; *I.R. Comrs.* v. *Dalgety & Co.* (1929), 98 L.J.K.B. 542; *A.-G.* v. *Barclays Bank*, [1943] 1 All E.R. 181; *Re Hodge's Policy, Hodge* v. *I.R. Comrs.*, [1957] 3 All E.R. 584.

As to policies kept up for a donee, see 15 HALSBURY'S LAWS (3rd Edn.) 24, and for cases see 21 DIGEST (Repl.) 138 et seq. For s. 2 of the Succession Duty Act, 1853; s. 38 of the Customs and Inland Revenue Act, 1881; s. 11 of the Customs and Inland Revenue Act, 1889, see 9 HALSBURY'S STATUTES (2nd Edn.) 269; 332; 344, respectively.

Cases referred to in argument:

A.-G. v. *Yelverton* (1861), 7 H. & N. 306; 30 L.J.Ex. 333; 5 L.T. 451; 7 Jur.N.S. 1250; 158 E.R. 490; 21 Digest (Repl.) 140, *803*.

Re Jenkinson (1857), 24 Beav. 64; 26 L.J.Ch. 241; 28 L.T.O.S. 280; 3 Jur.N.S. 279; 5 W.R. 301; 53 E.R. 281; 21 Digest (Repl.) 140, *802*.

A.-G. v. *Abdy* (1862), 1 H. & C. 266; 32 L.J.Ex. 9; 6 L.T. 756; 8 Jur.N.S. 798; 158 E.R. 884; 21 Digest (Repl.) 136, *767*.

Fryer v. *Morland* (1876), 3 Ch.D. 675; 45 L.J.Ch. 817; 35 L.T. 458; 41 J.P. 86; 25 W.R. 21; 21 Digest 160, *918*.

Appeal by the Crown from a decision of the First Division of the Court of Session in Scotland (LORD ROBERTSON, LORD PRESIDENT, LORD ADAM, and LORD KINNEAR), reversing a decision of the Lord Ordinary (LORD WELLWOOD).

The Crown claimed account stamp duty, or succession duty in respect of sums received under certain policies of life assurance gratuitously assigned by the party insured, the premiums on which had been paid by the respondent since 1883.

James Fleming, who resided at Cupar, in the county of Fife, died there on Feb. 18, 1890. On Feb. 21, 1840, he effected a policy on his life for £300 with the Scottish Equitable Life Assurance Society; and on April 9, 1860, he acquired right by assignment to a policy for £250 effected on his life with the same society on Dec. 4, 1840. He kept up these policies, and regularly paid the premiums as they fell due, until Sept. 29, 1883. He then assigned both policies gratuitously to his daughter the respondent, Mrs. Robertson. After that date the premiums were paid by her, and on his death she received from the society the principal sums contained in the policies and the bonuses which had accrued. The claim, which is these circumstances was made for account stamp duty, was based upon the Customs and Inland Revenue Act, 1881, s. 38, as amended by the Customs and Inland Revenue Act, 1889, s. 11. The action contained a conclusion against the respondent Mrs. Robertson for delivery of an account of the moneys received by her under the policy, or of part of such moneys received by her in proportion to the premiums paid by the deceased. On Dec. 12, 1894, the Lord Ordinary decided on this point in favour of the Crown, holding that there was

liability for duty in the proportion which the premiums paid by the deceased bore to the whole premiums paid on the policies. A

The Lord Advocate (*Graham Murray, Q.C.*), *the Solicitor-General* (*Sir R. Finlay, Q.C.*), and *Charteris* for the Crown.

Shaw, Q.C., and *H. Anderson* (both of the Scottish Bar), for the respondents.

LORD HALSBURY, L.C.—It appears to me that in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the legislature has enacted. This claim has been put in two ways. It appears to me that it is susceptible of a very simple answer in respect of either of them. B C

The first question is, whether it comes under s. 2, of the Succession Duty Act, 1853:

> "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval. . . ." D

This policy of insurance has been in existence a considerable number of years. The person entitled ultimately to this money, herself in one sense created the property—that is, she continued the contract under which, if she continued to pay premiums, certain money would be payable upon the death. She continued that for a period of seven years; and therefore, reading simply the words as they stand, I do not think that she has "become beneficially entitled . . . upon the death of any person;" because she has become entitled by reason—among other things—of her own payments during the period of seven years; and it appears to me, under that section, that in order to make this a "succession" we must introduce some words of this kind: "disposition of property by reason whereof either partly or wholly a person has become entitled." If those words were introduced, in a certain sense it is true that she did partly become entitled by reason of premiums previously paid, the policy effected, and the assignment then made, supposing she continued to pay the premiums. But I find no such words in the statute, and I decline to do anything else than construe the words which I find there. I therefore am of opinion that under that part of the statute it is impossible to maintain the claim of the Crown on this first ground. E F G

I then turn to the alternative claim, which is for account duty; and it appears to me that it is susceptible of an equally plain answer. I do not know that I can state it more plainly than Lord Adam has done. He says:

> "I confess I have never been able to understand in this case how a policy of insurance could be kept up for the benefit of a donee when no donee was in existence." H

Here, again, in order to apply the tax to the particular case in dispute, one must introduce words into the statute such as: "for the benefit of any existing or future donee, or person who may become a donee." I find no such words. Unless you introduce by construction those words into the statute it is impossible, as Lord Adam says, to understand how it could be kept up for the benefit of a donee, when no donee was in existence. I agree with him. The Lord Ordinary's view seems to have been that, the moment a policy of insurance is taken out, the person who takes out the policy keeps it up not only for his own benefit, but for the benefit of some possible donee at a future time. That really is an essential condition of the construction contended for by the Crown; and I am unable to agree with that construction. Under these circumstances, I think that this appeal should be dismissed with costs, and the interlocutors affirmed; and I move your Lordships accordingly. I

LORD HERSCHELL.—I am entirely of the same opinion. The first question is, whether the money payable under the policies was property to which the lady became entitled on the death of her father, by reason of the disposition which he made when he assigned the policies to her. I do not intend to lay down any principle, or to say anything applicable to any case but the one with which we are dealing. I shall solely consider whether that comes within the words of the enactment or not. In my opinion it does not. I do not think that it is accurate to say that the sum payable by the insurance company became hers by reason of the disposition which her father made. It is admitted that the entire sum cannot be said to have become hers by reason of that disposition; she would never have got it but for the fact that the premiums continued to be paid upon the policy. Therefore, the suggestion is that it must be split up into two portions—the one to be attributed to the payment of premiums by her father before the donation; the other to be attributed to the payment of premiums by her afterwards; and that, being so divided, upon the former of those sums the duty would be payable. I can find nothing in the words of the Act to warrant and give support to such a contention. For these reasons I think that the appeal entirely fails, so far as the Succession Duty Act, 1853, is concerned.

Then it is said that account duty was payable by virtue of the Customs and Inland Revenue Acts, s. 38 of the Act of 1881, as amended by s. 11 of the Act of 1889. In order to bring the case within those statutes, it is necessary to show that the policy, the duty on the proceeds of which is in question, has been either "wholly kept up" "for the benefit of the donee"—which of course is not the case here—or has been partially kept up for the benefit of the donee. In my opinion it would be really an abuse of words to say that the policy was "kept up for the benefit of the donee" at the time when payments were being made by the father of the lady, not for her benefit, as far as appears, or for anybody's benefit but his own. The contention is that, because he afterwards creates a donee, the payment of premiums which he made when for aught that appears he had no donee at all in his mind—I do not mean merely any individual donee, but no notion of creating a donee—must be regarded, if he creates a donee, as having been made for her benefit. I do not think that it is reasonable to treat the language of the Act of Parliament in that way. I think that it would really be not using the words of the statute, but abusing them, if we put such a construction upon them.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—I concur.

LORD SHAND.—I am of the same opinion, and while quite concurring in what has fallen from your Lordships, I think that the grounds of judgment have been very clearly and accurately stated by the learned Lord President and LORD ADAM in the Court of Session.

Appeal dismissed.

Solicitors: *F.C. Gore*, for *P. J. Hamilton-Grierson* (*Solicitor of Inland Revenue for Scotland*); *Keeping & Gloag*, for *William Gunn*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

SMITH *v.* SMITH

[PROBATE, DIVORCE AND ADMIRALTY (Sir Francis Jeune, P.), December 21, 1897]

[Reported [1898] P. 29; 67 L.J.P. 54; 78 L.T. 28]

Divorce—Maintenance of wife—Permanent maintenance—Limitation—Dum sola without "et casta" clause.

On a wife's petition for permanent maintenance it was found that the husband's income was £972 a year and that he was entitled to a reversionary interest on the death of his mother, the present value of which was about £5,434. The wife had no separate means and had the custody of the only child. On a motion to vary the registrar's report the question arose as to the insertion of a dum sola et casta clause.

Held: a clause dum sola vixerit might be inserted without the addition of "et casta" in an order for permanent maintenance, and the husband would be ordered to secure the wife £350 a year for life, with an additional £50 a year, limited dum sola vixerit, when the reversion fell in, and £100 a year for the child until the age of twenty-one, without security.

Notes. For the power of the court to award maintenance in a case of divorce under s. 19 of the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 407.

As to the dum sola et casta clause, see 12 HALSBURY'S LAWS (3rd Edn.) 438, and for cases see 27 DIGEST (Repl.) 625 et seq.

Case referred to in argument:

Kettlewell v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 14 T.L.R. 96; 27 Digest (Repl.) 619, *5785*.

Motion upon registrar's report as to permanent maintenance of former wife and allowance for the child of the dissolved marriage.

The registrar reported that on Aug. 25, 1897, the decree nisi obtained by the petitioner, Florence Smith, dissolving her marriage with the respondent, William Smith, on the grounds of his cruelty and adultery, was made absolute; and there was one child of the marriage, aged seven, and that alimony, pending suit, was paid at the rate of £220 per annum. The respondent admitted a present income of £972 10s., of which £857 10s. was derived from interest on a loan to his brother of £18,500 on security of certain indentures of mortgage less the interest on a charge of £1,500. The respondent also possessed a reversionary interest in a one-sixth share of £47,955, expectant on the death of his mother, who was then sixty-two years of age. The present value was stated to be about £5,434. The respondent alleged that the petitioner was about to be married to a man who had an income of £200 to £300 a year. The petitioner had no income of her own.

The report recommended that the respondent secure, by deed, the payment to the petitioner of an annual sum of £400 for life for her maintenance, and the further annual sum of £100 for the maintenance of the child, until twenty-one.

The respondent gave formal notice of objections to the report on the grounds (inter alia):—(i) That the annual sum of £400 for the petitioner and £100 for the child exceeded one half of the respondent's actual income. (ii) That the registrar should not have taken into account the reversion from which no income was derived by the respondent. (iii) That he should have taken into account the value of certain furniture and effects given to the petitioner at the time of the separation of the parties. (iv) That a dum sola et casta clause should be inserted. (v) Or, in the alternative, that the amount secured should be diminished on petitioner's future marriage.

Inderwick, Q.C., and *Priestley* for the petitioner.

Bargrave Deane, Q.C., and *R. W. Turner* for the respondent.

SIR FRANCIS JEUNE, P.—I am inclined to think that this additional £50 a year to the petitioner may very fairly be postponed and made contingent upon the falling in of the respondent's reversionary interest. I also think that it should be limited till the petitioner marry again. It is always difficult to decide the question as to insertion or omission of the clause of limitation in these cases. I never could see, however, why one should not, if desirable, insert one part of the clause without the other. It is sometimes argued that the insertion of the dum casta clause casts a slur upon the former wife, but I do not think it was ever meant to impute anything at all. It was put in in the old forms, and no doubt the two parts usually run together. I do not see, however, why they are bound always to do so. In the present case I am of opinion that a fair order will be that the respondent secure to the petitioner for her life £350 a year, to be increased by £50 a year on the respondent's reversion falling in, the additional £50 to be limited dum sola vixerit. The deed will be prepared in the usual way. In regard to the child, the registrar recommends that the amount of £100 be also secured. That is not usual. The allowance for the child will be ordered to be paid by the respondent, without giving security in respect thereof.

Solicitors: *Hamlin, Grammer & Hamlin*, for *Cousins & Cousins*, Leeds; *Vincent & Vincent*, for *North & Sons*, Leeds.

[*Reported by* H. DURLEY-GRAZEBROOK, ESQ., *Barrister-at-Law.*]

LACEBY *v.* LACON & CO.

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Watson, Lord Macnaghten and Lord Morris), March 16, 17, 20, 1899]

[Reported [1899] A.C. 222; 68 L.J.Q.B. 480; 80 L.T. 473; 63 J.P. 371; 47 W.R. 497; 15 T.L.R. 283; 43 Sol. Jo. 348]

Licensing—Licence—New licence—Grant subject to condition—Surrender of licence recently renewed.

The holder of an off-licence for the sale of beer, wines, and spirits in respect of certain premises successfully applied for a renewal of the licence at the annual licensing meeting. At the same meeting he applied for the grant of a new licence in respect of other premises in the same district, and the justices granted the application on condition that he would surrender the licence which had just been renewed and this he agreed to do.

Held: this was not an order for removal under s. 50 of the Licensing Act, 1872 [now s. 25 of the Licensing Act, 1953, as amended by the Licensing Act, 1961, Sched. 9, Part II], and the justices had validly exercised their discretion in granting the licence on this condition.

Notes. The Licensing Act, 1872, has been repealed. Section 50 of the 1872 Act corresponds to s. 25 of the Licensing Act, 1953 (as amended by the Licensing Act, 1961, Sched. 9, Part II).

Considered: *R.* v. *Barnstaple Justices, Ex parte Carder*, [1937] 4 All E.R. 263. Referred to: *Nash* v. *Stevenson Transport, Ltd.*, [1935] 2 K.B. 341; *R.* v. *National Arbitration Tribunal, Ex parte Imperial Tobacco Co.*, *R.* v. *National Arbitration Tribunal, Ex parte British American Tobacco Co.*; *R.* v. *National Arbitration*

Tribunal, Ex parte Godfrey Phillips, Ltd.; R. v. *National Arbitration Tribunal, Ex parte Ardath Tobacco Co.*, [1943] 2 All E.R. 162.

As to removal in general, see 22 HALSBURY'S LAWS (3rd Edn.) 570 et seq.; and for cases see 30 DIGEST (Repl.) 39 et seq. For the Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142. For the Licensing Act, 1961, see 41 HALSBURY'S STATUTES (2nd Edn.) 556.

Cases referred to in argument:

Boulter v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 30 Digest (Repl.) 75, *579*.

R. v. *Sharman, Ex parte Denton*, [1898] 1 Q.B. 578; 67 L.J.Q.B. 460; 78 L.T. 320; 62 J.P. 296; 46 W.R. 367; 14 T.L.R. 269; 42 Sol. Jo. 326; 30 Digest (Repl.) 49, *374*.

Royal Aquarium and Summer and Winter Garden Society v. *Parkinson*, [1892] 1 Q.B. 431; 61 L.J.Q.B. 409; 66 L.T. 513; 56 J.P. 404; 40 W.R. 450; 8 T.L.R. 352, C.A.; 33 Digest 104, *699*.

Sharp v. *Wakefield*, [1891] A.C. 173; 60 L.J.M.C. 73; 64 L.T. 180; 55 J.P. 197; 39 W.R. 561; 7 T.L.R. 389, H.L.; 30 Digest (Repl.) 12, *51*.

Appeal from an order of the Court of Appeal, [1898] 1 Q.B. 334, affirming an order of the Queen's Bench Division, [1897] 2 Q.B. 308, making absolute an order for certiorari to remove into the Queen's Bench Division and quash a licence or certificate granted to the appellant, George Coulson Laceby, by the Licensing Justices for the licensing division of Wandsworth on Mar. 26, 1897.

The respondents were lessees of the premises known as the "Five Alls," at 567, Battersea Park Road, Battersea, and the appellant was the underlessee. An off-licence had first been granted in respect of these premises in 1878 and had been renewed thereafter. In 1887 the appellant acquired the freehold in the premises adjoining the "Five Alls" at 2, Abercrombie Street. In 1890 an off-licence was granted to the appellant's sister in respect of the cellar of the premises at 2, Abercrombie Street and this licence had been renewed thereafter. With the permission of the then lessee a doorway was constructed between these two premises. The licences in respect of both these premises were transferred to the appellant on Sept. 29, 1893. In Feb. 1897, the appellant gave notice to the overseers of the poor for the parish of Battersea, the superintendent of police of the district, and the justices, in the appropriate form, of an intended application by him at the general annual licensing meeting for the division of Wandsworth, to be held on Mar. 5, 1897, for a certificate authorising him to sell by retail beer, wines, and spirits to be drunk or consumed off the premises at 2, Abercrombie Street. This application was not to be limited to the cellar, but was to extend to the whole premises.

At the general annual licensing meeting on Mar. 5, 1897, the existing licences for 567, Battersea Park Road, and the cellar of No. 2, Abercrombie Street were renewed. After the licences had been renewed the appellant, by his solicitor, applied for a certificate for a new licence for No. 2, Abercrombie Street, for which he had given notice. In reply to a question from the justices, and after consideration, the appellants' solicitor said that the appellant would, if the licence was granted to No. 2, Abercrombie Street, not restricted to the cellar, give up the licence for No. 567, Battersea Park Road, which had that day been renewed to him. The further consideration of the application having been adjourned the justices, on Mar. 19, 1897, viewed the houses No. 567, Battersea Park Road, and No. 2, Abercrombie Street.

On Mar. 26, 1897, the application again came before the justices, when counsel appeared for the respondents and claimed a right to be heard in opposition to the application. An objection was raised to his being heard by the appellant's solicitor on the ground that he had no locus standi, but the justices overruled the objection and counsel for the respondents was heard at full length, and the case was heard and argued upon the merits. On the conclusion of the arguments the chairman of the

justices delivered the decision of the Bench to the effect that the licence would be granted on condition that the licence for 567, Battersea Park Road was given up. On April 13, 1897, the respondents applied before GRANTHAM and WRIGHT, JJ., for a rule calling on the appellant and the licensing justices for the Wandsworth division of the county of London to show cause why a certiorari should not issue to remove into the Queen's Bench Division the licence or certificate granted for 2, Abercrombie Street that it might be quashed, and the court ordered a rule nisi to issue accordingly, on the ground that the application in respect of 2, Abercrombie Street, was for the removal of a licence within the meaning of s. 50 of the Licensing Act, 1872, and was in substance and effect a removal order, and as such, and as being made in spite of the owners of the premises, beyond the jurisdiction of the justices and contrary to s. 50 of the Act, and this rule was made absolute.

By s. 50 of the Licensing Act, 1872 [now s. 25 of the Licensing Act, 1953] :

"Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following :

The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorised to grant new licences in the licensing district in which the premises are situated to which the licence is to be removed.

Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence.

A copy of the notice shall be personally served upon or sent by registered letter to the owner of the premises from which the licence is to be removed, and the holder of the licence, unless he is also the applicant.

The justices to whom the application is made shall not make an order sanctioning such removal unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal.

Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences; but no such order shall be valid unless confirmed by the confirming authority of the licensing district."

Bosanquet, Q.C., and *Earle* for the appellant.
Lawson Walton, Q.C., *Foote, Q.C.*, and *Travers Humphreys* for the respondent.

THE EARL OF HALSBURY, L.C.—I am glad, out of respect to the two courts below, from whom this question has come, that the matter has been so elaborately and carefully argued; but I confess for myself that I cannot, now that the matter is fully before me, entertain any doubt as to the conclusion at which your Lordships ought to arrive. I admit that during a considerable part of the argument, before my mind was sufficiently alive to the provisions of the Licensing Act, 1872, I was very much impressed by the argument which seems to have found favour with the courts below, because the transaction looked to me, having regard to s. 50 as being, what I think two of the learned judges say it was, doing by an indirect performance that which the legislature had prohibited—namely, the removal of a licence from a house occupied by a tenant, against the will of his landlord to some other house where he could carry on his business at the sacrifice of the landlord's interest in the former house.

Without such a careful examination of the Act of Parliament as we have now had, that would be the first impression of a person reading these sections : it might be considered that the legislature had provided for the interest of the landlord by making the landlord's dissent an absolute bar to the proceeding by the magistrates

by way of removal. Upon a careful examination, however, of the statutes it appears to me that s. 50, upon which reliance is placed, is a section which, whatever may have been its original design, has under the statute no machinery and no provision which can effectually prevent the grant of new licences, and I do not believe that the legislature ever contemplated that such a bar should be placed in the way of the jurisdiction and discretion of the magistrates as would be involved in permitting the mere refusal of the owner of the house, as distinguished from the tenant of the house, to prevent the magistrates exercising their discretion in the matter. I can well understand that, given a current licence and given some proceeding whereby the current licence should be removed to other premises, the legislature would have prevented the tenant sacrificing his landlord's interest by a proceeding in which the landlord himself was not represented. That is, on the one hand, clear enough. When I find that the only application for a removal must be made at the general licensing sessions, and when I observe, what has been so often pointed out to us, the interval between that date, Mar. 5, and April 5, when the new licence must begin, I confess that I am wholly unable to see what useful object can be performed by that section, or what protection to anybody is thereby given.

As regards renewals and new licences it is obvious that neither this court nor any other court can supply machinery or provisions which the statute itself has not enacted. If the legislature intended that there should be some protection during the currency of the licence, and intended that the landlord should be represented, all one can say is that no such provisions can be found in the statute, and your Lordships have no jurisdiction to supply them. What is clear is that by this Act of Parliament, and by the others to which the learned counsel have called our attention from time to time, what the legislature has ultimately done has been to give an absolute unfettered discretion to the magistrates. Certainly it would be a very singular result of that legislation if, upon a new licence being applied for, the magistrates being invested, as by the hypothesis they are, with an absolutely unlimited discretion, the mere veto of the person who owns the house held by a licensed person, which licensed person was applying for a licence for another house, should prevent the magistrates granting a perfectly new licence to a new house, and that that bar should exist because the applicant had before that held another house under another licence. That would be a very singular result indeed, and certainly, unless there was something very clear in the statute to compel me to come to such a conclusion, I should absolutely refuse to assume that the legislature had done so. But it is not necessary for your Lordships to consider that, because the question here is whether or not anything has been done which the justices were not at perfect liberty to do. It must be made out before any such order could be made and maintained as has been made by both the courts below that the magistrates acted without jurisdiction.

I quite follow what counsel for the respondents have so ingeniously and earnestly pointed out, that the result arrived at may be the same as would have been arrived at by a "removal." Granted; but what then? The thing that the magistrates have done is not the thing which is contemplated by s. 50—that is to say, not the same as regards the actual order. Whether it is the same thing in substance or not I will treat of in a moment, but it is not the thing. What they have done is, they have licensed a house, and that licence does not purport to be, and is not certainly upon the face of the instrument, the former licence which existed of the Five Alls, but it is an absoluely new licence. What the legislature meant by the "removal of the licence" I can only conjecture, but I should think it would mean that a licence which had existed in one house should be, as indeed the phrase implies (it is not a very happy one), removed to another house. If any order was asked for upon that subject, it is to be remembered that whatever discretion the magistrates have they are limited in the orders they make by the language of the statute, and if they wanted to make such an order as that they must make the order accordingly. It is all very well to say that it may come to the same thing; but where the magistrates

A are fettered by a statute which enables them only to act in a particular way, they must abide by that way. Here the magistrates on the affidavit laid before us say they were not asked to make an order for removal and did not suppose they were making an order for removal; and when we look at the document itself there is no such thing as an order for removal to be found in the whole course of the proceedings; and yet your Lordships are asked to say that these proceedings are without B jurisdiction, because, although everything that the magistrates did and everything that they intended to do was within their jurisdiction, it is said that the effect produced is just the same as if they had made some other order which they never did make and never intended to make; and by this circuitous process of reasoning it is to be supposed that the magistrates acted outside of their jurisdiction.

C The observation immediately arises that where you are dealing with a subject-matter of this sort the form is part of the substance. It is a delusion to suppose that magistrates may do what may be equivalent to this, that, or the other. They are within the iron framework of a statute, and they have no jurisdiction to go beyond it. All that they did do, and all that they intended to do, was that they licensed a person to occupy a new house for the purposes contemplated by the D statute.

I decline to go into the question whether or not, if there was anything erroneous in the order which the magistrates made, the proper form of remedying that error has been adopted. I confess that I should require further argument before I hastily came to the conclusion that this was the proper form, but I decline to enter into the question or give any opinion upon the subject. If the question hereafter arises E whether certiorari is the proper remedy or not, then will be the proper time to decide it; but inasmuch as upon any hypothesis it can only be by some error in the proceedings, and inasmuch as I am of opinion that there is no error here at all, but that the magistrates have proceeded strictly within their jurisdiction, I am of opinion that this order of the Court of Appeal, confirming the order of the court below, ought to be reversed, and I accordingly so move your Lordships.

F

LORD WATSON.—The legislature have enacted that the licensing justices shall not remove (whatever that may mean) a licence from one house to another unless the owner of the house which is about to be deprived of the licence is called as a party to the proceedings for his interest, and unless he consents to the order being pronounced. In the present case I think that the only question is whether G such an order has been pronounced. I do not think it enough to bring the case within the statutory requirement of the presence of the owner of the house that the proceedings of the justices shall be attended with precisely the same consequences as if they had been asked to make, and had in point of fact made, an order of removal. It is not enough to say, as some of the judges have said, that the two things are in substance the same. It is not enough to say that either directly H or indirectly the result must be the same.

The court must come to the conclusion, in order to bring the matter within the statutory prohibition, that what has been done is one of the things which the legislature have prohibited. I need not repeat what has been already said by the Lord Chancellor, but in the present case it appears to me that in construing, as one must do, that clause which is not easy of construction, s. 50 of the Licensing Act, 1872, an I order of removal never was contemplated by any of the parties to this case. It was not applied for; it was not intended to be granted by the licensing justices; and when one examines what they have done it amounts to the case of the destruction (at least it was said to amount to destruction) of one licence and the continuance of another. That is, to my mind, entirely opposed to what is the plain meaning of the statute in using the word "removal" which means that a licence shall be transplanted from one house and serve as a privilege and protection to another house —it may be to another house in a different licensing district. In those circumstances I do not think that the respondents in this case were entitled to any remedy.

I do not think that they have shown facts requiring any remedy, and therefore I think it quite unnecessary to discuss in what form the remedy ought to have been granted if it had been required.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—I am of the same opinion. In this case an application is made for a certiorari on the part of the respondents to remove into the Queen's Bench Division an order for a licence of 2, Abercrombie Street in order to have it quashed. That licence on the face of it is a perfectly valid licence, because it is a licence granted by persons competent and having jurisdiction—it is a licence to carry on in the house 2, Abercrombie Street, the business of sales for consumption off the premises. Then, what is the objection to that licence which is good upon the face of it? It is said that although it is a licence on the face of it as a grant for a new licence, yet it amounts to an order for a removal. Sometimes it is said "in substance," sometimes it is said "in effect," and sometimes it is said "the consequences are the same," but the argument is that it amounts to an order for a removal under s. 50 of the Licensing Act. As I have said, on the face of it it does not purport to be anything of the sort; it purports to be what it is—a grant of a new licence. The Act of 1872 contemplates licences being obtained and granted under three sets of circumstances. By s. 40 [repealed] it contemplates the grant of renewals; by s. 42 [repealed] it contemplates the grant of new licences; and by s. 50 it contemplates the grant of a "removal" of a licence, which I should understand from the use of the words "removal of the licence" to refer to a licence then in esse. In this case the proceedings have not been taken merely under s. 50.

The applicant never applied for a removal—he applied for a renewal—he applied for the grant of a new licence to the entire of 2, Abercrombie Street. Why is he to be held as having applied for a grant of a "removal" when he did not do it? As a mattter of fact, he did not take the proceedings for that. There are three different applications dealt with by the statute. There are three different sets of notices to be given by the statute; there are three different results to be arrived at by the statute. The first is renewal, the second is a grant of a new licence, and the third is an order for removal. Why is it to be persevered in that he must be held to have applied for that which he did not apply for? Why is it to be held as against the magistrates that they made an order, which they did not make, for a removal under s. 50, because, forsooth, the consequences may be practically the same as if that proceeding had been taken? That is a matter for legislation. This House, as one branch only of the legislature, is not entitled to legislate. If it is suggested that this protection to brewers and their houses should be extended to the case of renewals, and to the case of a grant of new licences, it is for the legislature to say so. The legislature have confined the protection to the case of removal. Suffice it to say that this is not a case of removal. If it were not for the very great respect which I have for the courts that have decided the opposite, I should have said that it was a very plain case indeed.

Appeal allowed.

Solicitors: *W. W. Young & Son; Wellington Taylor.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re WHITE. PENNELL *v.* FRANKLIN

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Chitty and Henn Collins, L.JJ.), July 4, 1898]

[Reported [1898] 2 Ch. 217; 67 L.J.Ch. 502; 78 L.T. 770; 46 W.R. 676; 14 T.L.R. 503; 42 Sol. Jo. 635]

Solicitor—Trustee—Right to profit costs—Charging clause in will—Insolvent estate—Costs in defending action by creditor.

A solicitor was the sole executor and trustee of a will which, after directing payment of debts, funeral and testamentory expenses, directed that he should be the solicitor to the estate and as such should be allowed all professional charges notwithstanding his executorship. The estate was insolvent. The solicitor having defended in person a creditors' action,

Held: he was not entitled to his profit costs since the power in the will to charge for them was equivalent to a legacy and could not, therefore, take effect as against the creditors.

Per CHITTY, L.J.: This principle applied to all professional trustees.

Notes. Applied: *Re Salmen, Salmen* v. *Bernstein* (1912), 107 L.T. 108; *Re Brown, Wace* v. *Smith* (1918), 62 Sol. Jo. 487. Considered: *Jones* v. *Wright* (1927), 139, L.T. 43.

As to remuneration of a solicitor-representative, see 16 HALSBURY'S LAWS (3rd Edn.) 137, 138; and for cases see 24 DIGEST (Repl.) 656 et seq.

Cases referred to in argument:

Re Barber, Burgess v. Vinicome (1886), 34 Ch.D. 77; 56 L.J.Ch. 216; 55 L.T. 882; 35 W.R. 326; 24 Digest 652, *6431*.

Re Pooley (1888), 40 Ch.D. 1; 58 L.J.Ch. 1; 60 L.T. 73; 37 W.R. 17; 5 T.L.R. 21, C.A.; 42 Digest 122, *1178*.

Re J. Thorley, Thorley v. *Massam, Re W. R. Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613; 60 L.J.Ch. 537; 64 L.T. 515; 39 W.R. 565; 7 T.L.R. 479, C.A.; 21 Digest (Repl.) 100, *489*.

Cradock v. *Piper* (1850), 1 Mac. & G. 664; 1 H. & Tw. 617; 19 L.J.Ch. 107; 15 L.T.O.S. 61; 14 Jur. 97; 41 E.R. 1422, L.C.; 42 Digest 117, *1144*.

Appeal from a decision of KEKEWICH, J., in an action brought by creditors against S. Franklin, a solicitor, the sole executor and trustee of the will of Walter White, deceased, in which a summons was taken out by the plaintiffs asking for an order that as the testator's real and personal estate was insufficient to pay his debts in full, the defendant was not entitled to any profit costs under the direction contained in the testator's will.

After directing payment of debts, funeral and testamentory expenses, the will directed that the defendant should be the solicitor to the estate, and as such, notwithstanding his acceptance of the trusteeship and executorship of the will, should be allowed all professional and other charges for his time and trouble, which, if employed as solicitor to the trustees and executors, not being himself a trustee and executor, he would be entitled to make.

The estate was insolvent. The two other trustees and executors appointed by the will having renounced probate and disclaimed the trusts of the will, the will was proved by the defendant alone, who appeared and defended the action in person, acting as solicitor for himself.

The summons was adjourned into court, and came on to be heard before KEKEWICH, J., on the further consideration of the action, who decided (77 L.T. 793) that the defendant was not entitled to his profit costs, as the power to charge was equivalent

to a legacy, which could not take effect as against the creditors. From that decision the defendant now appealed.

Cozens-Hardy, Q.C., and *J. G. Wood* for the defendant.
Farwell, Q.C., and *Church* for the plaintiffs, were not called on to argue.

SIR NATHANIEL LINDLEY, M.R.—I do not think that it is possible for us to differ judicially from the decision of the learned judge in the court below. This is a creditors' action. The defendant is a trustee who happens to be a solicitor, and happens also to be the only trustee and only executor of the testator. The other executors and trustees have disclaimed and must, therefore, be disregarded. It is impossible to get over the authorities, and the principles on which they are based. The estate is insolvent, and the solicitor-trustee is seeking to charge profit costs. KEKEWICH, J., has declared in the order appealed from that the defendant is not entitled to any profit costs out of the estate, under the directions in the testator's will, in competition with the creditors. The estate being insolvent, I do not see how to get over that declaration, having regard to the decisions. It is no doubt hard upon the solicitor, but it cannot be helped. The appeal must, therefore, be dismissed with costs.

CHITTY, L.J.—I am of the same opinion. I see no escape from the proposition of law as laid down by KEKEWICH, J. The law is that a trustee must give his services gratuitously in the absence of a direction to the contrary. This direction is bounty. No one can claim the bounty of a testator until the creditors are satisfied. The principle applies not only to a solicitor-trustee, but equally to all trustees—to accountant-trustees, to architect-trustees, and surveyor-trustees; in fact, to all professional trustees.

HENN COLLINS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *S. Franklin; Maitlands, Peckham & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re PERKINS. POYSER *v.* BEYFUS

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Henn Collins, L.JJ.), May 24, 25, 26, June 11, 1898]

[Reported [1898] 2 Ch. 182; 67 L.J.Ch. 454; 78 L.T. 666; 46 W.R. 595; 14 T.L.R. 464; 42 Sol. Jo. 591; 5 Mans. 193]

Landlord and Tenant—Lease—Assignment—Successive assignments—Covenants to pay rent and indemnify assignors—Bankruptcy of first assignee—Lessee granted bankrupt assignee's right to indemnity in consideration of release of bankrupt's estate from liability under bankrupt's covenant with lessee—Right of lessee to prove in bankrupt's estate for future liability—Bankrupt's right to indemnity against succeeding assignee—"Property" of bankrupt—Construction of release of bankrupt's estate—Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), ss. 20, 40, 50 (5), 56, 57, 168.

The plaintiff was the original lessee under a lease containing covenants by him to pay rent, to insure the demised property, and to perform the covenants in the lease. He assigned the lease to Plaistowe who assigned it to Perkins, each of the assignees covenanting with his assignor to perform the covenants in the lease and to indemnify the assignor against breaches of covenant. The

plaintiff having been called on to pay, and having in fact paid, arrears of rent due under the lease, tendered a proof against Plaistowe's estate in bankruptcy for the rent he had paid and for his estimated future liability under the covenants in the lease. A compromise was agreed to between the plaintiff and Plaistowe's trustee in bankruptcy which was embodied in a deed whereby, in consideration of the plaintiff withdrawing his proof and releasing Plaistowe's estate from all liability in respect of Plaistowe's covenant with the plaintiff, Plaistowe's trustee assigned to the plaintiff the benefit of Perkins' covenant with Plaistowe, together with the right to recover from Perkins' estate all such damages as Plaistowe might have recovered but for his bankruptcy. Under this deed the plaintiff carried in a claim against the estate of Perkins, who had died nearly two years previously, for payment of the rent already paid by him and an indemnity against future liability for breaches of covenant. The plaintiff succeeded in his claim and Perkins' executors appealed against that decision.

Held: (i) under the Bankruptcy Act, 1883, Plaistowe's trustee was entitled to compromise the plaintiff's claim by assigning to him the benefit of Perkins' covenant because (a) by ss. 20, 44, 50 (5) and 168 of the Act of 1883 the plaintiff was entitled to prove in Plaistowe's estate not only for the rent already paid by him, but also in respect of Plaistowe's future liability under his covenant with the plaintiff: *Hardy* v. *Fothergill* (1) (1888), 13 App. Cas. 351, applied; and (b) the right of Plaistowe's trustee to sue Perkins' estate on Perkins' covenant with Plaistowe was "property" within the meaning of s. 168 of the Act of 1883 and was, therefore, assignable to the plaintiff: *Seear* v. *Lawson* (2) (1880), 15 Ch.D. 426, applied; and the damages recoverable by Plaistowe's trustee against Perkins' estate would not be confined to the amount of the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate: *Cruse* v. *Paine* (3) (1868), L.R. 6 Eq. 641, applied; (ii) although the release in the deed was couched in general terms it must, if possible, be construed so as not to defeat the purpose of the deed; accordingly, the release did not extend to all Plaistowe's estate including the asset assigned to the plaintiff, but excluded that asset, and the release did not, therefore, have the effect of discharging Plaistowe's estate from all liability under his covenant with the plaintiff and thus of discharging Perkins' estate from liability to Plaistowe; under the deed the plaintiff had acquired the right to sue Perkins' estate; and, therefore, the appeal failed.

Notes. As to the law relating to bankruptcy, see now the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321).

Considered: *Ellis* v. *Torrington* (1919), 35 T.L.R. 531; *Josselson* v. *Borst*, [1937] 3 All E.R. 722. Applied: *Butler Estates, Ltd.* v. *Bean*, [1941] 2 All E.R. 793. Referred to: *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1914-15] All E.R. Rep. 1158; *British Union and National Insurance Co., Ltd.* v. *Rawson*, [1916-17] All E.R. Rep. 293; *Ellis* v. *Torrington*, [1918-19] All E.R. Rep. 1132; *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105.

As to liability of tenant and assignee, see 23 HALSBURY'S LAWS (3rd Edn.) 654 et seq.; and for cases see 31 DIGEST (Repl.) 457 et seq. As to actions by and against a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 397 et seq.; and for cases see 5 DIGEST (Repl.) 1046. As to debts provable in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 464; and for cases see 4 DIGEST (Repl.) 276.

Cases referred to:

(1) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 277, *2542*.

(2) *Seear* v. *Lawson* (1880), 15 Ch.D. 426; 49 L.J.Bcy. 69; 42 L.T. 893; 28 W.R. 929, C.A.; 5 Digest (Repl.) 1046, *8457*.

(3) *Cruse* v. *Paine* (1868), L.R. 6 Eq. 641; 37 L.J.Ch. 711; 19 L.T. 127; 17 W.R. 44; affirmed (1869), 4 Ch. App. 441; 38 L.J.Ch. 225; 17 W.R. 1033, L.C.; 23 Digest (Repl.) 303, *3684*.

(4) *Saward* v. *Anstey* (1825), 2 Bing. 519; 10 Moore, C.P. 55; 3 L.J.O.S.C.P. 63; 130 E.R. 406; affirmed sub nom. *Anstey* v. *Saward*, 4 L.J.O.S.K.B. 1; 17 Digest (Repl.) 408, *2138*.

(5) *Carr* v. *Roberts* (1833), 5 B. & Ad. 78; 2 Nev. & M.K.B. 42; 2 L.J.K.B. 183; 110 E.R. 721; 17 Digest (Repl.) 401, *2070*.

(6) *Ashdown* v. *Ingamells* (1880), 5 Ex.D. 280; 50 L.J.Q.B. 109; 43 L.T. 424, C.A.; 5 Digest (Repl.) 1052, *8502*.

(7) *Payler* v. *Homersham* (1815), 4 M. & S. 423; 105 E.R. 890; 12 Digest (Repl.) 570, *4340*.

(8) *Lindo* v. *Lindo* (1839), 1 Beav. 496; 8 L.J.Ch. 284; 48 E.R. 1032; 12 Digest (Repl.) 570, *4344*.

Also referred to in argument:

Guy v. *Churchill* (1888), 40 Ch.D. 481; 58 L.J.Ch. 345; 60 L.T. 473; 37 W.R. 504; 5 T.L.R. 149; 5 Digest (Repl.) 1083, *8732*.

Spark v. *Heslop* (1859), 1 E. & E. 563; 28 L.J.Q.B. 197; 32 L.T.O.S. 294; 5 Jur.N.S. 730; 7 W.R. 312; 120 E.R. 1020; 26 Digest (Repl.) 85, *597*.

Hill v. *Smith* (1844), 12 M. & W. 618; 13 L.J.Ex. 243; 2 L.T.O.S. 424; 8 Jur. 179; 152 E.R. 1346; 5 Digest (Repl.) 1052, *8499*.

Re Russell, *Russell* v. *Shoolbred* (1885), 29 Ch.D. 254; 53 L.T. 365, C.A.; 31 Digest (Repl.) 461, *5885*.

Lethbridge v. *Mytton* (1831), 2 B. & Ad. 772; 9 L.J.O.S.K.B. 330; 109 E.R. 1332; 17 Digest (Repl.) 190, *876*.

Heritage v. *Paine* (1876), 2 Ch.D. 594; 45 L.J.Ch. 295; 34 L.T. 947; 12 Digest (Repl.) 568, *4326*.

Hodgson v. *Wood* (1863), 2 H. & C. 649; 33 L.J.Ex. 76; 11 L.T. 180; 10 Jur.N.S. 591; 150 E.R. 269; 40 Digest (Repl.) 329, *2705*.

Holmes v. *Rhodes* (1797), 1 Bos. & P. 638; *Re Empress Engineering Co.* (1880), 16 Ch.D. 125; 43 L.T. 742; 29 W.R. 342, C.A.; 12 Digest (Repl.) 48, *266*.

Lloyd's v. *Harper* (1880), 16 Ch.D. 290; 50 L.J.Ch. 140; 43 L.T. 481; 29 W.R. 452, C.A.; 43 Digest 791, *2290*.

Appeal against an order of NORTH, J., on an originating summons taken out by one Poyser, for a declaration that the estate of one Perkins, deceased, was indebted to the plaintiff for a sum paid by him as rent under a covenant in a lease and was liable to indemnify the plaintiff for subsequent payments of rent and against future breaches of the covenants in the lease. The lease had been assigned to Perkins. NORTH, J., allowed the plaintiff's claim for the declaration, and the executors of Perkins' estate now appealed against that decision.

Everitt, *Q.C.*, and *Edward Ford* for the defendants, the executors.
Vernon R. Smith, *Q.C.*, and *H. Wace* for the plaintiff.

June 11, 1898. **SIR NATHANIEL LINDLEY, M.R.,** read the following judgment of the court.—By a lease, dated Oct. 5, 1891, a certain house was leased to the plaintiff for a term still unexpired, and by this lease the plaintiff covenanted to pay rent and to insure the house and perform certain other obligations usual in leases. On May 8, 1893, Poyser, the plaintiff, assigned this lease to Plaistowe, and, on April 1, 1895, Plaistowe assigned it to Perkins. Each of these assignments contained a covenant by the assignee with his assignor to pay the rent and perform the covenants reserved and contained in the lease of Oct. 5, 1891, and also to keep him, the assignor, indemnified against the same. In December, 1895, Perkins died. On June 12, 1897, Plaistowe was adjudicated bankrupt, and Berry was

appointed his trustee. The plaintiff Poyser was called on to pay, and he did pay, the arrears of rent, which became due under the lease of Oct. 5, 1891, and he tendered a proof against Plaistowe's estate for £1,353, the amount paid by the plaintiff and the estimated amount of his liability under his covenants contained in such lease. Thereupon a compromise was agreed to between the plaintiff and the trustee in bankruptcy, and was carried out by a deed of Aug. 31, 1897, which has given rise to the present controversy.

This deed was made between the trustee, of the one part, and the plaintiff, of the other part. It recited the facts above stated, and then proceeded as follows:

"Whereas the said Oscar Berry has, with the permission of the said committee of inspection, testified by a resolution passed at a meeting of the said committee of inspection held the 31st day of August, 1897, at 8, Southwark Street, Borough, in the county of Surrey, and by way of compromise of the claim of the said E. J. Poyser against the estate of the said bankrupt, agreed to sell and dispose of to the said E. J. Poyser the full benefit of the said covenant on the part of the said G. F. Perkins, with the rights and powers hereinafter assigned, in consideration of the said E. J. Poyser paying to him the sum of £5, and executing such release as is hereinafter contained. Now this indenture witnesseth that, in pursuance of the said agreement and in consideration of the sum of £5 now paid by the said E. J. Poyser to the said Oscar Berry (the receipt of which is hereby acknowledged), and of the release hereinafter contained, the said O. Berry, as trustee, and with the permission testified as aforesaid of the said committee of inspection, doth hereby assign unto the said E. J. Poyser the full benefit of the covenants by the said G. F. Perkins with the said F. M. E. Plaistowe contained in the hereinbefore recited indenture of April 1, 1895, as aforesaid, with the right to recover and receive from the said G. F. Perkins, his heirs, executors, or administrators, estate or effects, and to retain for the benefit of the said E. J. Poyser, his executors, administrators, and assigns, all and every such damages, costs, or other sums of money, if any, and to enforce for the like benefit all such other relief by way of indemnity or otherwise as the said F. M. E. Plaistowe, his executors, or administrators, but for his bankruptcy, or the said O. Berry or other the trustee for the time being in the bankruptcy might have been entitled now, or at any time or times hereafter, to recover or to enforce for the benefit of the said F. M. E. Plaistowe or his estate for any breach or breaches committed or hereafter to be committed of the said covenants or any of them or otherwise under or in respect of the liability of the said G. F. Perkins or his estate by virtue of such covenants or any of them if these presents and the arrangement hereby entered into had not been executed or made, and the right to bring, prosecute, carry on, compound, or release any action or proceeding for any such purpose, and all other rights, powers, privileges, and authorities which the said O. Berry, as such trustee, with such permission as aforesaid, can lawfully transfer to the said E. J. Poyser in connection with the premises to hold the premises unto the said E. J. Poyser, his executors, administrators, and assigns for his and their own benefit absolutely. And this indenture further witnesseth that, in further pursuance of the said agreement and in consideration of the assignment hereinbefore contained, the said E. J. Poyser hereby withdraws the said proof for the sum of £1,353 0s. 4d., and releases and discharges the estate of the said bankrupt and the said O. Berry as such trustee as aforesaid from all claims and demands under or in respect of the covenants by the said F. M. E. Plaistowe with the said E. J. Poyser contained in the hereinbefore recited indenture of May 8, 1893, as aforesaid."

Under this deed the plaintiff carried in a claim against Perkins's estate for payment out of his assets of what the plaintiff had paid for rent and insurance and for future indemnity against liability under the covenants contained in the lease of Oct. 5,

1891. It appeared that shortly after Plaistowe's bankruptcy Perkins's executors assigned the lease to a person named Jay, who, however, did not pay the rent or perform the covenants, so as to relieve Perkins's estate from liability to Plaistowe, or, rather, to his trustee in bankruptcy. The defendants are Perkins's executors, and they admit assets. NORTH, J., made an order allowing the plaintiff's claim, and from this order Perkins's executors appealed.

The appeal raises two questions—viz., (i) whether the rights vested by the Bankruptcy Act in Plaistowe's trustee could be assigned by him to the plaintiff; and (ii) whether, having regard to the terms of the deed and the release of Plaistowe's estate, the plaintiff acquired any right to sue Perkins's executors. The first of these questions turns on the Bankruptcy Act, 1883. The material sections are ss. 20, 44, 50 (cl. 5), 56, 57, and 168, which defines "property." It is plain from ss. 20, 44, 50 (cl. 5), and 168, and from the decision in *Hardy* v. *Fothergill* (1) that the plaintiff Poyser had a right of proof against Plaistowe's estate not only for the sums paid by the plaintiff for rent and fire insurance but also in respect of Plaistowe's future liability under his own covenants with the plaintiff. It is also plain from ss. 56 and 57 that it was competent for the trustee in bankruptcy to compromise the claim made by the plaintiff and to assign to the plaintiff any assignable asset vested in the trustee upon the terms that the plaintiff should accept such asset in satisfaction of all demands against Plaistowe's remaining assets. It is also plain that the right of the trustee to sue Perkins's executors upon Perkins's covenant was an asset—i.e., was property within the meaning of s. 168, and was assignable to the plaintiff or to anyone else (see s. 56 and *Seear* v. *Lawson* (2)), and that the damages in an action by the trustee against Perkins's executors would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate: see *Cruse* v. *Paine* (3). This disposes of the first ground of appeal.

The second turns on the true effect of the release contained in the deed of August, 1897. If this release is to be construed as a release by the plaintiff of Plaistowe or of his estate from all liability under his covenants with the plaintiff, then the effect will be to discharge Perkins's estate from all liability under his covenant to indemnify Plaistowe. A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms. A distinction was attempted to be drawn between the covenant by Perkins to pay the rent and perform the covenant to insure on the one hand, and his covenant to indemnify Plaistowe on the other, and it was contended that, although the release might extinguish all liability on the covenant to indemnify, it did not affect the covenant to pay the rent and to insure. Much time was spent in discussing these points, and in examining such cases as *Saward* v. *Anstey* (4), *Carr* v. *Roberts* (5), and *Ashdown* v. *Ingamells* (6), and in considering the amount of damages which could be recovered if the distinction suggested could be drawn, and had in fact to be made. But, in the view we take of the true construction of the deed of Aug. 31, 1897, these questions do not arise. The release contained in the deed, although couched in very general terms, must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part. The recitals and first witnessing part show that the release cannot be rationally construed as extending to all Plaistowe's estate, including the asset assigned to the plaintiff. The estate released must exclude that asset. Again, the claims and demands from which Plaistowe's estate is released cannot be rationally construed as all claims and demands in respect of Plaistowe's covenants. The claims and demands released must be confined to those against the released assets, and cannot be rationally held to include those the preservation of which is essential to the recovery by the plaintiff of the asset assigned to him and which asset he is to take in satisfaction of all demands.

In so construing the release the court is not departing from well-settled principles applicable to the construction of such documents. General words of release are always controlled by recitals and context which show that, unless the general

words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler* v. *Homersham* (7) and *Lindo* v. *Lindo* (8). In our opinion, therefore, the appeal fails on this ground also. It is to be observed that North, J., has merely given the plaintiff liberty to apply in respect of future breaches of covenant. He has not impounded assets to meet them, nor attempted to estimate damages in respect of them. The order is right both in substance and in form, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Beyfus & Beyfus; E. F. & H. Landon.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

WILLIAMS *v.* BIRMINGHAM BATTERY AND METAL CO.

[Court of Appeal (A. L. Smith, Vaughan Williams and Romer, L.JJ.), July 6, 1899]

[Reported [1899] 2 Q.B. 338; 68 L.J.Q.B. 918; 81 L.T. 62; 47 W.R. 680; 15 T.L.R. 468]

Master and Servant—Duty of master—Provision of safe plant—Dangerous employment—Liability of master—Acceptance by servant of risk and absence of proper precautions.

A workman employed upon a tramway raised at some height from the ground was accidentally killed while attempting to descend from it. The jury found that the workman's masters were negligent in not providing a ladder without which it was dangerous to descend from the tramway. The jury also found that the workman knew that it was dangerous to descend without a ladder. In an action brought under the Fatal Accidents Act, 1846, by the widow of the deceased workman,

Held: as the jury had not found that the deceased had taken upon himself the risk of working on the tramway in the absence of ladders or other safe means of ascent and descent the widow was entitled to judgment.

Per Romer, L.J.: If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is prima facie liable. And it is no sufficient answer to the prima facie liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether a servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him.

Notes. Considered: *Abbott* v. *Isham* (1920), 90 L.J.K.B. 309. Applied: *Monaghan* v. *Rhodes & Son*, [1918-19] All E.R. Rep. 336. Considered: *Fanton* v.

Denville, [1932] All E.R. Rep. 360. Referred to: *Cole* v. *De Trafford*, [1918-19] All E.R. Rep. 290; *Baker* v. *James Bros. & Sons, Ltd.*, [1921] All E.R. Rep. 590; *Knott* v. *London County Council*, [1934] 1 K.B. 126; *Wilsons and Clyde Coal Co.* v. *English*, [1937] 3 All E.R. 628; *Garcia* v. *Harland and Wolff, Ltd.*, [1943] 2 All E.R. 477; *Read* v. *J. Lyons & Co.*, [1944] 2 All E.R. 98.

As to consent to risk, see 28 HALSBURY'S LAWS (3rd Edn.) 82 et seq.; and for cases see 36 DIGEST (Repl.) 215 et seq. For the Fatal Accidents Act, 1846, see 17 HALSBURY'S STATUTES (2nd Edn.) 4 et seq.

Cases referred to:

(1) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, *812*.

(2) *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; 53 L.J.Q.B. 504; 51 L.T. 533; 49 J.P. 100; 33 W.R. 35, C.A.; 36 Digest (Repl.) 153, *801*.

(3) *Mellors* v. *Shaw* (1861), 1 B. & S. 437; 30 L.J.Q.B. 333; 25 J.P. 806; 7 Jur.N.S. 845; 9 W.R. 748; 121 E.R. 778; 36 Digest (Repl.) 479, *495*.

Also referred to in argument:

Yarmouth v. *France* (1887), 19 Q.B.D. 647; 57 L.J.Q.B. 7; 36 W.R. 281; 4 T.L.R. 1, C.A.; 36 Digest (Repl.) 135, *710*.

Membery v. *Great Western Rail. Co.* (1889), 14 App. Cas. 179; 58 L.J.Q.B. 563; 61 L.T. 566; 54 J.P. 244; 38 W.R. 145; 5 T.L.R. 468, H.L.; 36 Digest (Repl.) 150, *786*.

Skipp v. *Eastern Counties Rail. Co.* (1853), 9 Exch. 223; 2 C.L.R. 185; 23 L.J.Ex. 23; 156 E.R. 95; sub nom. *Skeipp* v. *Eastern Counties Rail. Co.*, 22 L.T.O.S. 123; 36 Digest (Repl.) 156, *824*.

Dynen v. *Leach* (1857), 26 L.J.Ex. 221; sub nom. *Dyman* v. *Leech*, 5 W.R. 490; 36 Digest (Repl.) 215, *1137*.

Woodley v. *Metropolitan District Rail. Co.* (1877), 2 Ex.D. 384; 46 L.J.Q.B. 521; 36 L.T. 419; 42 J.P. 181, C.A.; 36 Digest (Repl.) 150, *783*.

Thomas v. *Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 36 Digest (Repl.) 7, *11*.

Saxton v. *Hawksworth* (1872), 26 L.T. 851, Exch.; 34 Digest 200, *1637*.

Seymour v. *Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest 199, *1628*.

Appeal from a decision of DARLING, J., upon the findings of the jury at the trial of the action.

The action was brought under the Fatal Accidents Act, 1846, by the widow of a workman named Jacob Williams, who at the time of the accident which caused his death was in the service of the defendants, who carried on business as copper refiners. The defendants' refinery was connected with an adjoining canal by means of a tramway which, at the canal end, was raised about 11ft. above the level of the ground. In trying to get down to the ground from the tramway the deceased workman fell, and was killed.

The plaintiff alleged that the death of the deceased was caused by the defendants' personal negligence in not providing proper means and appliances for workmen to descend from the tramway. The defendants pleaded that the alleged defect and want of a ladder was known to the deceased, and that the deceased was guilty of contributory negligence.

At the trial of the action before DARLING, J., with a jury the learned judge left the following questions to the jury: (i) Did the defendants exercise due care to have the tramway in a safe and proper condition, so as to protect their servants working upon it against unnecessary risks? Answer: No. (ii) Was it dangerous to descend from the tramway without the means of a ladder? Answer: Yes. (iii) Had the deceased the same means of knowing that this was dangerous as the defendants had? Answer: Yes. (iv) Did the deceased know that it was dangerous? Answer:

Yes. (v) Was the deceased guilty of contributory negligence? Answer: No. The jury also assessed the damages at £130. Upon these findings DARLING, J., gave judgment for the defendants. The plaintiff appealed.

Cecil Walsh for the plaintiff.
Hugo Young, Q.C., and *Shakespeare* for the defendants.

Cur. adv. vult.

July 6, 1899. The following judgments were read.

A. L. SMITH, L.J.—This is an action at common law for damages brought by the widow of a deceased workman, by the aid of Lord Campbell's Act, against the masters of the deceased man for having been guilty of negligence whereby the workman lost his life. The first two questions left to the jury by the learned judge were:—Did the defendants exercise due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks? And the answer was, No. Secondly, Was it dangerous to descend from the tramway without the means of a ladder? Answer, Yes. I will deal with the other questions left to the jury hereafter. This case was remarkably well argued before us by the learned juniors on each side, and I believe almost every case bearing upon the liability of a master for injuries to his servant in the course of his employment and the applicability thereto of the maxim volenti non fit injuria was brought out in review before us; but when the case is rightly apprehended the judgment may be comparatively short.

In the first place, there can be no doubt as to the duty of a master to his man, and I will take a passage upon this subject from LORD HERSCHELL's judgment in *Smith* v. *Baker & Sons* (1) in the House of Lords. The noble Lord says ([1891] A.C. at p. 362):

> "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."

This being the master's duty towards his man, if the master knowingly does not perform it, it follows that he is guilty of negligence towards the man; and the first two findings of the jury in this case show that the defendants had not performed this duty, and had therefore been guilty of negligence towards the deceased, and it is not disputed that it was by reason of the absence of the ladder, caused by this neglect of duty, that the deceased man met with his death. In my opinion there was ample evidence to support the above findings, for it was proved that the absence of the ladder, which was the cause of the accident, had been well known to the defendants, and that they neglected to provide it, and hence the occasion of the man's death. This is not the case where a master has provided proper appliances and done his best to maintain them in a state of efficiency, in which case the man has no action against his master if the appliances became unsafe whereby the man has been injured unless he avers and proves that the master knew of their having become unsafe, and that the man was ignorant of it: *Griffiths* v. *London and St. Katharine Docks* (2). When proper appliances have been supplied by a master to a man they may well become unsafe to the knowledge of the man and without the knowledge of the master, and so it is that each issue must in such a case be established by the man when he sues his master. This is the case of no proper appliances having been supplied by the master at all, so that the man might carry on his operation in such a way as not to be exposed to unnecessary risk. The case is similar to that of *Mellors v. Shaw* (3).

If this case had stopped here it appears to me clear that there must have been judgment for the plaintiff, she having proved personal negligence in the defendants whereby the deceased man met with his death; and how do the defendants seek to

get rid of this case so far successfully made and proved against them? They plead in their defence that "the alleged defect and want," i.e., of a ladder, was known to the deceased, and also that he was guilty of contributory negligence. As regards this last defence, the jury have negatived it. But what as to the defence set up that "the defect and want (of the ladder) was known to the deceased"? What defence is that to the proved personal negligence of the masters? The defendants have advisedly abstained from raising the defence of the deceased man having contracted, or consented, or undertaken to run the risk of the defect, i.e., the want of the ladder, so as to raise the defence summarised by the maxim, volenti non fit injuria. That the mere knowledge of the risk does not necessarily involve consent to undertake the risk has now beyond question been settled by the House of Lords: see the judgments in *Smith* v. *Baker & Sons* (1), and specially the judgment of LORD HALSBURY, citing with approval BOWEN and LINDLEY, L.JJ. The sole question which was asked of the jury as to this was, Had the deceased the same means of knowing that this was dangerous as the defendants had? Answer, Yes. Did the deceased know it was dangerous? Answer, Yes. How does this prove that he either contracted, or consented, or undertook to accept the risk? The defendants called no evidence. They did not even attempt to show what was the contract under which the deceased man served. Nor did they ask that any question as to whether the man had contracted to take the risk should be left to the jury. As LORD WATSON said, in *Smith v. Baker & Sons* (1) ([1891] A.C. at p. 355):

> "When, as is commonly the case, his acceptance or non-acceptance of the risk is left to implication, the workman cannot reasonably be held to have undertaken it unless he knew of its existence, and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work, with such knowledge and appreciation, will in every case necessarily imply his acceptance. Whether it will have that effect or not depends, in my opinion, to a considerable extent upon the nature of the risk, and the workman's connection with it, as well as upon other considerations, which must vary according to the circumstances of each case."

If the defence of volenti non fit injuria was to be insisted upon, which the defendants did not raise in their pleadings, nor at the trial, they must have obtained a finding of the jury upon it in their favour. They have not done so, and for the reasons above I think that the judgment entered by the learned judge for the defendant must be set aside, and judgment entered for the plaintiff for the £130 damages assessed by the jury in favour of the plaintiff, with costs here and below. My brother VAUGHAN WILLIAMS agrees with this judgment.

ROMER, L.J.—Many authorities bearing on the question we have to decide have been cited and discussed. I do not propose to review them. They appear to me to establish the following propositions as to the liability at common law of an employer of labour. If the employment is of a dangerous nature, a duty lies on the employer to use all reasonable precautions for the protection of the servant. If by reason of breach of that duty a servant suffers injury, the employer is prima facie liable. And it is no sufficient answer to the prima facie liability for the employer to show merely that the servant was aware of the risk and of the non-existence of the precautions which should have been taken by the employer and which, if taken, would or might have prevented the injury. In order to escape liability the employer must establish that the servant has taken upon himself the risk without the precautions. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of each case. In considering such a question the circumstance that the servant has entered into, or continued, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him.

A I will now apply the above propositions to the case before us. The tramway, as left by the defendants without ladders or other safe means for ascending to or descending from it, was clearly dangerous. The defendants, in not providing these ladders or other safe means, were, in my opinion, guilty of breach of duty to the workmen employed about the tramway. This is in substance what the jury have found by their answers to the two first questions left to them by the judge. That B the workman Williams was injured by reason of the absence of the precautions above mentioned, which should have been taken by the defendants, is clear. For that injury, then, the defendants are prima facie liable.

The question then is, Have the defendants established a case to free themselves from the prima facie liability? The only findings of the jury favourable to the C defendants are that Williams had the same means of knowing the danger as the defendants and did know the danger. Those two findings are not sufficient to free the defendants from liability unless they amount to a finding that Williams took upon himself the risk of working on the tramway in the absence of the ladders or other safe means of ascending and descending. It appears to me that such a conclusion cannot be drawn from these two findings of the jury. This being so, D on the findings of the jury as a whole there should be judgment for the plaintiff. No doubt there was evidence before the jury on which the defendants, if they had taken the point, might have asked the jury to hold that Williams had taken upon himself the risk. But no such finding was asked for by the defendants, and indeed I cannot see that the point as to Williams having taken the risk upon himself was at all taken by the defendants prior to this appeal, I presume because they thought E it hopeless to expect to succeed on the point. At any rate they cannot now ask us to decide, as a matter of fact, that Williams had taken upon himself the risk, or call upon us to act as if a finding to that effect had been obtained from the jury. It appears to me, therefore, that the appeal should be allowed, and judgment entered for the plaintiff for the ascertained amount of damage, with costs here and below.

F *Appeal allowed.*

Solicitors: *Thomas White & Son, for W. H. Egginton*, Birmingham; *Timbrell & Deighton*, for *W. Shakespeare & Co.*, Birmingham.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

G

BARRACLOUGH *v.* BROWN AND OTHERS

H [HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Shand and Lord Davey), May 28, 31, June 1, July 19, 1897]

[Reported [1897] A.C. 615; 66 L.J.Q.B. 672; 76 L.T. 797; 62 J.P. 275; 13 T.L.R. 527; 8 Asp.M.L.C. 290; 2 Com. Cas. 249]

Shipping—Wreck—Removal—Liability for expenses—Right to recover expenses in summary proceedings provided by statute—Action in High Court— I *Competency—"Owner"—Person owning vessel when expenses incurred—Aire and Calder Navigation Act*, 1889 (52 *&* 53 *Vict.*, *c.* cxxii), *s.* 47—*Harbours, Docks, and Piers Clauses Act*, 1847 (10 *&* 11 *Vict.*, *c.* 27).

By s. 47 of the Aire and Calder Navigation Act, 1889 (which incorporated the Harbours, Docks, and Piers Clauses Act, 1847), it was provided that if any vessel should be sunk in any part of the navigation of the river Ouse, and the owner, or person in charge, should not remove it "the undertakers may if they think fit, recover such expenses from the owner of such vessel in a court of summary jurisdiction."

Held: (i) an action by undertakers to recover expenses under this section could not be maintained in the High Court since there was no liability to pay the expenses at common law and the only right to recover the expenses was under the section which provided that courts of summary jurisdiction should have exclusive jurisdiction in the matter; (ii) it would be unsound in principle to grant a declaration as to the right to recover expenses since the matter as to which a declaration was sought was exclusively submitted to the jurisdiction of the summary court.

Per LORD HERSCHELL: The words "the owner" in s. 47 do not mean the person who was the owner of the vessel at the time she sank, if he had ceased to be the owner before the expenses were incurred. The words refer to the person who was the owner at the time the expenses were incurred.

Notes. Considered: *Guaranty Trust Co. of New York* v. *Hannay*, [1914-15] All E.R. Rep. 24; *Barwick* v. *South-Eastern and Central Rail. Co.*, [1921] 1 K.B. 187. Followed: *Boston Corpn.* v. *Fenwick & Co., Ltd.*, [1923] All E.R. Rep. 583; *Sheppy Glue and Chemical Works* v. *Medway River Conservators* (1926), 24 L.G.R. 457. Considered: *Dee Conservancy Board* v. *McConnell*, [1928] All E.R. 554; *Clark* v. *Epsom R.D.C.* [1929] 1 Ch. 287. Applied: *Musical Performers' Protection Association, Ltd.* v. *British International Pictures, Ltd.* (1930), 46 T.L.R. 485. Considered: *Ruislip-Northwood U.D.C.* v. *Lee* (1931), 141 L.T. 208; *Pyx Granite Co.* v. *Ministry of Housing and Local Government*, [1958] 1 All E.R. 625. Referred to: *A.-G.* v. *Merthyr Tydvil Union*, [1900] 1 Ch. 516; *Devonport Corpn.* v. *Tozer* (1903), 67 J.P. 269; *R. v. Philbrick, Ex parte Edwards* (1905), 53 W.R. 527; *The Wallsend*, [1907] P. 302; *De Gasquet James* v. *Mecklenburg-Schwerin*, [1914] P. 53; *Simmonds* v. *Newport-Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 941; *Whitney* v. *I.R. Comrs.*, [1926] A.C. 37; *Wigg* v. *A.-G. of Irish Free State* (1927), 96 L.J.P.C. 88; *Farrow* v. *Orttewell*, [1933] All E.R. Rep. 132; *Allen* v. *Waters & Co.*, [1935] 1 K.B. 200; *Stockwell* v. *Southgate Corpn.*, [1936] 2 All E.R. 1343; *A.-G.* v. *Ripon Cathedral (Dean and Chapter)* [1945] 1 All E.R. 479.

As to removal of a wreck in general, see 35 HALSBURY'S LAWS (3rd Edn.) 728 et seq.; and for cases see 41 DIGEST 821 et seq.

Case referred to:

(1) *Arrow Shipping Co.* v. *Tyne Improvement Comrs., The Crystal*, [1894] A.C. 508; 63 L.J.P. 146; 71 L.T. 346; 10 T.L.R. 551; 7 Asp.M.L.C. 513; 6 R. 258, H.L.; 29 Digest 287, *2339*.

Also referred to in argument:

Smith & Sons v. *Wilson*, [1896] A.C. 579; 65 L.J.P.C. 66; 75 L.T. 81; 8 Asp.M.L.C. 197; 29 Digest, 254, *m*.

Appeal by the plaintiffs in the action from an order of the Court of Appeal, 74 L.T. 86, affirming a decision of MATHEW, J., in favour of the defendants.

The appellant, as the secretary and public officer of the undertakers of the navigation of the rivers Aire and Calder, brought an action in the High Court against the respondents, who were formerly the owners of the steamship *J. M. Lennard*, which sank in the river Ouse, which was within the undertakers' district, to recover the sum of £3,278, expended by them in unsuccessfully attempting to raise and finally in blowing up that vessel to free the navigation of the river, which was impeded by the wreck. The respondents denied their liability on the ground that before the undertakers had incurred any expense in the matter they had abandoned the vessel, and had given notice of abandonment to their underwriters.

Sir W. Phillimore and *Montague Lush* for the appellant.
J. Walton, Q.C., and *A. Lennard* for the respondents.

The House took time for consideration.

July 19, 1897. The following opinions were read.

LORD HERSCHELL.—On the night of Aug. 20, 1894, the *J. M. Lennard*, of which the respondents were then the owners, sank in the river Ouse, within the navigation district of the undertakers of the river Aire and Calder. The respondents abandoned the vessel, and on Aug. 24 gave notice of abandonment to their underwriters. The underwriters endeavoured to raise the vessel, but finding it impracticable to do so, they, on Aug. 31, gave to the Aire and Calder Navigation "notice of abandonment." On Sept. 5 the underwriters settled with the respondents for a total loss. On Sept. 6 the Aire and Calder Navigation entered into an agreement with the East Coast Salvage Co. Under this contract an attempt was made to raise the vessel, but it was unsuccessful; the expenses incurred amounted to £2,778. The undertakers of the navigation then proceeded to destroy the vessel by means of explosives, at a cost of £500. The present action was brought to recover these two sums. The defendants, by their defence and counterclaim, alleged that the stranding and damages consequent thereon were occasioned by the plaintiff's negligence. The facts, except as regards these allegations of negligence, being admitted, it was ordered by MATHEW, J., on a summons for directions, that the point of law as to the right of the plaintiffs to maintain the action should be argued on a day named. The order did not specify what the point of law referred to was, but it seems to have been, practically speaking, confined to the question what was the true construction of s. 47 of the Aire and Calder Navigation Act. After hearing argument, MATHEW, J., ordered judgment to be entered for the defendants with costs, and this judgment was affirmed by the Court of Appeal.

Section 47 of the Act referred to (so far as is material to the present case) provides that if any vessel shall be sunk in the river Ouse within the limits of improvement defined by the Act of 1884, and the owner or person in charge shall not forthwith remove the same, it shall be lawful for the undertakers to remove the vessel, and keep the same with her tackle and loading until payment be made of all the expenses relating thereto; or to sell such vessel, tackle, and loading, and thereout to pay such expenses and the expenses of the sale, returning to the owner of such vessel the overplus, if any, on demand; or that

> "the undertakers may, if they think fit, recover such expenses from the owner of such vessel in a court of summary jurisdiction."

At an early stage in the argument of the appeal the question was raised whether the High Court had any jurisdiction to entertain a claim for the recovery of expenses under the enactment I have just quoted, or to adjudicate upon it except by way of appeal from a court of summary jurisdiction. Unwilling as I am to determine the appeal otherwise than on the merits of the case, I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them, by action in the High Court. The respondents were under no liability to pay these expenses at common law. The liability, if it exists, is created by the enactment I have quoted. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is "to recover such expenses from the owner of such vessel in a court of summary jurisdiction." I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right. It was argued for the appellant that, even if not entitled to recover the expenses by action in the High Court, he was, at all events, entitled to come to that court for a declaration that on the true interpretation of the statute he had a right to recover them. It might be enough to say that no such case was made by the appellant's claim. But, apart from this, I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated

to the inferior court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle.

Although all your Lordships, I believe, feel compelled to dismiss the appeal on the ground I have indicated, it may be satisfactory to the parties to know that after having the case fully argued on the merits your Lordships arrive at the conclusion that the same result must have followed even if the question of jurisdiction had been determined the other way. I think the words "the owner" at the end of s. 47 do not mean the person who was owner of the vessel at the time she sank, if he had ceased to be owner before the expenses were incurred. The section does not impose upon the owner the duty of removing his vessel: it only renders it lawful for the undertakers to remove her if he does not. And in the latter part of the section the words used are "the owner," not "such owner," which one would have expected to find if the intention had been to refer to the same person throughout. I think the latter part of the section refers to the person who was owner at the time the expenses were incurred, and not to the person who was owner when the vessel sunk, if his ownership had ceased. In the present case (subject to the point I will mention directly) it is clear that the respondents had ceased to be owners at the time expenses were incurred. They had abandoned to the underwriters, and been paid as for a total loss. The point, however, was made by the learned counsel for the appellant that the vessel being sunk in that part of the river Ouse which was within the limits within which the undertakers of the Aire and Calder Navigation were by statute authorised to make and had made improvements, it was not competent for the owners so to abandon her as to cease to be owners within the meaning of s. 47. No authority was cited for this proposition, and I am unable to see any principle on which it can rest. Many public bodies have had committed to them the improvement of public navigable rivers by dredging, by the erection of river walls, and in other ways, but the rivers do not thereby cease to be public navigable rivers or in any way change their character, nor can the rights of the public who navigate them, in the absence of statutory enactments, thereby become different from what they were before. I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—Section 47 of the Aire and Calder Navigation Act, 1889, enlarges the provisions of s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847, in two particulars. In the first place, it extends the area within which the undertakers have the power of removal beyond harbours, docks, or piers, and the approaches to the same so as to include the whole of the river Ouse within the limits of improvement defined by the special Act of 1884. In the second place, it authorises the undertakers, when they have raised a sunken vessel under their statutory powers, to detain and sell for reimbursement of the expenses which they have incurred not only such vessel or wreck, but the tackle and loading thereof.

On the night of Aug. 20, 1894, the steamship *J. M. Lennard*, which at that time was owned by the respondents, capsized and sank in the river Ouse within the limits of improvement defined by the Act of 1884, and therefore, in the event of the respondents failing to raise her, the undertakers were authorised to do so by s. 47 of their Act of 1889. It is a matter of admission that the sunken vessel constituted an obstruction to the navigation of the river Ouse. The *J. M. Lennard* was fully insured, and notice was given to the underwriters, who made an unsuccessful attempt to raise her on Aug. 30. The respondents gave notice of abandonment to the underwriters, who accepted the notice and on Sept. 5, settled with the respondents for a total loss. After the date of that settlement, but not until then, the underwriters proceeded to exercise their statutory powers of removal. They began by spending £2,778 8s. 8d. in an attempt to float the ship, which resulted in failure. They then resolved to remove the wreck by means of explosives, a result which they accomplished at a cost of £500. The appellants on April 3, 1895, brought the present suit against the respondents before the Queen's

Bench Division for £3,278 8s. 11d., being the aggregate of the sums expended by the underwriters in endeavouring to raise and in removing the vessel. The claim was preferred upon two separate grounds: the first being that the respondents as owners of the ship at the time she sank were at common law responsible to the undertakers for the injury thereby done to the navigation of the river Ouse, and for all costs necessarily and reasonably incurred by them in repairing such injuries; and the second, that s. 47 of the Act of 1889 makes the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers.

At present I make this observation upon their alternative claim, that, while it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained except by a court of summary jurisdiction as is prescribed by s. 47. Both causes of action were insisted on before MATHEW, J., who gave judgment for the respondents with costs. His Lordship was of opinion that the undertakers, in the event of a vessel being wrecked and becoming an obstruction to the waterway of the Ouse within the limits of their navigation, have no remedy other than that which is given them by their statute. As to the second point, his Lordship held that the construction applied by this House in *The Crystal* (1) to s. 66 of the Harbours, Docks, and Piers Clauses Act, 1847, was equally applicable to s. 47 of the undertakers' Act of 1859. On appeal the decision of MATHEW, J., was affirmed. LORD ESHER, M.R., LOPES, L.J., and RIGBY, L.J., were all of opinion that the case, so far as founded on s. 47, was ruled by the decision of this House in *The Crystal* (1), and that the undertakers have no right given them to recover their outlays from persons who were owners of the ship at the time of her sinking whose ownership had ceased before their operations commenced. I do not find any reference made in the opinion delivered by the learned judges to the appellant's common law claim, which was renewed and insisted on by him at your Lordship's Bar. Upon the assumption that the courts below had jurisdiction to entertain all the questions raised in this suit, I see no reason to doubt that their decisions were right. Neither of the points pressed upon us by the appellant's counsel was of any substance, and they were consequently driven to rely upon assertion rather than argument.

I am content to rest my opinion of the merits of the case upon the reasons assigned by MATHEW, J., and the learned judges of the Court of Appeal. As already indicated, I am of opinion that the claim founded upon s. 47 of the Act of 1889 was not competently brought before the court in this suit. The only right which the undertakers had to recover from an owner is conferred by these words:

> "Or the undertakers may, if they think fit, recover such expenses from the owner of such boat, barge, or vessel, in a court of summary jurisdiction."

The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has, therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters. The objection is one which, in my opinion, it is pars judicis to notice, because it arises on the fact of the enactment which your Lordships are asked to enforce in this appeal. It cannot be the duty of any court to pronounce an order which will have that effect when it plainly appears that in so doing the court is using a jurisdiction which the legislature has forbidden it to exercise. The appellant's counsel maintain that your Lordships ought to substitute for a debt decree, which is the only remedy claimed under s. 47, and a declaration that, under that section, he has a right to recover from the respondents, who were admittedly the owners of the *J. M. Lennard* at the time when she sank. It is possible that your Lordships might accede to such a sug-

gestion if it were necessary in order to do justice. But the matter as to which a declaration is sought is one of those exclusively submitted to the jurisdiction of the summary court. In the absence of authority I am not prepared to hold that the High Court had any power to make declaration of right with respect to any matter from which its jurisdiction is excluded by an Act of the legislature, and, were such an authority produced, I should be inclined to overrule it. The declaration which we were invited to make would be of no practical utility, and it would be an interference by a court having no jurisdiction in the matter with the plenary and exclusive jurisdiction conferred by the legislature upon another tribunal.

I am, therefore, of opinion that the order appealed from ought to be affirmed. It is in form correct, although my reasons for affirming are not the same with those which prevailed in the courts below.

LORD HALSBURY, L.C., LORD SHAND and **LORD DAVEY** concurred.

Appeal dismissed.

Solicitors: *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull; *W. A. Crump & Son.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

HUBBUCK & SONS, LTD. *v.* WILKINSON, HEYWOOD AND CLARK, LTD.

[Court of Appeal (Sir Nathaniel Lindley, M.R., Chitty and Vaughan Williams, L.JJ.), October 29, November 8, 1898]

[Reported [1899] 1 Q.B. 86; 68 L.J.Q.B. 34; 79 L.T. 429; 15 T.L.R. 29; 43 Sol. Jo. 41]

Libel—Trade libel—Disparagement of goods—Circular comparing plaintiffs' goods with defendants' goods—Right of action—R.S.C., Ord. 25, r. 4.

The plaintiffs by their statement of claim alleged that the defendants falsely and maliciously published in China and Japan a circular containing a report of experiments comparing zinc paints manufactured by the plaintiffs with those made by the defendants, showing that the defendants' paint had a slight advantage over that of the plaintiffs, but that, for all practical purposes, they could be regarded as being equal. The plaintiffs alleged that the report was untrue, that their paint was in fact superior to that of the defendants, and that they had been injured in their trade and credit. The defendants applied, under R.S.C., Ord. 25, r. 4, to have the statement of claim struck out as showing no reasonable cause of action.

Held: the defendants' circular was no more than a disparagement of the plaintiffs' goods, and, as such, was not actionable even if the statements contained in it were untrue; proof of special damage by the plaintiffs would not improve their case; and, therefore, judgment would be entered for the defendants.

Evans v. *Harlow* (1) (1844), 5 Q.B. 624, *Young* v. *Macrae* (2) (1862), 3 B. & S. 264, and *White* v. *Mellin* (3), [1895] A.C. 154, applied.

Notes. Considered: *Worthington* v. *Belton* (1902), 18 T.L.R. 438. Distinguished: *Alcott* v. *Millar's Karri and Jarrah Forests* (1904), 91 L.T. 722. Considered: *Lyne* v. *Nicholls* (1906), 23 T.L.R. 86. Referred to: *Cundey* v. *Lerwill and Pike*

(1908), 99 L.T. 273; *Netz* v. *Ede*, [1946] 1 All E.R. 628; *Kemsley* v. *Foot*, [1951] 1 All E.R. 331; *Cadam* v. *Beaverbrook Newspapers, Ltd.*, [1959] 1 All E.R. 453; *J. Bollinger* v. *Costa Brava Wine Co.*, [1959] 3 All E.R. 800.

As to slander of goods, see 24 HALSBURY'S LAWS (3rd Edn.) 128 et seq.; and for cases see 32 DIGEST 209 et seq.

Cases referred to:

(1) *Evans* v. *Harlow* (1844), 5 Q.B. 624; 1 Dav. & Mer. 507; 13 L.J.Q.B. 120; 2 L.T.O.S. 400; 8 Jur. 571; 114 E.R. 1384; 32 Digest 209, *2601*.

(2) *Young* v. *Macrae* (1862), 3 B. & S. 264; 1 New Rep. 52; 32 L.J.Q.B. 6; 7 L.T. 354; 27 J.P. 132; 9 Jur.N.S. 538; 11 W.R. 63; 122 E.R. 100; 32 Digest 209, *2598*.

(3) *White* v. *Mellin*, [1895] A.C. 154; 64 L.J.Ch. 308; 72 L.T. 334; 43 W.R. 353; 11 T.L.R. 236; 11 R. 141; sub nom. *Mellin* v. *White*, 59 J.P. 628, H.L.; 32 Digest 184, *2265*.

(4) *Peru Republic* v. *Peruvian Guano Co.* (1887), 36 Ch.D. 489; 56 L.J.Ch. 1081; 57 L.T. 337; 36 W.R. 217; 3 T.L.R. 848; 1 Digest (Repl.) 52, *381*.

(5) *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L.R. 9 Exch. 218; 43 L.J.Ex. 171; 23 W.R. 5; 32 Digest 210, *2602*.

(6) *Allen* v. *Flood*, ante p. 52; [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 1 Digest (Repl.) 33, *254*.

(7) *Empire Type-setting Machine Co. of New York* v. *Linotype Co., Ltd.* (1898), 79 L.T. 8; 14 T.L.R. 511, C.A.; affirmed sub nom. *Linotype Co., Ltd.* v. *British Empire Type-setting Machine Co., Ltd.* (1899), 81 L.T. 331; 15 T.L.R. 524, H.L.; 32 Digest 20, *113*.

(8) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, *2086*.

Also referred to in argument:

Metropolitan Bank v. *Pooley* (1885), 10 App. Cas. 210; 54 L.J.Q.B. 449; 53 L.T. 163; 49 J.P. 756; 33 W.R. 709, H.L.; 1 Digest (Repl.) 81, *613*.

Appeal by the defendants from an order of KENNEDY, J., in chambers.

The statement of claim in the action alleged as follows:—

"1. The plaintiffs are a limited company, incorporated under the Companies Acts, 1862 to 1890, and they and their predecessors have carried on business as wholesale oil merchants and paint manufacturers for upwards of 125 years. The defendants carry on a similar business, and are a company similarly incorporated.

2. The plaintiffs have for many years carried on a large business in the export of white zinc to the East, and in particular to China and Japan, and have acquired a great reputation there for their said white zinc.

3. Prior to and in or about the month of April, 1898, the defendants, by themselves or their agent acting on their behalf, and within the scope of his authority and in their interests, contriving and intending to injure the plaintiffs in their said business, falsely and maliciously printed and published, and caused to be printed and published and issued in China and Japan, and continued the publication and issue of, a circular containing of the plaintiffs and of them as such manufacturers and sellers of the said white zinc and of them in the way of their said business, the words following, that is to say: Copy of a Report on a trial of 'Bell Brand Genuine White Zinc' [meaning the white zinc manufactured and sold by the defendants] in comparison with Hubbuck's Patent White Zinc [meaning the plaintiffs' said white zinc, and meaning that the defendants' white zinc was genuine but that of the plaintiffs was not genuine], by Fred and T. Thorne, Builders and Decorators, 266, Manchester Road, Cubitt Town, London, E. Paint covering experiments.—The under-

mentioned experiments were conducted at Storer's Wharf, Poplar, London, E., under our supervision, and we certify that the particulars hereunder given are correct in every detail: 32lb. Hubbuck's Patent White Zinc were thinned by adding 16lb. of a mixture containing two parts of pale boiled oil and one part of turpentine. 32lb. of Wilkinson, Heywood & Clark, Ltd.'s Genuine White Zinc Paint were thinned by adding exactly the same quantity of the same mixture as in the case of Hubbuck's. In order to eliminate all chance of unfair comparison, we caused both samples of stiff paint to be tested for percentage of oil, and found that they both contained 15½ per cent. Both lots of paint had the same consistency and appearance, except that Wilkinson, Heywood & Clark's struck us as being the better white of the two. A square of match boarding representing 384 square feet was knotted and primed with two coats of priming, and afterwards each alternate board was painted black. One half of this board was painted with Hubbuck's zinc and the other half with W., H. & C.'s. The paint was applied in the usual way by an experienced workman, care being taken that no drops or splashes were lost. The board was 6ft. high, and lines one foot apart were drawn right across its whole length, so that the first coat of paint was applied over the whole of its respective portion of the boarding or test board. The following coat commenced within a foot from the bottom, and so on with each succeeding coat until the fifth coat was applied. By this means it was easy to judge the density and therefore the value of each coat. Exactly 9lb. of paint was used in each case, and each coat took the same quantity of paint. Judging the finished work, it is quite evident that W., H. & C.'s zinc has a slight advantage over Hubbuck's, but for all practical purposes they can be regarded as being in every respect equal. (Signed) Fred and T. Thorne. I certify the above to be a copy of the original report.—W. D. Graham, manager of Wilkinson, Heywood & Clark, Ltd. (proprietors of David Storer & Sons), Praya Central, Hong-kong.'

4. By the said words the defendants meant that the white zinc of the defendants was superior to that of the plaintiffs, or that it was at least equal thereto at a much cheaper price, and that the white zinc of the plaintiffs was adulterated and not genuine, and that persons purchasing white zinc from the plaintiffs would do better by purchasing that of the defendants.

5. The said report was untrue, and each statement thereof was untrue, and the alleged trial had not been made or fairly made or made with the alleged results.

6. The white zinc of the plaintiffs is in fact superior to that of the defendants and not of an inferior or equal quality.

7. The plaintiffs have by reason of the premises been much injured in their trade and business, and the reputation of their said white zinc and of themselves, as the manufacturers thereof, has been much injured, and the plaintiffs have been injured in their credit and have been prevented from acquiring the profits which they might and otherwise would have acquired by reason of the said libel."

The plaintiffs claimed damages and an injunction restraining the defendants from further publishing "the said libel," or further libelling the plaintiffs as manufacturers, or their business. The defendants applied under R.S.C., Ord. 25, r. 4, to have the statement of claim struck out as showing no reasonable cause of action. The master ordered the statement of claim to be struck out unless the plaintiffs amended it by averring special damage with full particulars within four months. This decision was reversed by KENNEDY, J., in chambers, who ordered "that the statement of claim do stand as already delivered," and from this decision the defendants appealed.

Fletcher Moulton, *Q.C.*, and *Montague Lush* for the defendants.
Lawson Walton, *Q.C.*, and *W. O. Hodges* for the plaintiffs.

Cur. adv. vult.

Nov. 8, 1898. **SIR NATHANIEL LINDLEY, M.R.,** read the following judgment of the court.—This is an appeal by the defendants from the refusal of KENNEDY, J., to strike out the plaintiffs' statement of claim on the ground that it discloses no reasonable cause of action.

The application is made under R.S.C., Ord. 25, r. 4. Order 25 abolished demurrers, and substituted a more summary process for getting rid of pleadings which show no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Ord. 25, r. 2; the other is to apply to strike out the statement of claim under Ord. 25, r. 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression, "reasonable cause of action" in r. 4, shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.

The authorities collected in the ANNUAL PRACTICE show that the courts have always so construed r. 4, although sometimes, no doubt, a statement of claim may be so long and the facts so complicated that considerable time and attention are required to ascertain their true result, as in *Peru Republic* v. *Peruvian Guano Co.* (4). If in this case it were necessary, in order to justify us in striking out the statement of claim, to come to the conclusion that *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (5) was not law, and was in effect overruled by *White* v. *Mellin* (3), we should be of opinion that the question raised was too difficult and important to justify the court in summarily striking out the claim. But it is not necessary to consider any such question. The truth is that the defendants' circular, when attentively read, comes to no more than a statement that the defendants' white zinc is equal to and, indeed, somewhat better than the plaintiffs'. Such a statement, even if untrue and the cause of loss to the plaintiffs, is not a cause of action. Moreover, an allegation that the statement was made maliciously is not enough to convert what is prima facie a lawful into a prima facie unlawful statement. It is not unlawful to say that one's own goods are better than other people's, and *Allen* v. *Flood* (6) shows that malice in such a case is immaterial. The fact that the defendants call their white zinc genuine, and contrast it with the plaintiffs' patent white zinc, which is not called genuine, is relied on by the plaintiffs as showing that the circular is, or may be fairly regarded as, a defamatory libel on the plaintiffs—i.e., a libel on them in the way of their trade. But when the whole circular is looked at, and it is found that the defendants state that, for all practical purposes, the two contrasted paints are in every respect equal, it is impossible to treat the circular as anything more than a disparagement of the white zinc paint made and sold by the plaintiffs. No ingenuity can convert the circular into a defamatory libel on the plaintiffs, and, if the action went to trial, it would be the duty of the judge to tell the jury that no question of libel on the plaintiffs had to be considered.

We will now consider the circular in its other aspect—viz., as a disparagement of the plaintiffs' goods. From this point of view the case is undistinguishable from *Evans* v. *Harlow* (1) and *Young* v. *Macrae* (2), where malice, falsehood, and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decisions in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals is not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in *White* v. *Mellin* (3). The defendants in this case give the results of some experiments with the two sorts of paint, and in para. 5 of the statement of claim the plaintiffs say that the report of the experiments is untrue and that the trials were not fairly made. But, supposing this to be the case, the result is not altered. Paragraph 5 merely states more particularly what

has been already stated before in para. 3, where the general charge of falsehood is made. Even if each particular charge of falsehood is established it will only come to this—that it is untrue that the defendants' paint is better than, or equal to, that of the plaintiffs', for saying which no action lies. The particular reasons for making that statement are immaterial if the statement itself is not actionable. The statement of claim, then, as it stands, shows no reasonable cause of action, and the only other question is whether the plaintiffs should have liberty to amend by stating special damage as distinguished from general damage.

In *Evans* v. *Harlow* (1), all the members of the court agreed that the declaration showed no cause of action. PATTESON, J., however, went on to say that an action for disparaging the plaintiffs' goods would not lie unless the plaintiff alleged that, by reason of the disparagement, he had been prevented from selling his goods to some particular person. But in *Young* v. *Macrae* (2), it was pointed out that there were different ways of disparaging a man's goods—that some false statements about them might be actionable if special damage could be proved, and *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (5) was decided on this ground. But in *Young* v. *Macrae* (2) it was also pointed out that, if the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, even if the plaintiff is damnified by it. The judgments of COCKBURN, C.J., and of WIGHTMAN, J., who was a party to the decision in *Evans* v. *Harlow* (1), are clear on this point. LORD HERSCHELL, L.C., expressed himself very emphatically to the same effect in *White* v. *Mellin* (3) ([1895] A.C. at pp. 164, 165), and he expressed his clear opinion that it could make no difference whether a defendant said that his goods were better than the plaintiff's generally or whether the particulars in which the plaintiff's goods were said to be inferior were specified. He pointed out with great force that, if actions in such cases were held to lie, the courts would be constantly engaged in trying the respective merits of the goods of rival traders, and the pernicious practice of bringing actions for mere purposes of advertising would be greatly encouraged. See also *Empire Type-setting Machine Co. of New York* v. *Linotype Co., Ltd.* (7).

The present plaintiffs' case would not, therefore, be improved by the allegation and proof of actual loss. In other words, compliance with the master's order requiring more definite allegation of special damage would not improve the plaintiffs' case. The plaintiffs do allege actual loss attributable to the defendants' circular, and, if proof of such loss would enable the plaintiffs to maintain their action, it would be wrong summarily to strike out their statement of claim, although it might have been open to a demurrer before the Judicature Acts: see on this point *Ratcliffe* v. *Evans* (8). We regard this case as falling within the principle established by *Evans* v. *Harlow* (1), *Young* v. *Macrae* (2), and *White* v. *Mellin* (3).

It is not necessary to consider how the case would have stood if the defendants had not been rival traders, simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or at all events not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of claim as showing no reasonable cause of action. But the circular complained of is such as plainly to constitute no cause of action even if all the allegations in the statement of claim are true.

Under these circumstances, the appeal must be allowed, with costs here and below; and, as there is no reason to suppose that the plaintiffs can improve their case by any amendments they can make, the court ought to exercise the power conferred upon it by Ord. 25, r. 4, and order judgment to be entered for the defendants.

Appeal allowed.

Solicitors: *Fullilove & Co.; Johnson, Weatherall & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

ROWELL *v.* ROWELL

[Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.JJ.), November 2, 1899]

B

[Reported [1900] 1 Q.B. 9; 69 L.J.Q.B. 55; 81 L.T. 429; 16 T.L.R. 10]

Husband and Wife—Separation deed—Termination—Intercourse between parties —Wife persuaded to permit intermittent acts.

C By a covenant in a separation deed the husband agreed to pay the wife a weekly sum during their joint lives if they should so long live separate from each other. While they were living apart, the husband, by means of certain statements concerning his health, prevailed on the wife to allow him to have intercourse with her on four occasions. From the husband's diary which was put in evidence, it was clear that for some time after the acts of intercourse he was making overtures to persuade the wife to live with him. Nearly a D year after the acts of intercourse the husband stopped paying the wife the weekly sums under the covenant. In an action by the wife to recover the arrears of payments under the deed,

Held: in the circumstances of the case, the acts of intercourse were not conclusive evidence of a reconciliation between the parties, so as to put an end to the deed, and, accordingly, the husband was liable to pay the arrears owing.

E

Notes. Distinguished: *Macan* v. *Macan* (1900), 70 L.J.Q.B. 90. Considered: *Eaves* v. *Eaves*, [1939] 2 All E.R. 789. Applied: *Mummery* v. *Mummery*, [1942] 1 All E.R. 553. Referred to: *Cramp* v. *Cramp and Freeman*, [1920] All E.R. Rep. 164; *Russell* v. *Russell*, [1924] A.C. 687; *Abercrombie* v. *Abercrombie*, [1943] 2 All E.R. 465; *Morris* v. *Morris and Manning*, [1947] 2 All E.R. 377; *Perry* v. F *Perry*, [1952] 1 All E.R. 1076; *Morley* v. *Morley*, [1961] 1 All E.R. 428.

As to separation deeds, see 19 Halsbury's Laws (3rd Edn.) 877 et seq.; and for cases see 27 Digest (Repl.) 225 et seq.

Cases referred to in argument:

Nicol v. *Nicol* (1885), 30 Ch.D. 143; 54 L.J.Ch. 1042; 53 L.T. 140; affirmed (1866), 31 Ch.D. 524; 55 L.J.Ch. 437; 54 L.T. 470; 50 J.P. 468; 34 W.R. G 283; 2 T.L.R. 280, C.A.; 27 Digest (Repl.) 243, *1963*.

Haddon v. *Haddon* (1887), 18 Q.B.D. 778; 56 L.J.M.C. 69; 56 L.T. 716; 51 J.P. 486; 3 T.L.R. 574, D.C.; 27 Digest (Repl.) 722, *6903*.

Campbell v. *Campbell* (1857), Dea. & Sw. 285; 29 L.T.O.S. 150; 3 Jur.N.S. 845; 5 W.R. 519; 164 E.R. 578; 27 Digest (Repl.) 516, *4598*.

H *Webster* v. *Webster* (1853), 4 De G. M. & G. 437; 22 L.J.Ch. 837; 1 W.R. 509; 43 E.R. 577, L.JJ.; 27 Digest (Repl.) 243, *1960*.

Scholey v. *Goodman* (1823), 1 C. & P. 36, N.P.; 27 Digest (Repl.) 214, *1700*.

Negus v. *Forster* (1882), 46 L.T. 675; 30 W.R. 671, C.A.; 27 Digest (Repl.) 188, *1441*.

I **Appeal** by the husband from a decision of Grantham, J., at the trial of the action without a jury.

The action was brought by the wife against her husband to recover the sum of £90, being the amount of the arrears for forty-five weeks from Jan. 1, 1898, up to Nov. 12, 1898, when the writ was issued, due to her under a covenant in a separation deed whereby the husband had agreed to pay her £2 a week so long as they should live separate from each other. The separation deed was as follows:

"This indenture made the 5th day of March, 1896, between John Reed Rowell, of 14, Sackville Street, in the county of London, tailor, of the one

part, and Harriette Elizabeth Rowell, wife of the said J. R. Rowell, of the other part. Whereas unhappy differences have arisen between the said J. R. Rowell and H. E. Rowell, his wife, and they have agreed to live separate from each other for the future and to enter into such arrangements as are hereinafter expressed. And whereas the said J. R. Rowell and H. E. Rowell, his wife, have one child only, namely, John Reed Rowell, now of the age of eight years. Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the premises and of the covenants of the said H. E. Rowell hereinafter contained the said J. R. Rowell hereby covenants with the said H. E. Rowell that so long as the said H. E. Rowell performs all the covenants and agreements on her part hereinafter contained the said H. E. Rowell shall and may at all times hereafter, notwithstanding her coverture, live separate and apart from the said J. R. Rowell as if she were a feme sole and shall be freed from the control and authority of the said J. R. Rowell and shall reside in such place or places and in such manner as she shall think fit and that the said J. R. Rowell will not require her to live with him and will not institute any legal proceedings or take any other steps whatsoever for that purpose and will not in anywise molest or interfere with the said H. E. Rowell in her manner of living or otherwise. And also that the said J. R. Rowell will during the joint lives of himself and the said H. E. Rowell if they should so long live separate from each other and the said H. E. Rowell shall live a chaste life and observe the covenants and agreements on her part hereinafter contained pay to the said H. E. Rowell the weekly sum of £1 10s. for her sole and separate use without power of anticipation. And also shall and will during his life, if the said J. R. Rowell (his son) shall so long remain under the age of twenty-one years and reside with or under the tutelage or care of the said H. E. Rowell and if the said H. E. Rowell shall so long perform and observe the stipulations on her part herein contained, pay to the said H. E. Rowell the further sum of 10s. per week for and towards the support, maintenance, board, lodging, clothing, and education of the said J. R. Rowell (the son), the said weekly sums of £1 10s. and 10s. making together the weekly sum of £2 to be paid to the credit of the said H. E. Rowell in her account at the Birkbeck Bank, Chancery Lane, in the county of London aforesaid. And also that all property (if any) of the said H. E. Rowell which but for this covenant would belong to or be receivable by the said J. R. Rowell in her right shall be held and enjoyed by her, the said H. E. Rowell, for her sole and separate use. And that if the said H. E. Rowell shall die in the lifetime of the said J. R. Rowell all property (if any) of the said H. E. Rowell which but for this covenant would on her death go and belong to the said J. R. Rowell in his marital right or as her administrator or as tenant by the curtesy shall go to the person or persons and in the manner to whom and in which the same would have gone if the said J. R. Rowell had died in her lifetime. Now this indenture witnesseth that in further pursuance of the said agreement and in consideration of the premises the said H. E. Rowell hereby covenants with the said J. R. Rowell that she will out of the provision made for her by these presents or otherwise provide and pay for all such necessary and other board, lodging, clothing, ornaments, medical attendance, comforts, recreation, and things whatsoever as she may now or hereafter require or obtain and shall in all respects support and maintain herself and shall pay and discharge all the debts, engagements, and liabilities which she may incur or enter into in respect of the matters aforesaid or if any other matters shall indemnify the said J. R. Rowell, his heirs, executors, and administrators, therefrom and from all actions, claims, proceedings, costs, damages and expenses, demands and liability on account thereof. And that she shall and will from time to time with and out of the said further sum of 10s. per week hereinbefore agreed to be paid by the said J. R. Rowell and without any further assistance from the said J. R. Rowell support, maintain, board, lodge,

clothe, and educate the said J. R. Rowell (the son) in a suitable manner and supply him with all things necessary or proper and shall and will indemnify the said J. R. Rowell from all actions, proceedings, costs, damages, claims, demands, and liability on account thereof. And also that she will henceforth live separate and apart from the said J. R. Rowell and shall not in any way molest, annoy, or interfere with the said J. R. Rowell. In witness whereof the said parties to these presents have hereunto set hands and seals the day and year first above written."

Up to the spring of 1897 the parties lived apart, and all the covenants therein were duly observed. In 1897, they frequently met each other on friendly terms, sometimes dining together at restaurants and going together to the theatre, and he at times used to take afternoon tea with her in the house where she lived, and where she earned a livelihood by letting lodgings. In April, 1897, the husband made some statements which concerned his health, by means of which he prevailed upon the wife to allow him to have marital intercourse with her on four occasions. They still continued, however, to occupy separate houses, and on no occasion did they spend a night under the same roof. The wife, who was the only witness called at the trial, stated that neither he nor she had any intention at the time of putting an end to the separation deed. The husband continued after this for a time to pay her a weekly allowance for the support of herself and their child who lived with her. From the husband's diary which was put in evidence it appeared that, in the autumn of 1897, he was still making overtures to the wife for a reconciliation, GRANTHAM, J., gave judgment for the wife. The husband appealed.

Priestley (*McCall*, *Q.C.*, with him) for the husband.
Sinclair (*Witt*, *Q.C.*, with him) for the wife.

LORD RUSSELL OF KILLOWEN, C.J.—This case seems to me to be by no means free from difficulty. The action is brought by a wife against her husband to recover money alleged to be due under a covenant in a separation deed. The action was tried before GRANTHAM, J., without a jury, and the only witness called was the wife.

The deed on which the action is brought was entered into by the husband and wife on Mar. 5, 1896. I will begin by saying that the deed is nothing more than a separation deed, and there is, therefore, no necessity to pay heed to observations made by judges on cases where a deed has contained other matters collateral to, and independent of, the subject of the separation of the husband and wife. This deed, then, being simply a separation deed, recites that differences have arisen between the parties, that they have agreed to separate, and that there is one child of the marriage. It then contains these covenants: It is clear that with regard to these sums of £1 10s. and 10s. to be paid by the husband to the wife, the covenant to pay is not absolute. The husband's liability under the covenant to pay the £1 10s. would come to an end if the parties ceased to live separate, and his liability to pay the 10s. would come to an end if the child ceased to reside with, or be under the care of its mother. It appears from the evidence that, after the separation, the wife kept a lodging-house, and that the husband sometimes visited her there. On four occasions in 1897 the husband prevailed on her to allow him to have connection with her. Besides this they often met in a more or less friendly way, and sometimes dined together at restaurants and went to the theatre. But after the four acts of intercourse they still continued to live apart in the real sense of the words, each at his or her own house, and he kept up until Jan. 1, 1898, the payments of the £1 10s. and the 10s. which he had covenanted to pay.

In my judgment, if the court were to arrive at the conclusion that the parties intended a real reconciliation, the whole deed would be at an end. The question is whether the facts warrant the court in coming to that conclusion. The onus of proving a reconciliation lies on the husband. The wife was the only witness called,

and she says that, in April, 1897, her husband came to her with a story of what his doctor told him, and in consequence of what he said she consented on four occasions to acts of marital intercourse. They were on friendly terms at that time, but she did not consider the deed at an end, nor did he. He was still paying her money under the deed, and she was taking care of the child. Suppose that the husband obtained judgment in this action, what would be the condition of the child? According to the terms of the deed, the boy is to be under the care of his mother. The husband is to be in no way liable for the boy's keep, and the wife is to indemnify him for any costs that may be imposed on him by law in respect of the child. If there had really been a reconciliation between the parties, the deed would have come to an end, and the boy would, therefore, cease to be under the care of his mother. The husband would be responsible for the boy. But here we find that the boy has continued all along under the care of his mother. This does not look as if the parties ever came to such a reconciliation as would put an end to the deed. But it was argued on behalf of the husband that the four acts of marital intercourse were enough to constitute a reconciliation.

No case has been cited to show that the mere fact of a few intermittent acts of connection between husband and wife would put an end to a separation deed. I agree that such acts, if unexplained, would be strong evidence, though not full proof, I think, of reconciliation. The circumstances under which such acts took place must be taken into consideration. Here we find that the wife was only induced to permit these acts by means of some extravagant statements made by the husband, and it appears that neither he nor she considered that any reconciliation had really taken place. From the husband's diary which was put in evidence it is clear that for some time after these four acts he was making overtures to the wife to live with him. For these reasons, I think that the husband has not discharged the onus which lay on him of proving a reconciliation, and the judgment of GRANTHAM, J., must be affirmed.

A. L. SMITH, L.J.—I am of the same opinion. The action is brought by a wife against her husband for arrears of money payable by the husband under a covenant in a separation deed. His covenant is to pay so long as he and she should live separate, and the husband's case is that, as they have come together again, the deed is void. I think that he has failed to prove his case, and I agree with all that my lord has said as to this. Proof of intercourse between a husband and wife would, in itself, be strong prima facie evidence of a reconciliation such as would probably put an end to a separation deed; but in the present case I think that counsel for the husband went too far in contending that the acts of intercourse were in themselves proof of reconciliation between the parties. The cases seem to me to go to this extent, that where there is a simple separation deed, such as we have here, it is put an end to by a reconciliation. The question for the court here is whether there has been a reconciliation. My Lord has dealt with the facts, and I agree that they do not show a reconciliation in the full sense of the word. Neither party intended a reconciliation, and neither thought that, by what had occurred, an end was put to the deed. The circumstances under which the acts of intercourse took place show that this is so, as well as the subsequent behaviour of the husband. I think that the judgment of GRANTHAM, J., was right, and that the appeal should be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. A separation deed, like other kinds of deeds, is subject to this incident, that it is to be construed according to what is contained within the four corners of it. It is not safe to say, as a rule, that this or that particular event will put an end to a separation deed. In each case the words of the deed itself must be looked at. Here, the husband's convenant to pay his wife is to last for their joint lives if they should so long live separate. We have to find out what the parties meant by that. In my opinion, they meant that,

notwithstanding any acts of marital intercourse, they had decided to live separate from each other. I also wish to add this: I conceive that a separation deed might be so worded that, though such clauses of it as were dependent on the husband and wife living separate might come to an end, yet, according to the true intention of the parties, the property clauses might still remain in force notwithstanding that the husband and wife resumed cohabitation.

Appeal dismissed.

Solicitors: *Nunn & Popham; F. C. T. Mortimer.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

R. *v.* COCKSHOTT AND OTHERS

[QUEEN'S BENCH DIVISION (Wright and Darling, JJ.), March 3, 1898]

[Reported [1898] 1 Q.B. 582; 67 L.J.Q.B. 467; 78 L.T. 168; 62 J.P. 325; 14 T.L.R. 264; 42 Sol. Jo. 346; 19 Cox, C.C. 3]

Magistrates—Procedure—Right of accused to claim trial by jury—Failure to inform accused of right—Quashing of conviction—Need for conviction to state accused was informed.

Failure by a court of summary jurisdiction to inform the accused, before the charge against him was gone into, that he had a right to claim trial by jury, pursuant to s. 17 (2) of the Summary Jurisdiction Act, 1879 [now s. 25 (3) of the Magistrates' Courts Act, 1952], **held** to render the conviction bad. It was not, however, necessary that the conviction should state that the accused had been informed of his right.

Semble, an accused could not waive the right given to him by s. 17.

The defendant was charged with an offence carrying, on summary conviction, imprisonment for more than three months. When the case was called on the justices' clerk was about to remind the justices to inform the defendant of his right to claim trial by jury under s. 17 of the Summary Jurisdiction Act, 1879, but desisted when he saw that the advocates were conferring on whether the defendant should plead Guilty. In the event the case proceeded without the justices having informed the defendant, pursuant to s. 17 (2), of this right, the defendant first pleading Not Guilty to the charge and later changing his plea to Guilty. The defendant was convicted and fined. In affidavits sworn by the defendant he said that he would have elected to be tried by a jury had he known of his right, and by his solicitors that they were ignorant of the defendant's right.

Held: since the caution in s. 17 (2) of the Act of 1879 had not been read to the defendant before he pleaded to the charge, the conviction was bad and must be quashed.

Notes. The relevant provisions of s. 17 of the Summary Jurisdiction Act, 1879, are now contained, with modifications, in s. 25 (1), (2) and (3) of the Magistrates' Courts Act, 1952. Section 25 (1) of the Act of 1952 has been amended by the Sexual Offences Act, 1956, s. 48 and Sched. 3.

Considered: *R.* v. *Beesby*, [1909] 1 K.B. 849. Followed: *R.* v. *Dixon, Southampton Justices, Ex parte Porteous* (1929), 142 L.T. 597. Considered: *Stefani* v. *John*, [1947] 2 All E.R. 615. Applied: *R.* v. *Kent Justices, Ex parte Machin*, [1952] 1 All E.R. 1123. Referred to: *R.* v. *Goldberg* (1904), 73 L.J.K.B. 970;

R. v. *Latham, Ex parte Roberts* (1943), 41 L.G.R. 99; *R.* v. *Salisbury and Amesbury Justices, Ex parte Greatbatch*, [1954] 2 All E.R. 326.

As to claim to trial by a jury, see 25 HALSBURY'S LAWS (3rd Edn.) 179, para. 330; and for cases see 33 DIGEST 318. For the Magistrates' Courts Act, 1952, s. 25, see 32 HALSBURY'S STATUTES (2nd Edn.) 443, and for the Sexual Offences Act, 1956, s. 48 and Sched. 3, see 36 HALSBURY'S STATUTES (2nd Edn.) 240, 254.

Case referred to in argument:

Turner v. *Postmaster-General* (1864), 5 B. & S. 756; 34 L.J.M.C. 10; 11 Jur.N.S. 137; 122 E.R. 1011; sub nom. *Shepherd* v. *Postmaster-General*, 5 New Rep. 80; 11 L.T. 369; 29 J.P. 166; 13 W.R. 89; 10 Cox, C.C. 15; 33 Digest 337, *478*.

Rule Nisi for a writ of certiorari to bring up to be quashed a conviction under s. 3 of the Betting Act, 1853, by the justices of the borough of Southport.

On Nov. 6, 1897, Joshua Rickerby was convicted of using an office at 7, Market Passage, Southport, for the purpose of betting with persons resorting thereto upon horse-races. It was contended that the conviction should be quashed since it did not appear from the conviction that the justices, before going into the charge, informed Rickerby that he had a right to be tried by a jury, and that, in fact, the justices did not so inform him.

On Nov. 6 the clerk to the justices, as the case was called on, was about to hand up a card to the chairman of the bench containing the statutory notice that the defendant might elect to be tried by a jury; but, seeing that a consultation was going on as to whether the defendant should plead Guilty, he desisted, and the case was continued without the notice being read at all, the defendant first of all pleading Not Guilty, so that his solicitor might cross-examine. After some evidence had been given on oath, the defendant, by the advice of his solicitors, pleaded Guilty. The justices fined him £50. Affidavits were filed on behalf of Rickerby to the effect that he would have elected to be tried by a jury if he had known that he had the right to do so. His solicitors also swore that they did not know that he had that right.

For the justices it was contended that by pleading guilty the accused waived his right to claim trial by jury under s. 17 of the Summary Jurisdiction Act, 1879. For the accused, Rickerby, it was submitted that under s. 17, informing the accused of his right to trial by jury was a condition precedent to the court's jurisdiction, and accordingly the conviction was bad and should be quashed.

Danckwerts for the justices.
J. R. Randolph for Rickerby.

WRIGHT, J.—To my mind this is a case of great importance. Rickerby was brought up before the justices on a charge under the Betting Act, 1853, a conviction for which might render him liable to imprisonment for six months with hard labour. The offence, therefore, was within s. 17 (1) of the Summary Jurisdiction Act, 1879, as being an offence

> "in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault."

That section further provides that a person "may on appearing before the court and before the charge is gone into, but not afterwards, claim to be tried by a jury," and thereupon the court shall deal with it as if it were an indictable offence. The second sub-section provides:

> "A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall

address him to the following effect: 'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury. Do you desire to be tried by a jury?' "

HIS LORDSHIP stated the facts, and continued: The first point raised was that the conviction must state the fact of the caution having been given; but that was not persisted in, and, in my opinion, that is not a good point, as s. 27 of the Summary Jurisdiction Act only applies to indictable offences tried summarily. It was then pointed out that the person charged must make his election "before the charge is gone into, but not afterwards." Then is it essential to the jurisdiction that this notice should be given? This power of electing is of no use to the person charged unless he knew that he had it. He must have the knowledge of his right to elect. That shows that it is necessary that the information should be given to him before the one opportunity on which he could make use of it has passed away. I think we have no right to fritter away the protection given to prisoners. The option is to be put to each prisoner before the charge is gone into, and the bench should ask him and give him the option whether he pleads guilty or not guilty. I think the chance should always be given. It is not material whether he knows of the right, but the option should always be stated. There can be no waiver of a right by a person entirely ignorant that he possessed such a right. The affidavits are all to the effect that neither the defendant nor his solicitors knew of the right to trial by jury. Moreover, I doubt very much whether there could be a waiver under this section, even if they had known.

DARLING, J.—I am of the same opinion. To accept the suggestion that the caution should be given after the plea had been taken would do away with the protection given by s. 17 of the Summary Jurisdiction Act. The exact time when the claim to have his trial by jury should be made by a prisoner is on appearing before the court and before the charge is gone into. The knowledge of his right may make all the difference in a plea by a prisoner. It must not be assumed in the case as a presumption of law that the prisoner or even the solicitors for him knew the law, for the statute made in effect an exception to the presumption by providing in terms that the information must be given.

Rule absolute.

Solicitors: *Rowcliffes, Rawles & Co.*, for *J. Smallshaw*, Southport; *Pritchard, Englefield & Co.*, for *Brighouse, Brighouse & Jones*, Southport.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

A

BENSAUDE *v.* THAMES AND MERSEY MARINE INSURANCE CO.

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Shand and Lord Davey), July 8, 1897]

B

[Reported [1897] A.C. 609; 66 L.J.Q.B. 666; 77 L.T. 282; 46 W.R. 78; 13 T.L.R. 501; 8 Asp.M.L.C. 315; 2 Com. Cas. 238]

Insurance—Marine insurance—Freight—Exception of "claim consequent on loss of time whether arising from peril of the sea or otherwise"—Damage caused by peril of the sea—Delay caused by repairs—Cancellation of charter.

C

A time policy of insurance on freight contained the following exception clause: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." After the commencement of the voyage the ship sustained damage from a peril of the sea, and returned to her port of loading. The necessary repairs caused a delay which frustrated the object of the venture, and the charterers, as they were entitled to do, cancelled the charter and the freight was totally lost. The shipowners sued the insurers for the loss of freight.

D

Held: the claim was consequent on loss of time within the exception clause and the underwriters were not liable.

Notes. Followed: *Turnbull, Martin & Co.* v. *Hull Underwriters Association*, [1900-3] All E.R. Rep. 85. Applied: *Russian Bank for Foreign Trades* v. *Excess Insurance* (1918), 87 L.J.K.B. 872. Considered: *Robertson* v. *Petros M. Nomikos, Ltd.*, [1939] 2 All E.R. 723; *Atlantic Maritime Co., Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086. Referred to: *Carras* v. *London and Scottish Assurance Corpn., Ltd.*, [1935] All E.R. Rep. 246.

E

As to total loss of freight in general, see 22 HALSBURY'S LAWS (3rd Edn.) 147-148; and for cases see 29 DIGEST 209 et seq.

F

Appeal by the plaintiffs in the action from an order of the Court of Appeal [1897] 1 Q.B. 29, reversing a decision of HENN COLLINS, J., 75 L.T. 155, in their favour.

The action was brought by the appellants, the owners of the steamship *Peninsular*, against the respondents, as underwriters, to recover a total loss under a policy of marine insurance for £1,500 on freight valued at £2,500 covering only the risk of total or constructive total loss and general average. The action was tried before HENN COLLINS, J., on June 15, 1896, when the following facts were proved or admitted. On April 3, 1895, the Portuguese government contracted with the Empreza Nacional and others for the transport of troops and stores from Lisbon to Lorenzo Marques. In pursuance of that contract a subsidiary contract was entered into on April 5, 1895, between the Empreza Nacional and the appellants, by which it was provided that the *Peninsular* should transport certain of the troops and should also load and carry a cargo of government stores from Lisbon to Lorenzo Marques, and that the Empreza Nacional, in addition to the sum to be paid for the transport of the troops, should pay to the appellants eight days after the arrival of the *Peninsular* at Lorenzo Marques, and after having received the same from the Portuguese government, the sum of fifteen million reis freight for the cargo. The *Peninsular* loaded the cargo at Lisbon, and sailed for Lorenzo Marques on April 15, being one of four transports carrying troops and stores which were urgently required by the Portuguese government at Lorenzo Marques. On the following day, April 16, the main shaft of the *Peninsular* broke by perils of the seas, and she had to be towed back to Lisbon, where she arrived on April 19. On April 20 she was surveyed, and it was found that the damage she had sustained by the perils of the seas could not be repaired at Lisbon, and that she must be taken to Cadiz to be repaired. All her cargo was thereupon discharged at Lisbon. The delay necessary

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for the purpose of taking the *Peninsular* to Cadiz, and repairing her, was such as to frustrate the objects of the adventure, and the Portuguese government and the Empreza Nacional put an end to the appellants' contract and refused to carry it out. It was proved that by Portuguese law they were entitled to do so, and that no freight was payable to the appellants, who totally lost their freight. The policy contained the following clause:

> "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise;"

and the question in the case was whether or not this clause freed the respondents from liability for the loss of freight claimed by the appellants.

Bigham, *Q.C.*, *Bucknill*, *Q.C.*, and *Leck* for the appellants.
J. Walton, *Q.C.*, and *Scrutton* for the respondents.

LORD HALSBURY, L.C.—This case has been very ably argued for the appellants, but I think that none of your Lordships entertain any doubt as to the conclusion at which we must arrive. If the words on which the question turns are to be read as part of the contract, it is impossible to support the judgment of HENN COLLINS, J. The words, if they are part of the contract, seem to be very plain. They are these:

> "Warranted free from any claim consequent upon loss of time arising from a peril of the sea or otherwise."

The *Peninsular* (the vessel insured by a policy which contained these words by way of exception) broke her main shaft. It is not denied that if it had been capable of being repaired within such time as would have enabled her to complete the adventure, there would have been no loss of freight. The reason why there was a loss of freight was that the repairs would have taken so long a time as would have defeated the adventure. That is how the loss of freight arose.

It has been assumed—and, indeed, it underlies the whole of the judgment of HENN COLLINS, J.,—that the right to insist upon the payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. There is a fallacy underlying that form of the argument, namely, that there must be a sufficiently ascertained condition of damage to show at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. It would be only a question of evidence which one might ascertain at that time, or wait until the facts had proved it by the occurrence of those facts subsequently. But the reason why the loss of freight has been incurred must be that the damage was of such a character that there was an impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it. The facts here have been ascertained, and we now know why the freight was lost. Why was it? Not simpliciter because the main shaft was broken, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage.

Then the question comes whether that is included in the language I have read,

> "warranted free from any claim consequent upon loss of time arising from a peril of the sea, or otherwise."

The main shaft being broken in consequence of a peril of the sea, what is the consequence of that? The consequence of that is that the vessel cannot, within the time, perform the voyage. Is that, or is it not, a "claim consequent upon loss of time arising from a peril of the sea." If this exception is part of the contract, and if it is applicable to the contract into which the parties have entered, I really am wholly incapable of following the argument that the present claim does not

come literally within the words. There is a sort of faint effort made to suggest that it is not part of the contract at all. Nobody says that it is not; nobody has ever ventured to say in terms that it is not, but there is a sort of insinuation to the effect that this warranty is only upon a piece of paper pasted on the margin of the policy. What is the relevancy of that? It either is, or is not, part of the contract. If it is part of the contract it is perfectly immaterial what part of the contract it appears in. It might as well have been incorporated in the original policy itself.

But then it is said—or when I say it is said, perhaps that is overstating it—it is rather suggested that this may not have been a sort of stipulation that was applicable to the particular contract which the parties were making. It appears to me that this case itself shows that these words can receive a reasonable and intelligible meaning as applicable to the contract into which the parties were entering. Then why am I to reject the clause. Is it because it is pasted on? Is it because it is aside of the rest of the contract? No one can gravely suggest that. Then I have to construe this as part of the contract, and, as I have already said, this case furnishes an illustration of what the parties were intending to do. They intended to except out of the liability they had otherwise entered into a claim which was consequent upon loss of time arising from a peril of the sea. If the claim was consequent upon loss of time occasioned in that way, then the warranty was to apply. This claim seems to me to be in the strictest sense consequent upon loss of time so occasioned in any ordinary and reasonable meaning that can be put upon the words. Therefore I think that the judgment of the court below was perfectly right, and I move your Lordships that it be affirmed.

LORD WATSON.—In this case I think that it is part of the appellants' own case that the breaking of the shaft of the *Peninsular*, owing to a peril of the sea, rendered inevitable such delay in the prosecution of her voyage as entitled the charterer to determine the adventure. The loss of freight, in my opinion, was consequent upon that delay in this sense, that but for delay occasioned by the breaking of the shaft there would have been no loss to claim. The only question that remains is whether the clause, which is one of the conditions pasted upon the document forming the contract between the parties, is to receive effect or no. For my own part, I think that there has been no cause whatever shown for rejecting it, and I can only add that I entirely agree with the opinions expressed by the learned judges of the Court of Appeal, because I think with them that the case which occurs here falls precisely within the words of the exception, which are introduced by the conditions. I therefore concur in the judgment which has been moved.

LORD HERSCHELL.—This a policy against total loss of freight. The learned counsel for the appellants were unable to suggest any case or class of cases to which the words of the warranty would apply unless it were to such a case as is now before your Lordships. I quite agree that, if you find in a policy, as you commonly do, a number of stipulations inserted, and, with reference to the subject-matter of a policy, one of those stipulations is on its natural construction inapplicable, it would not be right for the purpose of finding a meaning for that as applicable to that particular contract to torture or strain its language. The natural conclusion would be that the common form had been used with the insertion of certain warranties or conditions not applicable to the particular case as the policy was completed. This is, of course, not an uncommon occurrence. But if with reference to the subject-matter of the policy the particular stipulation is applicable without any straining or torturing of the language then it is the duty of the court construing the contract to give that natural meaning and construction to it as applicable to the subject-matter of the contract.

Can these words be properly applied to a policy against total loss of freight? It seems to me that they can, and that the present case is an illustration of a

perfectly proper application of them. The whole basis of the claim, of course, must be the loss of the subject-matter insured—that is, the freight. That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that, although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage, so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability. It seems to me not only is no violence done to the words but that they receive the natural, the ordinary, and reasonable signification when they are applied to such a case as this.

LORD SHAND and **LORD DAVEY** concurred.

Appeal dismissed.

Solicitors: *Lowless & Co.; Waltons, Johnson, Bubb & Whatton.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

SOUTH STAFFORDSHIRE WATER CO. *v.* SHARMAN

[Queen's Bench Division (Lord Russell of Killowen, C.J., and Wills, J.), May 12, 1896]

[Reported [1896] 2 Q.B. 44; 65 L.J.Q.B. 460; 74 L.T. 761; 44 W.R. 653; 12 T.L.R. 402; 40 Sol. Jo. 532]

Chattel—Ownership—Presumption—Chattel found on or under private land—Right of land owner to possession as against finder.

Where a chattel is found upon or under any land which is private property belonging to an owner who has a real de facto possession and exclusive control over such land and the things in or upon it, the presumption is that such chattel is in the possession of the owner of the land and that he is entitled to the possession as against the finder.

Bridges v. *Hawkesworth* (1) (1851), 21 L.J.Q.B. 75, distinguished.

Notes. Applied: *Johnson* v. *Pickering and Norton*, [1907] 2 K.B. 437; *Re Cohen, National Provincial Bank, Ltd.* v. *Katz*, [1953] 1 All E.R. 378. Referred to: *Hannah* v. *Peel*, [1945] 2 All E.R. 288; *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860.

As to finding of chattels, see 2 Halsbury's Laws (3rd Edn.) 99 et seq.; and for cases see 3 Digest (Repl.) 67 et seq.

Cases referred to:

(1) *Bridges* v. *Hawkesworth* (1851), 21 L.J.Q.B. 75; 18 L.T.O.S. 154; 15 Jur. 1079; 3 Digest (Repl.) 68, *85.*

(2) *Armory* v. *Delamirie* (1722), 1 Stra. 505; 93 E.R. 664; 3 Digest (Repl.) 67, *83.*

(3) *R.* v. *Rowe* (1859), Bell, C.C. 93; 28 L.J.M.C. 128; 32 L.T.O.S. 339; 23 J.P. 117; 5 Jur.N.S. 274; 7 W.R. 236; 8 Cox, C.C. 139, C.C.R.; 15 Digest (Repl.) 1086, *10,751.*

(4) *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch.D. 562; 55 L.J.Ch. 734; 55 L.T. 831; 35 W.R. 192; 2 T.L.R. 782; 3 Digest (Repl.) 69, *88.*

Also referred to in argument:

R. v. *Clinton* (1869), I.R. 4 C.L. 6; 15 Digest (Repl.) 1078, **6560.*

Brew v. *Haren* (1874), I.R. 9 C.L. 29; 44 Digest 74, *541 iii.*

Appeal by the plaintiffs from Lichfield County Court.

The action was an action of detinue brought by the plaintiffs to recover two gold rings as the property of the plaintiffs, found by the defendant in the Minster Pool, Lichfield. The plaintiffs claimed the return of the rings, or £5 for their value, and £1 damages for their detention. The plaintiffs were the freeholders by a conveyance dated Jan. 6, 1872, from the mayor, aldermen, and citizens of Lichfield, of land covered by the Minster Pool in Lichfield. The defendant was employed by the plaintiffs in August, 1895, with about forty other labourers, to clean out the pool, and while the defendant was so employed he found in the mud from the bottom of the pool the two gold rings in question. The plaintiffs demanded the rings from the defendant, but he refused to deliver them up, and the present action was then brought. It was proved as a fact that there was no special contract between the plaintiffs and the defendant as to the giving up any articles that might be found. The learned judge decided, upon the authority of *Armory* v. *Delamirie* (2), and *Bridges* v. *Hawkesworth* (1), that the defendant had a good title against all the world except the true owner. He, therefore, gave a verdict for the defendant with costs, and gave the plaintiffs leave to appeal upon the terms that the plaintiffs should pay the defendant's costs in any event. The plaintiffs appealed.

William Wills for the plaintiffs.
Disturnal for the defendant.

LORD RUSSELL OF KILLOWEN, C.J.—In this case I think that the learned county court judge was wrong, and that his judgment must be reversed. The case is an interesting one, and raises an interesting question. The action is brought to recover two gold rings from the defendant, and the defendant does not deny the detention of the rings, but he denies the plaintiffs' right to claim them. The plaintiffs are the owners in fee of certain land, on which this pool was situate, and for some purpose of their own the plaintiffs employed persons—amongst others the defendant—to clean out the pool. In the course of that cleaning several articles of interest were found, and amongst them these two rings. The plaintiffs were the freeholders of the pool, and they had the right to enjoin on those whom they employed what they were to do with the contents, or any part of the contents, of the pool.

It is no doubt correct, as was contended on behalf of the defendant, that before the plaintiffs can succeed they must make out that they had an actual control over the locus in quo, that is, the pool, and over the contents of the pool. Can it be said, under the circumstances of this case, that the Minster Pool and the contents of it were not under the control of the plaintiffs? I think they were under the control of the plaintiffs, just as the piece of iron found in the canal in *R.* v. *Rowe* (3) was held to be under the control of the canal company, although they were ignorant of the fact that it was there.

I think that the principle on which this case ought to be decided is well laid down, and also the distinction between this case and *Bridges* v. *Hawkesworth* (1) is well drawn, in POLLOCK AND WRIGHT ON POSSESSION, pp. 40, 41, where it is said, speaking of *Bridges* v. *Hawkesworth* (1):

> "A case like this illustrates the importance both of grasping the preliminary conception of facts and of keeping it clear from the supervening questions of right. The finder's right starts from the absence of any de facto control at the moment of finding. And decisions which seem contradictory must not be pronounced to be really so before we have attended to the possibility of differences of fact, which, though minute in themselves, may be material in their consequences. Thus in *Bridges* v. *Hawkesworth* (1) the court did not say that an object dropped by a guest in a private dwelling-house would not be in the custody of the master—'within the protection of his house'—and therefore in

A his possession; and PATTESON, J., did say that an innkeeper would have possession in the like case. . . . The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. So it was lately held concerning a prehistoric boat imbedded B in the soil: *Elwes* v. *Brigg Gas Co.* (4). It is free to any one who requires a specific intention as part of de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession, constituted by the occupier's general power and intent to exclude unauthorised interference."

C I think that passage is distinctly applicable to this case, and it shows the broad distinction between this case and the cases referred to for the defendant, and especially some of the cases where things were cast away into a public place or into the sea where it could not be said that there was in any one a real de facto possession, or a general power and intent to exclude unauthorised interference.

Bridges v. *Hawkesworth* (1) really stands by itself and on its own special grounds, D and, standing on its own grounds, I think the decision was perfectly right. There a person had dropped a bundle of bank notes in a public shop, public, that is to say, in the sense that it was open to the public. A customer came in and picked up the bundle of notes and showed it to the shopman, and afterwards gave it to the shopkeeper in order that he might advertise it. The owner was not found, and the shopkeeper afterwards refused to give up the notes to the customer who had E found them. The customer then brought an action against the shopkeeper for the notes, and it was held that he was justified in demanding the notes, and the true ground of that decision is stated by PATTESON, J., where he says (21 L.J.Q.B. at p. 78):

> "The notes never were in the custody of the defendant, nor within the protection of his house before they were found."

F The general principle within which the case falls seems to me to be that where there is possession of a house or land, with a manifest intention to exercise control over it, and the things in or upon it, and with control over that particular locus in quo, then if something is found on it by a person who is either a stranger or a servant, the presumption is that the possession of the thing so found is in the G owner of that locus in quo. For these reasons I think judgment must be for the plaintiffs.

WILLS, J.—I agree entirely with the judgment of the Lord Chief Justice, and I only wish to add that a decision to the contrary effect would, as it seems to me, be a great encouragement to dishonesty.

H *Appeal allowed.*

Solicitors: *Burton, Yeates & Hart*, for *Johnson, Barclay, Johnson & Rogers*, Birmingham; *Nelson & Son*, for *H. S. Chinn & Son*, Lichfield.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

RICE *v.* REED

[Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Vaughan Williams, L.JJ.), October 30, 1899] B

[Reported [1900] 1 Q.B. 54; 69 L.J.Q.B. 33; 81 L.T. 410]

Conversion—Waiver of right of action—Conversion by two persons—Action against one settled by payment to owner of part of proceeds of sale—Right of owner to proceed against other tortfeasor.

If the owner of goods which have been converted by two persons agrees to stay the action against one of the wrongdoers in consideration of a sum of money, part of the proceeds of the sale of the goods, without prejudice to his claim against the other wrongdoer, he does not thereby waive the tort and is not prevented from suing the other wrongdoer. C

The plaintiff's servant, without his authority, wrongfully sold his goods to the defendant and kept the proceeds. The defendant knew that the servant was dealing with the goods in an improper manner. When the plaintiff discovered the conversion of his goods it was found that the servant had £1,500 to his credit at a bank. The plaintiff brought an action against the servant and the bank claiming, as against the servant, damages for conversion, and, alternatively, the sum of £1,500 as money had and received to his use, and against the servant and the bank an injunction restraining any dealing with the money, alleging that it was part of the proceeds of the conversion. The plaintiff obtained an interlocutory injunction in the terms claimed, but the action was stayed by consent on the terms that £1,125 of the £1,500 should be paid to the plaintiff in satisfaction of all claims against the servant, but without prejudice to his claim against the defendant. After the injunction was obtained, but before the first action was settled, the plaintiff commenced the present action against the defendant claiming damages for conversion. The defendant contended that the plaintiff, with full knowledge of the facts, had ratified the servant's sale of the goods and had thereby waived the tort and was precluded from suing him for conversion. D E F

Held: the plaintiff never intended to forgo his claim against the defendant and had accepted the sum of money without prejudice to that claim; he had, therefore, not elected to waive the tort and was not estopped from suing the defendant. G

Notes. Applied: *Apley Estates Co.* v. *De Bernales*, [1946] 2 All E.R. 338. Referred to: *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20.

As to waiver of tort, see 38 Halsbury's Laws (3rd Edn.) 798 et seq.; and for cases see 43 Digest 535 et seq. H

Cases referred to:

(1) *Morris* v. *Robinson* (1824), 3 B. & C. 196; 5 Dow. & Ry.K.B. 34; 107 E.R. 706; 43 Digest 536, *708*.

(2) *Burn* v. *Morris* (1834), 2 Cr. & M. 579; 4 Tyr. 485; 3 L.J.Ex. 193; 149 E.R. 891; 42 Digest 996, *236*. I

(3) *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 43 Digest 536, *711*.

Also referred to in argument:

Brewer v. *Sparrow* (1827), 7 B. & C. 310; 1 Man. & Ry.K.B. 2; 6 L.J.O.S.K.B. 1; 108 E.R. 739; 43 Digest 535, *704*.

Valpy v. *Sanders* (1848), 5 C.B. 886; 17 L.J.C.P. 249; 11 L.T.O.S. 201; 12 Jur. 483; 136 E.R. 1128; 43 Digest 535, *706*.

Appeal by the defendant from a decision of LAWRANCE, J., after the trial of the action with a jury.

The plaintiff brought this action to recover from the defendant £5,000 damages for conversion of a large quantity of sawdust belonging to the plaintiff. The plaintiff carried on business as a dyer of furskins. In the process of cleaning the skins a large quantity of sawdust was used. The sawdust was used several times, and, if properly and thoroughly used, became so impregnated with dye as to become of little value. The plaintiff had, for many years, in his employ a man named Soltau. It was part of Soltau's duty to see to the sending away of the waste sawdust, to make all arrangements therefor, to give directions as to the loading of the vans which removed the waste sawdust, and to see that no sawdust was so removed which had not been thoroughly used. The waste sawdust was for some years removed by the defendant Reed, and the plaintiff was unable to make any arrangement for payment for this sawdust. Soltau had no authority to sell or receive payment for any sawdust, and the plaintiff believed that no payment was made by Reed for any sawdust. In February, 1898, the plaintiff discovered that for some years Soltau had been selling to Reed large quantities of sawdust, some of which had not been used at all, and some of which had been only partially used, and that Soltau had been paid by Reed, by cheques, a sum amounting to upwards of £1,500 for this sawdust. These cheques were paid by Soltau into his own account at the Birkbeck Bank, and on Feb. 18 there was a sum of £1,500 standing to the credit of Soltau at that bank. On Feb. 5, 1898, the plaintiff caused Soltau to be arrested, and charged him with the theft of sawdust; and on Feb. 17 preferred further charges of embezzlement against him.

On Feb. 19, 1898, the plaintiff commenced an action against Soltau and the Birkbeck Bank. The indorsement of the writ was as follows:

> "The plaintiff's claim is for (1) Damages from the said defendant Henry Soltau for that he in the years 1891 to 1898 inclusive converted to his own use and wrongfully deprived the plaintiff of the use and possession of a large number of bags of sawdust belonging to the said plaintiff which the said defendant Henry Soltau wrongfully sold during the said period for sums amounting to upwards of £1,500; (2) alternatively to the claim in paragraph (1), payment by the defendant Soltau to the plaintiff of the sum of £1,500 and whatever other sum or sums may be found to be due from the defendant Henry Soltau to the said plaintiff as money had and received by the said defendant Henry Soltau for the said plaintiff's use being the proceeds of the sale by the said defendant Henry Soltau of the said sawdust belonging to the said plaintiff and not accounted for by the said defendant Henry Soltau to the said plaintiff; (3) payment and transfer by the defendant bank to the said plaintiff of a sum of £1,500 now standing in their books to the account and credit of the said defendant Henry Soltau and any interest thereon; (4) an injunction to restrain until trial of this action or further order the said defendant Henry Soltau, his servants and agents, from in any way charging, incumbering, disposing of, drawing out, or otherwise dealing with the said sum of £1,500 or any part thereof and from receiving any interest due or to accrue due on the same or any part thereof, and to likewise restrain the defendant bank from parting with out of their custody or in anywise dealing with the said sum of £1,500 or any part thereof and any interest thereon."

On Feb. 19, 1898, on the application of the plaintiff, an order was made at chambers restraining the defendant Soltau and the defendant bank, until Feb. 23 or further order, from in anywise dealing with the sum of £1,500 standing in the books of the bank to the account and credit of the defendant Soltau or any part thereto or any interest thereon. On Feb. 23 an order was made continuing the injunction against the bank until the trial of the action; and on Mar. 8 a similar order was made with regard to the injunction against Soltau. In an affidavit in support of the application

for the injunction the plaintiff verified the facts as above stated, and alleged that the £1,500 standing to the credit of Soltau at the Birkbeck Bank was part of the proceeds of the sale of the sawdust. On Mar. 1, 1898, Soltau was convicted of larceny of the sawdust.

On April 22, 1898, the plaintiff commenced the present action against Reed claiming £5,000 damages for conversion of the sawdust. Upon June 3, 1898, the plaintiff's solicitors wrote to the solicitors of Soltau saying that, on behalf of their client, they agreed, in consideration of Soltau consenting to an application by the plaintiff for an order directing payment to him of the sum of £1,125 (part of the sum of £1,500) standing in the hands of the Birkbeck Bank, in respect of the sawdust (of the value of £5,000) claimed by the plaintiff in the action and of his costs, not to proceed further in respect of the said sawdust against Soltau personally and to stay all proceedings in the action, and that they would also agree on behalf of the plaintiff to an order directing payment to Soltau of the sum of £375, the balance of the said sum of £1,500. This letter concluded as follows:

> "This agreement is without prejudice to our client's claim against Mr. James Reed and any other person or persons in respect of the said sawdust or otherwise in relation thereto."

A settlement was arrived at upon the terms of that letter, and on June 10, 1898, an order was made by consent, in the action against Soltau and the bank, by which it was ordered that the bank should out of the sum of £1,500 and the interest thereon pay to the plaintiff the sum of £1,125 together with the interest thereon since Feb. 19, 1898, the same being accepted by the plaintiff in full settlement of all claims, costs, and damages in whatever respect arising against the defendant Soltau, and that the balance—viz., £375—together with the interest thereon should be paid to the solicitors of Soltau; and it was further ordered that the injunctions should be dissolved upon such payment.

The present action was tried in November, 1898, before LAWRANCE, J., with a jury, when the jury found that the defendant knew that Soltau was dealing with the sawdust in an improper manner. Upon further consideration, the defendant contended that the plaintiff had, with full knowledge of the facts, ratified Soltau's sale of the sawdust and waived the tort, and was precluded from suing the defendant for conversion. The learned judge gave judgment in favour of the plaintiff for damages to be assessed by an official referee, the amount received from Soltau in the previous action to be deducted from the amount of damages. The defendant appealed.

Witt, Q.C., and *H. A. Forman* for the defendant.

Sir E. Clarke, Q.C., *Gill, Q.C.*, and *Galbraith* for the plaintiff were not called on to argue.

LORD RUSSELL OF KILLOWEN, C.J.—This was an action of trover and conversion against the defendant, which was tried before LAWRANCE, J., with a jury. One question only was left to the jury—viz., whether the defendant had received the goods of the plaintiff knowing them to have been stolen. The jury found that the defendant knew that the goods were being improperly dealt with by the plaintiff's servant. That was the only question of fact left to the jury. I assume that it is for the court to draw any other inference which may be necessary from the facts and circumstances of the case. The question which has been argued on this appeal is whether the plaintiff was estopped from maintaining this action of trover and conversion by reason of his having elected, by his dealings with his servant, to affirm the authority of his servant to deal with the goods. It is, I think, quite clear that the plaintiff never did in fact intend to forego his claim against the present defendant for conversion. The plaintiff received only £1,125 from his servant, and he accepted that sum without prejudice to his claim against the present

defendant. The question therefore is substantially whether the circumstances of this case are such as to require the court to hold that the plaintiff so acted as to be estopped from claiming against the defendant for trover and conversion.

The plaintiff's servant Soltau was convicted of larceny on Mar. 1, 1898. Before this the plaintiff had commenced an action against Soltau and the Birkbeck Bank, claiming damages for conversion and alternatively making a claim for money had and received. That action never proceeded further than the writ. Considering the verdict of the jury in the present case, that the defendant knew that Soltau was improperly dealing with the sawdust, it is clear that he was a party to torts against the plaintiff for which he was separately liable, though in a certain sense they were joint acts of tort. In these circumstances there was an application for an interim injunction made by the plaintiff, in the action against Soltau, in which he made an affidavit. In that affidavit the plaintiff said that the money standing to the credit of Soltau at the bank was part of the proceeds of the sale of his sawdust. An interim injunction, restraining any dealing with the money at the bank until the trial of the action, was obtained. Doubtless, if the plaintiff had gone to trial in that action and taken a judgment for money had and received to his use, that would have been a conclusive election by him to waive the tort; but he did not do so. In April, 1898, he brought the present action against the defendant for conversion, claiming from him the true value of the sawdust. Then an arrangement was made by the plaintiff with Soltau that £1,125 should be paid out of the money in the bank to the plaintiff, and that all claims against Soltau should be discharged, but that the plaintiff's claim against the present defendant should be preserved. This action was tried in November, 1898. The jury gave a verdict upon one question of fact only; all other inferences of fact being left to the court.

Are we obliged to say, contrary to the real intention of the plaintiff, that he so acted as to conclusively elect to ratify the sale of his goods by Soltau, and to waive the tort? In my opinion, we are not bound to so hold. I agree that the claim which was made in the action against Soltau, and the proceedings taken in that action, do raise a difficulty, but not an insuperable one. I think that the cases do not compel us to come to the conclusion that the plaintiff is estopped from claiming against the present defendant for conversion. *Morris* v. *Robinson* (1) is important in the consideration of the question. There the master of a ship, which was injured by perils of the sea, put in to Mauritius and there abandoned the ship and cargo, which were sold under an order of the court and the proceeds paid into court. The owners of the cargo applied for payment out of court to them of the proceeds of sale, but the money was not paid out to them. It was held that this application did not prevent the owners of the cargo from suing the purchasers upon the ground that the sale was wrongful. That case seems to establish the proposition that an application made to the court for payment of the proceeds of sale of the goods is not conclusive proof of an election to treat the sale as authorised. That seems to me to answer the contention of the defendant in the present case. Indeed, in this case, no application of that kind was made. I think that *Burn* v. *Morris* (2) is in favour of the plaintiff. In that case it was held that the plaintiff could sue the defendant for conversion of a lost bank-note, although part of the proceeds had been paid to him by the defendant, acceptance of part of the proceeds not being a waiver of the tort. Further, the result of the proceedings against Soltau went to the relief of the present defendant, which is a not unimportant consideration. I arrive, therefore, at the conclusion that there are no circumstances in this case which compel the court to hold that there was a conclusive election by the plaintiff to ratify the acts of Soltau. The appeal therefore fails, and must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The plaintiff brought this action to recover £5,000 damages for conversion of his goods by the defendant. The jury found that the defendant knew that the plaintiff's servant, Soltau, was dealing with the goods improperly. The defendant contends that the plaintiff cannot sue him

in trover, because he took proceedings against Soltau and waived the tort and affirmed the sale of his goods.

There are authorities which show that, when an action has been brought to recover the proceeds of a sale as money had and received to the plaintiff's use, the plaintiff thereby affirms the sale and cannot afterwards sue for tort, having made an unequivocal election to affirm to the sale. Those cases were rightly decided and are binding upon us. What happened in the present case? The plaintiff sued Soltau, claiming in the alternative damages for conversion and money had and received. We cannot say that this was an election to waive the tort and affirm the sale. The plaintiff, in the action against Soltau, applied for and obtained an interim injunction to prevent Soltau dealing with the money standing to his credit at the bank. The object of that application was clear; it was to save some of the proceeds of the theft. In *Smith* v. *Baker* (3), BOVILL, C.J., says (L.R. 8 C.P. at pp. 355, 356):

> "The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. . . . But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort, and so the commencement of an action of trespass or trover is a conclusive election the other way. . . . But there is another class of cases in which an act is of an ambiguous character, and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law."

If a claim is made both for conversion and for money had and received, where is the conclusive election to waive the tort? I am clearly of opinion that in this case there was not, as a matter of fact, any election by the plaintiff to waive the tort. I agree that the appeal must be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. The key to this case is the fact that there is no judgment of the court upon which the defendant can rely as an answer to the present action, but only a consent order to the effect that the action against Soltau should be stayed, upon terms, without prejudice to the plaintiff's claim against the present defendant. If there had been a judgment in trover in the other action, and an assessment of damages, I agree that the defendant would be entitled to succeed in this action. There was not, however, any judgment in trover in the other action. Again, if judgment had been recovered, in the other action, for money had and received to the plaintiff's use, in the same way the plaintiff would have conclusively elected to waive his right to proceed in tort, and that waiver would enure for the benefit of those liable with the defendant against whom that judgment had been obtained. But this case is quite different. Although the order in the action against Soltau was drawn up as an order of the court, yet is was only a consent order, and the correspondence shows that, at the very time, the defendant was reserving his rights against the present defendant. I wish to point out that, where an action is brought for damages for a tort, the right of the plaintiff to reserve his rights against another wrongdoer is larger than in cases of claims upon a contract. If the plaintiff chooses to compromise his claim, even in an action upon a contract, and reserves his rights against a joint debtor, that prevents the latter from setting up the compromise as an answer to a claim against himself.

Appeal dismissed.

Solicitors: *J. Westcott; Firth & Co.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

WILKINSON AND ANOTHER *v.* DOWNTON

[Queen's Bench Division (Wright, J.), April 30, May 8, 1897]

[Reported [1897] 2 Q.B. 57; 66 L.J.Q.B. 493; 76 L.T. 493; 45 W.R. 525; 13 T.L.R. 388; 41 Sol. Jo. 493]

Damages—Mental shock—Statement to wife of injury to husband.

The defendant falsely and maliciously represented to a wife that her husband had been seriously injured and was in great danger, the shock caused by that statement brought on dangerous and serious illness, and the husband was put to expense for medical assistance. In an action by the husband and wife for damages for mental anguish, injury to health, and out-of-pocket expenses,

Held: as the defendant had wilfully and unjustifiably done an act calculated to cause physical harm to the plaintiff, an intention to produce such a result must be imputed to him; the damages claimed were not too remote; and, therefore, the plaintiffs were entitled to succeed.

Notes. Considered: *Dulieu* v. *White & Sons*, [1900-3] All E.R. Rep. 353. Approved and Applied: *Janvier* v. *Sweeney*, [1918-19] All E.R. Rep. 1056. Considered: *Hambrook* v. *Stokes Bros.*, [1924] All E.R. Rep. 110. Referred to: *Shapiro* v. *La Morta* (1923), 40 T.L.R. 39; *Hay or Bourhill* v. *Young*, [1942] 2 All E.R. 396; *King* v. *Phillips*, [1953] 1 All E.R. 617.

As to remoteness of damage in tort, see 11 Halsbury's Laws (3rd Edn.) 277 et seq.; and for cases see 17 Digest (Repl.) 121 et seq.

Cases referred to:

(1) *Pasley* v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 35 Digest 25, *163.*

(2) *Langridge* v. *Levy* (1837), 2 M. & W. 519; 6 L.J.Ex. 137; affirmed sub nom. *Levy* v. *Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi* v. *Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex. Ch.; 35 Digest 51, *464.*

(3) *Lynch* v. *Knight* (1861), 9 H.L.Cas. 577; 5 L.T. 291; 8 Jur.N.S. 724; 11 E.R. 854, H.L.; 32 Digest 171, *2093.*

(4) *Victorian Railways Comrs.* v. *Coultas* (1888), 13 App. Cas. 222; 57 L.J.P. 69; 58 L.T. 390; 52 J.P. 500; 37 W.R. 129; 4 T.L.R. 286, P.C.; 17 Digest (Repl.) 122, *333.*

(5) *Pugh* v. *London, Brighton and South Coast Rail. Co.*, [1896] 2 Q.B. 248; 65 L.J.Q.B. 521; 74 L.T. 724; 44 W.R. 627; 12 T.L.R. 448; 40 Sol. Jo. 565, C.A.; 29 Digest 401, *3178.*

(6) *Bell* v. *Great Northern Rail. Co. of Ireland* (1890), 26 L.R.Ir. 428; 36 Digest (Repl.) 197, **1852.*

(7) *Allsop* v. *Allsop* (1860), 5 H. & N. 534; 29 L.J.Ex. 315; 2 L.T. 290; 6 Jur.N.S. 433; 157 E.R. 1292; sub nom. *Alsopp* v. *Alsopp*, 8 W.R. 449; 32 Digest 173, *2110.*

(8) *Jones* v. *Boyce* (1816), 1 Stark. 493, N.P.; 36 Digest (Repl.) 23, *101.*

(9) *Wilkins* v. *Day* (1883), 12 Q.B.D. 110; 49 L.T. 399; 48 J.P. 6; 32 W.R. 123, D.C.; 36 Digest (Repl.) 209, *1105.*

(10) *Harris* v. *Mobbs* (1878), 3 Ex.D. 268; 39 L.T. 164; 42 J.P. 759; 27 W.R. 154; 36 Digest (Repl.) 39, *194.*

(11) *Smith* v. *Johnson & Co.* (1897), cited in, [1897] 2 Q.B. p. 61; 66 L.J.Q.B. p. 496; 76 L.T. p. 494; 45 W.R. p. 526; 13 T.L.R. p. 390; 41 Sol. Jo. 493, D.C.; 36 Digest (Repl.) 197, *1036.*

Further Consideration as to the legal liability of the defendant for damages in an action tried by Wright, J., with a common jury.

The action was brought by the plaintiffs against the defendant to recover damages for false, fraudulent, and malicious representation. The paragraphs of the statement of claim, so far as they relate to the present point, were as follows:

"(2) On April 9, 1896, the plaintiff Thomas Andrew Wilkinson went by train to see the Harlow races, and in the evening of the same day, the plaintiff Thomas Andrew Wilkinson being then absent, the defendant entered the public-house at 25, St. Paul's Road and then and there falsely, fraudulently, and maliciously told the plaintiff Lavinia Elizabeth Wilkinson that he had received a message from her said husband that the said Thomas Andrew Wilkinson had had a smash up and was at that time lying at the Elms public-house, Leytonstone, and that the said Thomas Andrew Wilkinson had desired the said defendant to request the plaintiff Lavinia Elizabeth Wilkinson to go down at once with a cab and fetch some pillows to take her husband home. The said defendant further falsely and maliciously said to the plaintiff Lavinia Elizabeth Wilkinson that her said husband had returned from the races with some friends in a waggonette and was seriously injured, all of which statements the said defendant well knew to be false and fraudulent and spoken by him the said defendant with intent maliciously to and well knowing that he would thereby aggrieve, injure, and annoy the said plaintiff Lavinia Elizabeth Wilkinson. (3) By reason of the said false, fraudulent, and malicious statements of the said defendant, the plaintiff Lavinia Elizabeth Wilkinson suffered great mental anguish, and was made seriously ill, and her hair was turned white and her life was for some time in great danger, and the plaintiff Thomas Andrew Wilkinson, by reason of the grievances herein complained of, has suffered distress of mind on account of his said wife's condition, and incurred considerable expense for medical attendance on his said wife and otherwise in respect of her said illness, and has lost the services of his said wife, and has been otherwise damnified."

The plaintiffs were allowed to amend their claim by adding the expenses directly caused by the false statement, which were the railway fares of the men sent to fetch the husband home. The learned judge left the following questions to the jury: (i) Did the defendant speak the words alleged or to that effect? Answer, Yes. (ii) Did he mean them to be heard and acted upon, or say them in such a way as if so meant? Yes. (iii) Were they believed and acted upon? Yes. (iv) Were they false to his knowledge? Yes. (v) What were the damages with regard to the journey? 1s. 10½d. (vi) Was the illness the effect of shock from the words? Yes. (vii) What were the damages caused by the illness of the female plaintiff? £100.

Warburton and *Talbot* for the plaintiffs.
Abinger for the defendant.

Cur. adv. vult.

May 8, 1897. **WRIGHT, J.**, read a judgment in which he referred to the plaintiffs' allegations, in the statement of claim, and continued: The defendant, in the execution of what he seems to have regarded as a practical joke, represented to the female plaintiff that he was charged by her husband with a message to her to the effect that the husband had been smashed up in an accident, and was lying at the Elms public-house at Leytonstone with both legs broken, and that she was to go at once in a cab to fetch him home. All this was false. The effect of this statement on the female plaintiff was a violent shock to the nervous system producing vomiting and other more serious and permanent physical consequences, at one time threatening her reason and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical treatment of her. These consequences were not in any way the result of previous ill-health or weakness of constitution, nor was there any evidence of predisposition to nervous shock or of any other idiosyncrasy. In addition to these matters of substance there is a small claim for 1s. 10½d. for the cost of railway fares of persons sent by the female plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10½d. expended in railway fares on the faith of the defendant's statement, it is clearly within the scope of the decision

in *Pasley* v. *Freeman* (1). It was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the £100, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and, therefore, within the doctrine established by *Pasley* v. *Freeman* (1) and *Langridge* v. *Levy* (2). I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement, intending it to be acted on, must make good the damage naturally resulting from its being acted on. Here is no injuria of that kind. I think, however, that the verdict may be supported on another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the female plaintiff, i.e., to infringe her legal right to personal safety, and has thereby in fact caused physical harm to her. That proposition, without more, appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused, nor any motive of spite, is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced, that an intention to produce it ought to be imputed to the defendant regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority I should give the same answer, and on the same grounds, as to the last question, and say that it was not too remote. Whether, as the majority of the Lords thought in *Lynch* v. *Knight* (3), the criterion is in asking what would be the natural effect on reasonable persons, or whether, as LORD WENSLEYDALE thought, the possible infirmities of human nature ought to be recognised, it seems to me that the connection between the cause and the effect is sufficiently close and complete.

It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an injuria to entitle the plaintiffs to recover in a case where damage is a necessary part of the cause of action. One is *Victorian Railways Comrs.* v. *Coultas* (4), where it was held in the Privy Council that illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in *Pugh v. London, Brighton, and South Coast Rail. Co.* (5) as open to question. It is inconsistent with an earlier decision of the Court of Appeal in Ireland (*Bell* v. *Great Northern Rail. Co. of Ireland* (6)), where the Irish Exchequer Division declined to follow *Victorian Railways Comrs.* v. *Coultas* (4), and it has been disapproved in the Supreme Court of New York (see POLLOCK ON TORTS (4th Edn.), p. 47 (n.)). Nor is it altogether in point, for there was not in that case any element of wilful wrong, nor was perhaps the illness so direct and natural a consequence of the defendant's conduct, as in this case.

On these grounds it seems to me that *Victorian Railways Comrs.* v. *Coultas* (4) is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in *Allsop* v. *Allsop* (7), which was approved in the House of Lords in *Lynch* v. *Knight* (3). In that case it was held by POLLOCK, C.B., MARTIN, BRAMWELL, and WILDE, BB., that illness caused by a slanderous im-

putation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the grounds that, in all the innumerable actions for slander which had occurred, there were no precedents for alleging illness to be sufficient special damage; and that it would be an evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case, nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person falsely tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that the case might be one of criminal homicide; or that, if a serious aggravation of illness ensued, damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions are cited in MR. BEVEN'S book on NEGLIGENCE as inconsistent with the decision in *Victorian Railways Comrs.* v. *Coultas* (4), such as *Jones* v. *Boyce* (8), *Wilkins* v. *Day* (9), *Harris* v. *Mobbs* (10). But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or the horse was really the result not of that act, but of a fright which rendered that act involuntary, and which, therefore, ought to be regarded as itself the direct and immediate cause of the damage.

In *Smith* v. *Johnson & Co.* (11), decided in January, 1897, BRUCE, J., and I held that, where a man was killed in the sight of the plaintiff by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present one.

Judgment for plaintiffs.

Solicitors: *J. E. Waters; G. E. Philbrick.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

WHITE *v.* TURNBULL, MARTIN & CO.

[COURT OF APPEAL (A. L. Smith, Chitty and Vaughan Williams, L.JJ.), May 10, 1898]

[Reported 78 L.T. 726; 14 T.L.R. 401; 8 Asp.M.L.C. 406; 3 Com. Cas. 183]

Ship—Charter—Broker's commission—Commission "on all hire earned"—Cancellation of charterparty—Commission due to broker.

The plaintiff, acting as broker for shipowners, obtained a time charterparty for their ship on terms of being paid a commission on all hire earned. During the currency of the charterparty litigation arose between the shipowners and the charterers as to the fitness of the ship for the purposes for which she was chartered, which resulted in the cancellation of the charterparty, there being no wilful act or default on the part of the shipowners in bringing about this result.

Held: there being no implied term in the charterparty that the plaintiff was to receive commission during the whole of the currency of the charterparty, he was only entitled to commission on the hire actually earned.

Notes. Approved: *L. French & Co., Ltd.* v. *Leeston Shipping Co., Ltd.*, [1922] All E.R. Rep. 314.

As to stipulations in a charterparty as to payment of commission, see 35 HALSBURY'S LAWS (3rd Edn.) 325 et seq.; and for cases see 41 DIGEST 349 et seq.

Cases referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 58 L.J.P. 73; 60 L.T. 654; 37 W.R. 439; 5 T.L.R. 316; 6 Asp.M.L.C. 373, C.A.; 12 Digest (Repl.) 686, *5274.*

(2) *Hamlyn & Co.* v. *Wood & Co.* [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

Also referred to in argument:

Inchbald v. *Western Neilgherry Coffee, Tea, and Cinchona Plantation Co., Ltd.* (1864), 17 C.B.N.S. 733; 5 New Rep. 52; 34 L.J.C.P. 15; 11 L.T. 345; 10 Jur.N.S. 1129; 13 W.R. 95; 144 E.R. 293; 1 Digest (Repl.) 632, *2118.*

Green v. *Lucas* (1875), 33 L.T. 584; 40 J.P. 390, C.A.; 1 Digest (Repl.) 590, *1899.*

Fuller v. *Eames* (1892), 8 T.L.R. 278; 1 Digest (Repl.) 590, *1903.*

Rhodes v. *Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 1 Digest (Repl.) 629, *2106.*

Appeal from a decision of BIGHAM, J., at the trial of the action without a jury.

By a charterparty dated Sept. 14, 1896, obtained for the defendants through the intervention of the plaintiff, and made between the defendants as owners and the Jamaica Fruit Importing and Trading Company of London as charterers, the steamship *Elderslie* was let to the charterers for the term of twelve calendar months, she being tight, staunch, and strong, and in every way fitted for the service, the charterers to pay for the use and hire of the vessel at the rate of £1,050 per month. It contained provisions for the ceasing of payment of hire in the event of loss of time from deficiency of men or stores, breakdown of machinery, etc., and the owners agreed to place at charterers' disposal in good working order the refrigerating engine and plant then on board for the carrying of fruit. The charterparty also provided for the payment of one-third only of the agreed hire in the event of delay under certain circumstances. Should the vessel be lost, the hire was to cease on the day of such loss. The printed form of charterparty which was used also contained this clause:

"A commission of 5 per cent. on the estimated gross amount of freight or hire due on the signment hereof, ship lost or not lost, to John White,"

but the latter words of this clause were struck out and other words inserted in writing, so that, in the charterparty as signed by the defendants, this clause ran, "A commission of 5 per cent. on all hire earned to be paid to John White." The plaintiff received commission under this agreement on the hire earned during the first two months of the charterparty. In the third month of the charterparty, disputes arose between the owners and the charterers with reference to the fitness of the ship for the purposes for which she had been chartered, and litigation commenced between them. On the trial of that action, judgment was entered by consent for the charterers on terms, one of which was that the charterparty should be cancelled. The plaintiff then commenced the present action claiming damages for breach of contract in respect of loss of commission for hire during the last ten months of the charterparty. BIGHAM, J., gave judgment for the defendants. The plaintiff appealed.

Lawson Walton, Q.C. (*J. Eldon Bankes* with him), for the plaintiff.

Joseph Walton, Q.C., and *Leck*, for the defendants, were not called on to argue.

A. L. SMITH, L.J.—I entirely agree with the decision of BIGHAM, J. The charterparty, on the terms of which the plaintiff bases his claim for commission, was drawn up on one of the printed forms used by him which all contain a clause

that a commission of 5 per cent. on the estimated gross amount of freight or hire should be paid to John White on the signing of the agreement. That clause is an absolute contract for the payment of that amount of commission. It is clear that the owners, who are now being sued, objected to signing a charterparty with such a clause, because the latter part of it was struck out, and instead of it words were inserted by which it was agreed that a commission of 5 per cent. on all hire earned should be paid to the plaintiff. That was clearly put in as a limitation of the obligation of the defendants with regard to the commission to be paid.

I cannot do better than refer to the judgment delivered by BIGHAM, J. He points out that the plaintiff cannot claim commission on hire actually earned, except in respect of the first two or three months use of the ship under the charterparty, and that claim is admitted by the defendants. He then refers to the argument put forward on behalf of the plaintiff that there was an implied term in the agreement that the defendants would do nothing to prevent commission becoming payable to the plaintiff, that is to say, that they would keep the charterparty alive for the twelve months, and do all things necessary to earn freight under it. The learned judge observes that the plaintiff was driven to contend that the hire was not earned by reason of a breach of the charter by the defendants:

> "The question, therefore, comes round to this: Was there any such breach as to entitle the plaintiff to claim in respect of it? I think not. I have to gather the intention of the parties from the language of the clause and the surrounding circumstances. I think the intention of both parties was that commission should only be payable upon hire actually earned, and that all risks which might interfere with the earning of hire, short possibly of the defendants' own wilful default, should be shared by them both; that is to say, if from causes such as brought this charter to an end no hire was earned, the plaintiff was to be paid no commission. The commission clause seems to me to have been expressed in its present terms for the very purpose of preventing disputes of the kind which have arisen in this case."

I entirely agree with that. There is no evidence before us that the cancellation of the charterparty was brought about by any wilful acts of the defendants such as are the subject of the cases that have been cited.

Taking the meaning of this agreement to be that which I hold it is, none of the cases cited has any application to the case now before us, and, therefore, I shall not discuss them. We know that there was a dispute between the parties to the charterparty followed by litigation, at the end of which they came to an agreement that the charterparty should be cancelled. That does not constitute a wilful act on the part of the defendants within the meaning of the cases cited. LORD BOWEN has admirably expressed the principle to be applied in such cases in *The Moorcock* (1) and in *Hamlyn & Co.* v. *Wood & Co.* (2). In the latter case, he said ([1891] 2 Q.B. at p. 493):

> "In some cases it may be necessary, in order to give effect to a transaction, that the law should imply a stipulation not wilfully to put an end to a business, although the parties had not made such a stipulation in terms. The question is whether such an implication is necessary here, or whether without such an implication the contract may not have a very reasonable effect."

Those words seem to me very applicable to the present case.

On the true construction of this contract, I think that the plaintiff is not entitled to recover commission in respect of the hire which was never earned under the charterparty, and that the appeal must, therefore, be dismissed.

CHITTY, L.J.—I am of the same opinion, and I think that BIGHAM, J., based his judgment on true grounds. The case lies in a very small compass. We are entitled to take note of the clause contained in the printed form which was struck

out and replaced in writing by the one which is now sued on. As finally settled, this clause provides for the payment to the plaintiff of a commission of 5 per cent. "on all hire earned." I see no difficulty about the meaning of those words. The commission is to be paid on what the defendants earn under the charterparty. But the plaintiff is not satisfied with that. He seeks to import into the matter an implied obligation of some kind lying on the defendants. What that implied obligation is counsel for the plaintiff had some difficulty in expressing. But in the result it came to this, that the defendants were bound not to put an end to the charterparty under any circumstances whatever. The proposition that such an implication is to be made in this contract cannot, I think, be maintained. What happened was that litigation arose between the defendants and the charterers with regard to the fitness of the ship for the purposes for which she was to be employed under the charterparty, and this litigation resulted in an arrangement under which the charterparty was cancelled. It would be wholly unreasonable to imply in the agreement between the plaintiff and the defendants any term which would make the defendants liable, under those circumstances, to pay the plaintiff the commission which he now claims. But, after all, the real question before us is merely a question of construction, and, on the express terms of this agreement, I think that the plaintiff must fail.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I only wish to add that I do not think that there is anything in our present decision which at all negatives the possibility of the existence of an implied term in this contract which might be of such a character as to render it a breach of contract for the defendants to repudiate the charterparty, and wilfully refuse to carry it out. The term which we are invited to imply here is of a much wider character. It is that the defendants undertook to the plaintiff that they would not do or omit to do anything to prevent the performing of the charterparty, and would not, in the course of carrying out the charterparty, be guilty of any breach of it. I not only find nothing in the present case to warrant our saying that there is here any necessary implication of such a term, but I will add this that, in my judgment, the provisions of this charterparty render it absolutely impossible that we should hold that any such term could be implied.

Appeal dismissed.

Solicitors: *Swepstone & Stone; Lowless & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re SCOWCROFT. ORMROD *v.* WILKINSON

[CHANCERY DIVISION (Stirling, J.), October 25, 27, 1898]

[Reported [1898] 2 Ch. 638; 67 L.J.Ch. 697; 79 L.T. 342; 15 T.L.R. 4; 43 Sol. Jo. 11] B

Charity—Religion—Devise of land upon trust for "furtherance of Conservative principles and religious and mental improvement."

By his will a testator devised to the vicar for the time being of a named parish a building known as the "Conservative Club and Village Reading Room" to be maintained "for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing." He also devised to such vicar "one moiety of the income [of a piece of freehold land] . . . to be used for the maintenance of the aforesaid club and reading-room." C

Held: on the true construction of the will the first gift was either for the furtherance of Conservative principles so far as they were consistent with religious and mental improvement, or it was a gift for the furtherance of religious and mental improvement in connection with the advancement of Conservative principles; in either case it was a gift for the furtherance of religious and mental improvement and so a good charitable gift; the second gift must be read in conjunction with the first gift, and, therefore, was also a good charitable gift. D E

Notes. Applied: *Re Hood, Public Trustee* v. *Hood*, [1930] All E.R. 215. Considered: *Bonar Law Memorial Trust* v. *I.R. Comrs.* (1933), 49 T.L.R. 220; *Tribune Press, Lahore (Trustees)* v. *Income Tax Comr., Punjab, Lahore*, [1939] 3 All E.R. 469. Referred to: *I.R. Comrs.* v. *Temperance Council of Christian Churches of England and Wales* (1926), 136 L.T. 27; *Re Hopkinson, Lloyds Bank, Ltd.* v. *Baker*, [1949] 1 All E.R. 346; *Baddeley* v. *I.R. Comrs.*, [1953] 2 All E.R. 233. F

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 218 et seq.; and for cases see 8 DIGEST (Repl.) 328 et seq.

Cases referred to in argument: G

West v. *Shuttleworth* (1835), 2 My. & K. 684; 4 L.J.Ch. 115; 39 E.R. 1106; 8 Digest (Repl.) 338, *205*.

A.-G. v. *Lawes* (1849), 8 Hare, 32; 19 L.J.Ch. 300; 14 Jur. 77; 68 E.R. 261; 8 Digest (Repl.) 316, *26*.

Re Hunter, Hood v. *A.-G.*, [1897] 2 Ch. 105; 66 L.J.Ch. 545; 76 L.T. 725; 45 W.R. 610; 13 T.L.R. 415, C.A.; reversed sub nom. *Hunter* v. *A.-G.*, post; [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 340, *227*. H

Thornton v. *Howe* (1862), 31 Beav. 14; 31 L.J.Ch. 767; 6 L.T. 525; 26 J.P. 774; 8 Jur.N.S. 663; 10 W.R. 642; 54 E.R. 1042; 8 Digest (Repl.) 335, *161*.

Thompson v. *Thompson* (1844), 1 Coll. 381; 8 Jur. 839; 63 E.R. 464; 8 Digest (Repl.) 330, *119*. I

Re Delmar Charitable Trust, [1897] 2 Ch. 163; 66 L.J.Ch. 555; 76 L.T. 594; 45 W.R. 630; 13 T.L.R. 422; 41 Sol. Jo. 543; 8 Digest (Repl.) 395, *881*.

Originating Summons taken out by the trustees of the will of the Rev. J. H. Scowcroft, late vicar of Bishop's Itchington, in the county of Warwick, to determine the validity of certain charitable gifts contained in the will.

The testator by his will dated Feb. 26, 1897, devised to the vicar for the time being (his successor) and his successors, vicars of Bishop's Itchington, a building

known as "The Conservative Club and Village Reading Room" in the said village, to be maintained

> "for the furtherance of Conservative principles and religious and mental improvement and to be kept free from all intoxicants and dancing."

And he also thereby devised to such vicar and his successors a certain piece of freehold land situate in the village

> "one moiety of the income thereof to be used by the said vicar for and towards church expenses (especially the organist's salary) the other moiety to be used for the maintenance of the aforesaid club and reading-room."

In administering the estate and executing the trusts of the will the question was raised whether the two gifts of the building and the land were or were not good and valid charitable gifts, and an originating summons was taken out by the trustees for the determination of that question.

It appeared that the testator had purchased the land on which the club now stood in 1895, and had erected the building in 1896, and that down to the date of his death in February, 1897, the building had been used as a club-room for persons whose political opinions were Conservative to meet in, and also as a reading-room for persons residing in the parish who professed to belong to the Conservative party. It was not disputed that the gift for church expenses was valid.

Stallard for the summons.
Joyce for the Attorney-General.
Clode for the Vicar of Bishop's Itchington.

STIRLING, J., stated the facts and continued:—The first question is, what is the true construction of the gift. It was said that it was a gift of a building either for the furtherance of Conservative principles or for the furtherance of religious and mental improvement, and that a gift for the furtherance of Conservative principles was not a good charitable gift. The gift is for the furtherance of Conservative principles and religious and mental improvement in combination. Therefore, it is either a gift for the furtherance of Conservative principles, so far as they were consistent with religious and mental improvement, or it is a gift for the furtherance of religious and mental improvement in connection with the advancement of Conservative principles; and in either case it is a gift for the furtherance of religious and mental improvement. That construction is borne out by the direction in the will which follows the gift, namely, that the building is "to be kept free from intoxicants and dancing." In my opinion, therefore, the first is a good charitable gift. With regard to the gift of the land, one moiety of the income of which is "to be used for the maintenance of the aforesaid club and reading-room," it was said that that was for the maintenance of the club and reading-room as it existed at the date of the testator's death. In my view that it not so. It must be taken in connection with the former gift, and accordingly both gifts are in my opinion good charitable gifts.

Solicitors: *Field, Roscoe & Co.*, for *Wood & Bourne, Southam; Treasury Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

HARROLD *v.* WATNEY

[COURT OF APPEAL (A. L. Smith, Rigby and Vaughan Williams, L.JJ.), June 23, 1898]

[Reported [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609] B

Child—Highway—Nuisance—Defective fence adjoining highway—Child injured while climbing on fence—Liability of owner.

The defendant was the owner of a piece of waste land adjoining a highway and of a wooden fence which separated the land from the highway. Children were accustomed to play on the waste land, and the plaintiff, a child of four, climbed on the fence to watch the children at play on the other side. The fence broke, and he fell and was injured. The fence was in such a defective condition as to amount to a nuisance on the highway. C

Held: the defendant should have anticipated that an accident to a child was likely to result from the condition of the fence, and, therefore, he was liable in respect of the plaintiff's injuries. D

Per VAUGHAN WILLIAMS, L.J.: When considering whether the nuisance was the cause of the accident it is a good test to see whether what the child did was something which ought to have been present to the mind of the defendant as a possible and probable result of leaving the fence in a dangerous condition. The highway is for the use not only of adults but of children also, and if a man leaves a nuisance close to a highway, it is extremely likely to cause injury to persons on the highway. E

Notes. Distinguished: *Giles* v. *L.C.C.* (1903), 68 J.P. 10. Considered: *Barker* v. *Herbert*, [1911-13] All E.R. Rep. 509; *Latham* v. *Richard Johnson & Nephew, Ltd.*, [1911-13] All E.R. Rep. 117; *Hardy* v. *Central London Rail. Co.*, [1920] All E.R. Rep. 205. Distinguished: *Bromley* v. *Mercer*, [1922] 2 K.B. 126. Considered: *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R. Rep. 222. Applied: *Owens* v. *Scott & Sons (Bakers), Ltd. and Wastall*, [1939] 3 All E.R. 663. Considered: *Wringe* v. *Cohen*, [1939] 4 All E.R. 241. Referred to: *McDowall* v. *Great Western Rail. Co.*, [1900-3] All E.R. Rep. 593; *Glasgow Corpn.* v. *Taylor*, [1921] All E.R. Rep. 1; *Donovan* v. *Union Cartage Co., Ltd.*, [1932] All E.R. 273; *Jacobs* v. *L.C.C.*, [1950] 1 All E.R. 737. F

As to degree of care in relation to children, see 28 HALSBURY'S LAWS (3rd Edn.) 16-17, 93-95, and for cases see 36 DIGEST (Repl.) 114 et seq. G

Cases referred to:

(1) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*. H

(2) *Jewson* v. *Gatti* (1886), 2 T.L.R. 381, 441, C.A.; 36 Digest (Repl.) 116, *582*.

Also referred to in argument:

Ilott v. *Wilkes* (1820), 3 B. & Ald. 304; 106 E.R. 674; 36 Digest (Repl.) 153, *807*.

Barnes v. *Ward* (1850), 9 C.B. 392; 19 L.J.C.P. 195; 14 Jur. 334; 137 E.R. 945; 36 Digest (Repl.) 209, *1100*. I

Bird v. *Holbrook* (1828), 4 Bing. 628; 1 Moo. & P. 607; 2 Man. & Ry.M.C. 198; 6 L.J.O.S.C.P. 146; 130 E.R. 911; 36 Digest (Repl.) 153, *808*.

Mangan v. *Atterton* (1866), L.R. 1 Exch. 239; 4 H. & C. 388; 35 L.J.Ex. 161; sub nom. *Atterton* v. *Mangan*, 14 L.T. 411; 30 J.P. 360; 14 W.R. 771; 36 Digest (Repl.) 123, *621*.

Hughes v. *Macfie*, *Abbott* v. *Macfie* (1863), 2 H. & C. 744; 3 New Rep. 394; 33 L.J.Ex. 177; 9 L.T. 513; 10 Jur.N.S. 682; 12 W.R. 315; 159 E.R. 308; 36 Digest (Repl.) 123, *627*.

A *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, *135*.
Cotton v. *Wood* (1860), 8 C.B.N.S. 568; 29 L.J.C.P. 333; 7 Jur.N.S. 168; 141 E.R. 1288; 36 Digest (Repl.) 130, *662*.

Application by the plaintiff for judgment or for a new trial on appeal from the B verdict and judgment at the trial before RIDLEY, J., with a jury, in Middlesex.

The plaintiff was a boy four years of age, suing by his father as his next friend, who brought this action to recover damages for personal injuries. The defendant was the owner of a piece of waste land adjoining South Street, Wandsworth, which was separated from the highway by a wooden fence which belonged to the defendant. It was proved at the trial that children were accustomed to play upon the piece C of waste land; that the fence was in a rotten condition; and that the plaintiff had put his feet upon the fence when a large part of it fell down upon him and severely injured him. Presumably the child was climbing upon the fence for the purpose of looking at the children who were playing upon the piece of waste land. The jury returned a verdict as follows:

D "We find that the fence was very defective, but actually fell through the child standing wholly or partly on the fence, not for the purpose of climbing over. If the plaintiff is entitled to recover, we assess the damages at £45."

RIDLEY, J., after argument entered judgment for the defendant. The plaintiff appealed.

E *Chamier* for the appellant.
A. J. David for the respondent.

A. L. SMITH, L.J.—This is an appeal by the plaintiff asking that the verdict and judgment shall be entered for him in an action tried before RIDLEY, J., with a jury. It seems to me that the real question in this case was not specifically put F to the jury at the trial.

The case was as follows. The defendant was the owner of a fence by the side of a highway. The evidence was overwhelming that this fence was rotten, and the jury have really so found. The plaintiff, a child four years of age, was using the highway. There was evidence that upon the land on the other side of the fence children were accustomed to play, and there was evidence that the plaintiff put his G feet upon the fence for the purpose of looking at the children who were playing on the other side. The fence broke and fell upon the plaintiff and injured him, and the jury have estimated the damages at £45. RIDLEY, J., after argument, entered judgment for the defendant. I cannot think that he was right in so doing. First of all, there was a rotten fence close to the highway, which was obviously a nuisance to the highway. If a person leaned against the fence and it broke, and he was H injured, it would obviously be an injury caused by a nuisance. This is a stronger case. The injury has been caused to a person lawfully using the highway, and doing precisely that which was pointed out to be probable by LORD DENMAN, C.J., in *Lynch* v. *Nurdin* (1). He there says (1 Q.B. at p. 38):

I "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blameable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has however shown these qualities in as great a degree as

he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it."

That case has never been over-ruled or questioned. It was a case where a horse and cart were left unattended on a highway, and the plaintiff, a child, got into the cart to play and another child led the horse on and the plaintiff was thrown out and injured. That case seems to me to govern the present case.

There is also another case of *Jewson* v. *Gatti* (2), which is in point. There the defendant kept a cellar at the side of the highway, and when it was open he left a bar across the open part; a child who was coming along the street leant against the bar; the bar gave way and the child was injured. DAY, J., nonsuited the plaintiff, but the Court of Appeal set aside the nonsuit and ordered a new trial. LORD ESHER, M.R., there said (2 T.L.R. at p. 442):

"This was a case of premises on a highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that, for there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean when looking down into the cellar where the painting was going on. That was almost an invitation, certainly an inducement, to the children to lean against the bar when looking down into the cellar."

In that case it was argued that it was the child's own fault that caused the injury, but the Court of Appeal decided otherwise.

For these reasons I think that it is the duty of this court, considering what are the real facts of the case and the finding of the jury, not to allow the expense of a new trial to be incurred, but to order judgment to be entered for the plaintiff for the amount of damages assessed by the jury. The appeal will, therefore, be allowed and judgment be entered for the plaintiff.

RIGBY, L.J.—I am of the same opinion. I think that the argument that the child cannot recover damages because the injury arose from his own fault cannot be maintained. How is it possible to say that a matter of this kind is the child's own fault? In neither *Lynch* v. *Nurdin* (1) nor *Jewson* v. *Gatti* (2) was that argument accepted. I agree, therefore, that the appeal must be allowed and judgment be entered for the plaintiff.

VAUGHAN WILLIAMS, L.J.—I agree. This case raises a question of principle which may occur again, and I, therefore, think it right to express what I believe to be the principle applicable in cases of this kind. This is an action in which it is alleged that injury was caused to a child by the dangerous condition in which the defendant had left his fence which adjoined a highway. The jury were not asked the specific question whether or not the fence was in such a condition as to be dangerous to persons using the highway. If, however, we consider the evidence and the finding of the jury, there can be no doubt but that the only proper conclusion to be drawn is that the fence was in such a condition that it did constitute a danger to those who were using the highway. In my opinion, the fence constituted a nuisance.

When it is established that the fence was a nuisance, that is not enough of itself to give a cause of action. It must be proved, not only that the fence was in such a condition as to be a nuisance to the highway, but also that this nuisance was the cause of the injury complained of. When it is contended on behalf of the defendant that the child ought not to have put his feet upon the fence, that is really a suggestion that the accident was not caused by the nuisance but by the conduct of the

child himself, and that it is immaterial whether that conduct amounted to trespass or negligence. In my opinion, it is not true to say in this case that the accident was caused by the conduct of the child at all. The defendant was guilty of creating this nuisance. When considering whether the nuisance was the cause of the accident, it is a good test to see whether what the child did was something which ought to have been present to the mind of the defendant as a possible and probable result of leaving the fence in a dangerous condition. The highway is for the use not only of adults but of children also, and, if a man leaves a nuisance close to a highway of this kind, it is extremely likely to cause injury to persons on the highway. If that be so, it is the nuisance which causes the injury, and it is impossible to avoid the conclusion that the nuisance is the cause of the injury by relying on the act of a child in touching the fence, it being an act which an adult would probably not have done. I think, therefore, that the plaintiff has established in this case that the fence was in such a condition as to be a nuisance to the highway, and that the injury was caused by the condition of the fence and not by the child's own fault. Judgment ought, therefore, to be entered for the plaintiff, and the appeal must be allowed.

Appeal allowed.

Solicitors: *Chas. F. Appleton; Pownall & Co.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

SICKERT *v.* SICKERT

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), July 18, 26, 1899]

[Reported [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 48 W.R. 268; 15 T.L.R. 506]

Divorce—Desertion—Constructive desertion—Adultery by husband—Refusal to discontinue adulterous relations with other women—Wife's withdrawal from cohabitation.

To constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. The party who intends to bring the cohabitation to an end and whose conduct causes its termination commits the act of desertion, and that party need not necessarily be the one who leaves the matrimonial home. A wife whose husband is carrying on an adulterous intercourse with another woman, whether in the matrimonial home or not, is not bound to remain in cohabitation with the husband. In such a case the husband is deemed to intend the consequences of his action, i.e., that the wife will not live with him, and the situation is the same as if he had left the matrimonial home.

A husband carried on adulterous associations with other women while living with his wife and refused the wife's request that he should give up such associations, and as a result of his refusal the wife left the matrimonial home.

Held: he was guilty of desertion.

Notes. For the grounds for a petition for divorce, see now the Matrimonial Causes Act, 1950, s. 1 (29 HALSBURY'S STATUTES (2nd Edn.) 389).

Considered: *Harriman* v. *Harriman*, [1908-10] All E.R. Rep. 85. Applied: *Bowran* v. *Bowran*, [1925] All E.R. Rep. 148. Considered: *Spence* v. *Spence*, [1939] 1 All E.R. 521; *Edwards* v. *Edwards*, [1948] 1 All E.R. 157. Approved:

Lang v. *Lang*, [1954] 3 All E.R. 571. Referred to: *Dodd* v. *Dodd*, [1906] P. 189; *Eastbourne Gardens* v. *Croydon Gardens*, [1910] 2 K.B. 16; *Blackledge* v. *Blackledge*, [1913] P. 9; *Thomas* v. *Thomas*, [1924] All E.R. Rep. 48; *Buchler* v. *Buchler*, [1947] 1 All E.R. 319; *Hosegood* v. *Hosegood* (1950), 66 (pt. 1) T.L.R. 735; *Simpson* v. *Simpson*, [1951] 1 All E.R. 955; *Kemp* v. *Kemp*, [1961] 2 All E.R. 764.

As to constructive desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 246 et seq., and for cases see 27 DIGEST (Repl.) 350 et seq.

Cases referred to:

(1) *Dickinson* v. *Dickinson* (1889), 62 L.T. 330; 27 Digest (Repl.) 351, *2902.*

(2) *Koch* v. *Koch*, [1899] P. 221; 68 L.J.P. 90; 81 L.T. 61; 27 Digest (Repl.) 351, *2906.*

(3) *Graves* v. *Graves* (1864), 3 Sw. & Tr. 350; 33 L.J.P.M. & A. 66; 10 L.T. 273; 10 Jur.N.S. 546; 12 W.R. 1016; 164 E.R. 1310; 27 Digest (Repl.) 347, *2877.*

(4) *Pizzala* v. *Pizzala* (1896), 68 L.J.P. 99, n.; 12 T.L.R. 451; 27 Digest (Repl.) 351, *2904.*

Petition by Ellen Millicent Ashburner Sickert for a dissolution of her marriage with Walter Richard Sickert on the ground of the latter's adultery and desertion.

The petitioner was married to the respondent, who was an artist, on June 10, 1885, and they lived together until Sept. 29, 1896. In 1895 the petitioner had a strong suspicion that the respondent was leading an improper life. In that year she found a letter to him from a woman, and he admitted two cases of adultery, one with her and one with another woman. He promised to have nothing more to do with them, and the petitioner forgave him. In May, 1896, there was a short separation between them in consequence of his conduct, but the respondent rejoined the petitioner in Switzerland. On Sept. 29, 1896, while they were at Fluelen, on the Lake of Lucerne, he made a statement to her, the substance of which was that it was no use concealing the fact that he had never been faithful to her and never could be. The petitioner said that, as long as the respondent lived that sort of life, she could not live with him, but was willing to do so if he would give it up. He declined to do so. They thereupon separated and had ever since lived apart. On Dec. 8, 1898, the petitioner wrote to the respondent as follows:

"Dear Walter,—In spite of your having told me, when we parted in Switzerland in September, 1896, that immediately after our marriage and ever since you had lived an adulterous life, and that you felt sure you could never live a different one, I have been hoping against hope that you would abandon it, but all that I have heard of you during the last two years has forced me to give up all possible hope for the future.—Yours truly, E. M. SICKERT."

To this letter the respondent replied as follows:

"My dear Nellie,—I have received your letter of December 8. It is quite true that I have not been faithful to you since our marriage, and it is equally true that during the two years since we parted I have been intimate with several women. As I told you long ago, I cannot continue a life of dissimulation. I have chosen my mode of life, and I am unable to alter it. An undertaking on my part would be misleading.—Ever your profoundly attached, WALTER SICKERT."

In May, 1899, the present suit was begun.

Bargrave Deane, Q.C., and *A. Llewelyn Davies* for the petitioner.

Cur. adv. vult.

July 26, 1899. **GORELL BARNES, J.,** read the following judgment.—The petitioner in this case prays for a dissolution of her marriage with the respondent, on the ground of his desertion and adultery. The adultery, which occurred in April, 1898, and May, 1899, was proved; but an important question is raised with

regard to the alleged desertion. The facts appear to be these: [The learned judge then summarised the facts as set out above.] There have been a number of cases on this question of desertion, but as they were mostly undefended, and the question raised upon the facts in this case is of considerable importance, I reserved my judgment. A wife is entitled to obtain a divorce from her husband if he has been guilty of (inter alia) adultery coupled with desertion, without reasonable excuse, for two years and upwards.

In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always necessarily the guilty party who leaves the matrimonial home. In my opinion the party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to the state of cohabitation and does so by leaving his wife and that of a husband who, with the like intent, obliges his wife to separate from him.

The view of the law, applicable to desertion, has been taken in *Dickinson* v. *Dickinson* (1) and *Koch* v. *Koch* (2). In the first of these cases the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house, and then told her husband that either she or the woman must leave the house. The husband told her that she might do as she liked, but that the woman would remain. The wife thereupon left and never afterwards cohabited with her husband. SIR CHARLES BUTT held that the husband was guilty of deserting his wife. In the second case, which was heard before myself, the husband was guilty of immoral relations with a servant in the house. The husband refused to break off these relations or discharge the girl, and the wife thereupon left the house. The husband continued to live for years with the servant. I held the husband guilty of desertion.

In these two cases the adulterous intercourse which the husband refused to put an end to was being carried on in the matrimonial home; but in the earlier case of *Graves v. Graves* (3), heard by LORD PENZANCE in 1864, the adulterous intercourse, though carried on for a time in the house occupied by the petitioner and respondent, was not discovered by the petitioner until after the parties had separated. The report in the LAW JOURNAL is fuller than the report in 3 Sw. & Tr. 350, and the headnote is as follows (33 L.J.P.M. & A. 66):

> "Shortly after a marriage the husband, with the intention of bringing about a separation, so treated his wife as to compel her to leave him. She subsequently made several offers to return, but he refused to receive her. She continued willing to return until she found that he was carrying on an adulterous intercourse which had subsisted since the marriage. She then refused to return except upon condition that such intercourse should cease. HELD, that such conduct before the wife became aware of his adultery amounted to desertion, and that such desertion was not put an end to by her unwillingness to return while the adultery continued."

The present case is scarcely distinguishable from *Pizzala* v. *Pizzala* (4). There the husband was carrying on an adulterous intercourse with another woman, but not in the matrimonial home, and refused to break it off, although his wife told him that unless he did so she must leave him. The wife then left him, and he continued to live with the woman for over two years. The President held the husband guilty of desertion.

These cases all appear to me to have been decided in accordance with the principles shortly stated above, and no distinction has been made whether the adulterous intercourse was carried on in the matrimonial home or elsewhere. A wife whose husband is carrying on an adulterous intercourse with another woman or other

women is not bound to remain in cohabitation with him. She can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connection complained of, and if he refuses to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say, his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. It may be committed by a husband acting, as I have just said, and if the attitude of the parties remain the same for two years, the offence of desertion contemplated by the statute is complete. I may add that the American writer Bishop, in his work on the law of marriage and divorce (Law of Marriage and Divorce (Edn. 1891), vol. 1, s. 1710) has the following passage on the subject of desertion:

> "It is immaterial which of the married parties leaves the matrimonial home, the one who intends bringing the cohabitation to an end commits the desertion."

I am of opinion that upon the facts proved in evidence before me in the present case the respondent has been guilty of adultery coupled with desertion for two years and upwards, and I pronounce a decree nisi, with costs.

Solicitors: *Sharpe, Parker, Pritchards & Borham*, for *Matthews, Jones & Co.*, Birmingham.

[*Reported by* H. M. Giveen, Esq., *Barrister-at-Law.*]

SCHOLFIELD *v.* LORD LONDESBOROUGH

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), November 26, 28, 29, 1895, July 31, 1896]

[Reported [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700]

Bill of Exchange—Alteration—Forgery—Increase in amount of bill—Bill accepted in form facilitating forgery—Liability of acceptor.

The principle under which, where a person who receives a mandate is misled by the negligence of the person who gives it, the loss must fall exclusively on the giver—as where the neglect of due caution by the customer of a bank in drawing a cheque has caused his bankers to make a payment, as a result of subsequent forgery, of a greater amount than that for which the cheque was drawn—is not applicable to a case between the acceptor of a bill and a subsequent holder. There is no duty on the acceptor of a bill of exchange to see, before he accepts the bill, that it is not so drawn as to render a subsequent fraudulent alteration possible.

S. drew a bill of exchange on the respondent. The bill was drawn upon a stamp sufficient to cover a much larger sum than that which appeared on the face of it, and spaces were intentionally left in the body of the bill which would facilitate alterations. After the respondent had accepted the bill, S. fraudu-

lently inserted words and figures which altered the amount from £500 to £3,500. The bill so altered afterwards came into the hands of the appellant as a bona fide endorsee for value. In an action on the bill by the appellant against the respondent,

Held: the respondent was not liable for more than £500, the original amount of the bill.

Young v. *Grote* (1) (1827), 4 Bing. 253, discussed and distinguished.

Notes. Considered: *Wise* v. *Dunning*, [1900-3] All E.R. Rep. 727; *Farquharson Bros. & Co.* v. *King & Co.*, [1900-3] All E.R. Rep. 120. Distinguished: *Herdman* v. *Wheeler*, [1902] 1 K.B. 361. Considered: *Colonial Bank of Australasia* v. *Marshall*, [1906] A.C. 559; *London Joint Stock Bank, Ltd.* v. *Macmillan*, [1918-19] All E.R. Rep. 30. Applied: *Auchteroni & Co.* v. *Midland Bank, Ltd.*, [1928] All E.R. Rep. 627. Referred to: *Bell* v. *Marsh*, [1903] 1 Ch. 528; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49; *Macmillan* v. *London Joint Stock Bank*, [1917] 2 K.B. 439; *Slingsby* v. *District Bank, Ltd.*, [1931] 2 K.B. 588; *Bottomley* v. *Bannister*, [1931] All E.R. Rep. 99.

As to alteration of a bill of exchange, see 3 Halsbury's Laws (3rd Edn.) 231-234, and for cases see 6 Digest (Repl.) 350 et seq. For the Bills of Exchange Act, 1882, see 2 Halsbury's Statutes (2nd Edn.) 505.

Cases referred to:

(1) *Young* v. *Grote* (1827), 4 Bing. 253; 12 Moore, C.P. 484; 5 L.J.O.S.C.P. 165; 130 E.R. 764; 3 Digest (Repl.) 255, *714.*

(2) *Hall* v. *Fuller* (1826), 5 B. & C. 750; 8 Dow. & Ry. K.B. 464; 4 L.J.O.S.K.B. 297; 108 E.R. 279; 3 Digest (Repl.) 256, *719.*

(3) *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 3 C.L.R. 1066; 25 L.T.O.S. 272; 3 W.R. 573; 10 E.R. 950, H.L.; 21 Digest (Repl.) 485, *1714.*

(4) *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395; 41 L.J.Q.B. 201; 27 L.T. 79; 1 Asp.M.L.C. 389, H.L.; 1 Digest (Repl.) 485, *1275.*

(5) *Bank of England* v. *Vagliano Bros.*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 55 J.P. 676; 39 W.R. 657; 7 T.L.R. 333, H.L.; 6 Digest (Repl.) 29, *208.*

(6) *Adelphi Bank* v. *Edwards* (1882), see 26 Sol. Jo. 360; 27 Sol. Jo. 70; cited in [1896] A.C. at p. 540; 6 Digest (Repl.) 361, *2604.*

(7) *Société Général* v. *Metropolitan Bank, Ltd.* (1873), 27 L.T. 849; 21 W.R. 335; 6 Digest (Repl.) 361, *2603.*

(8) *Robarts* v. *Tucker* (1851), 16 Q.B. 560; 20 L.J.Q.B. 270; 15 Jur. 987; 117 E.R. 994; Ex. Ch.; 3 Digest (Repl.) 250, *685.*

(9) *Halifax Union* v. *Wheelwright* (1875), L.R. 10 Exch. 183; 44 L.J.Ex. 121; 32 L.T. 802; 39 J.P. 823; 23 W.R. 704; 3 Digest (Repl.) 181, *321.*

(10) *Ingham* v. *Primrose* (1859), 7 C.B.N.S. 82; 28 L.J.C.P. 294; 5 Jur.N.S. 710; 141 E.R. 745; 6 Digest (Repl.) 347, *2515.*

(11) *Arnold* v. *Cheque Bank*, *Arnold* v. *City Bank* (1876), 1 C.P.D. 578; 45 L.J.Q.B. 562; 34 L.T. 729; 40 J.P. 711; 24 W.R. 759; 6 Digest (Repl.) 451, *3154.*

(12) *Baxendale* v. *Bennett* (1878), 3 Q.B.D. 525; 47 L.J.Q.B. 624; 40 L.T. 23; 43 J.P. 204; 26 W.R. 899, C.A.; 6 Digest (Repl.) 398, *2851.*

(13) *London and South Western Bank* v. *Wentworth* (1880), 5 Ex.D. 96; 49 L.J.Q.B. 657; 42 L.T. 188; 28 W.R. 516; 6 Digest (Repl.) 287, *2106.*

(14) *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175; 2 New Rep. 521; 32 L.J.Ex. 273; 10 Jur.N.S. 102; 11 W.R. 862; 159 E.R. 73, Ex.Ch.; 6 Digest (Repl.) 424, *2981.*

(15) *Graham* v. *Gillespie* (1795), Mor. Dict. 1453.

(16) *Pagan and Hunter* v. *Wylie* (1793), Mor. Dict. 1660.

(17) *Garrard* v. *Haddan* (1870), 67 Penns. (17 Smith), 82.

(18) *Orr and Barber* v. *Union Bank of Scotland* (1854), 1 Macq. 513; 24 L.T.O.S. 1; 2 C.L.R. 1566, H.L.; 6 Digest (Repl.) 425, *2987*.

Also referred to in argument:

Staple of England (Mayor, etc., of Merchants of the) v. *Bank of England (Governor & Co.)* (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 52 J.P. 580; 36 W.R. 880; 4 T.L.R. 46, C.A.; 3 Digest (Repl.) 132, *27*.

Colonial Bank v. *Cady and Williams*, *London Chartered Bank of Australia* v. *Cady and Williams* (1890), 15 App. Cas. 267; 60 L.J.Ch. 131; 63 L.T. 27; 39 W.R. 17; 6 T.L.R. 329, H.L.; 6 Digest (Repl.) 425, *2985*.

Pickard v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, *1103*.

Carr v. *London and North Western Rail. Co.* (1875), L.R. 10 C.P. 307; 44 L.J.C.P. 109; 31 L.T. 785; 39 J.P. 279; 23 W.R. 747; 21 Digest (Repl.) 367, *1091*.

Seton v. *Lafone* (1887), 19 Q.B.D. 68; 56 L.J.Q.B. 415; 57 L.T. 547; 35 W.R. 749; 3 T.L.R. 624, C.A.; 21 Digest (Repl.) 199, *12*.

Heaven v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

Goodwin v. *Robarts* (1875), L.R. 10 Exch. 337; 44 L.J.Ex. 157; 33 L.T. 272; 23 W.R. 915, Ex.Ch.; affirmed (1876), 1 App. Cas. 476; 45 L.J.Q.B. 748; 35 L.T. 179; 24 W.R. 987, H.L.; 3 Digest (Repl.) 305, *956*.

Derry v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 35 Digest 27, *185*.

Langridge v. *Levy* (1837), 2 M. & W. 519; affirmed sub nom. *Levy* v. *Langridge* (1838), 4 M. & W. 337; 150 E.R. 1458; sub nom. *Levi* v. *Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387, Ex.Ch.; 35 Digest 51, *464*.

Le Lièvre v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Denness* v. *Gould*, 9 T.L.R. 243, C.A.; 35 Digest 28, *187*.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., and Rigby, L.J., and Lopes, L.J., dissenting), [1895] 1 Q.B. 536, affirming on different grounds a decision of Charles, J., at the trial of the action without a jury, [1894] 2 Q.B. 660, in favour of the defendant.

The action was to recover £3,500 on a bill of exchange, dated Sept. 8, 1890, and drawn by one Francis Charles Scott Sanders upon, and accepted by, the respondent. The appellant became the holder of the bill in good faith and for valuable consideration. The bill when accepted by the respondent was for £500 only, and before it was endorsed it had been fraudulently altered into a bill for £3,500. The bill bore a £2 stamp, which was sufficient to cover £4,000. In the left-hand corner of the bill at the time of the acceptance were the figures "500," preceded by the sign "£." Between the "£," however, and the figures Sanders had left a space sufficiently wide to admit of another figure being interpolated. As originally drawn the body of the bill was in three lines. On the first were the words: "Three months after date"; on the second were the words: "Pay to me or my order the sum of"; and on the third were the words: "Five hundred pounds for value received." After the word "of" in the second line there was sufficient space left for the addition of another word; and before the word "five" in the third line there was a space allowing the addition of a word without carrying the third line farther to the left than the word "pay" in the second. Charles, J., found that Sanders, having obtained the respondent's acceptance to the bill so drawn, inserted the figure "3" between the sign "£" and the figures "500," and in the body of the instrument added the words "three thousand" between the word "of" on the second line and the words "five hundred" on the third line, writing the word "three" on the second line, and "thousand" on the third line, and in that shape he negotiated it. The learned judge held that the respondent was not estopped by these facts from denying that

A he had accepted a bill for £3,500; that he was only liable for £500, the amount of the bill as originally drawn and accepted; and, this sum having been paid into court, he gave judgment for the defendant. The Court of Appeal, affirming this decision, held that there was no duty on the respondent to scrutinise the form of the bill.

Asquith, Q.C., Morten, and *Roskill* for the appellant.

B *Jelf, Q.C., A. T. Lawrence*, and *Francis* for the respondent.

Their Lordships took time for consideration.

July 31, 1896. The following opinions were read.

C **LORD HALSBURY, L.C.**—In this case the appellant brought an action against the respondent on what purported to be a bill of exchange for £3,500. The respondent's name attached to the bill in question was genuine. He had, in fact, accepted a bill for £500, but, by fraudulent alteration, amounting to forgery, the amount for which the respondent accepted was increased to the sum sued for. It is not contended that the bill is not a forgery and, if nothing else appeared, it would of course be a sufficient defence for the acceptor to plead and prove that he never accepted any such bill as that for which the plaintiff brought his action. But it is contended that the form of the bill was such that the respondent was negligent in accepting it. The bill, as originally accepted, was so far in ordinary form and perfect that, but for some criminal act, it was, in its then form, a complete bill of exchange, leaving nothing to be added to or taken from it. It is said, indeed, that certain spaces were left which gave opportunity for the insertion of the added words and figures, and if by that is meant that the words and figures were not written so closely together as to prevent the insertion of other words and figures, the observation is true. But when it is said that certain spaces were left, it is to be remembered that there was nothing unusual or calculated to excite attention in the intervals between the written words and figures by which the bill was made. As a matter of fact, the person who drew the bill intended to draw it in such a way as to enable him to fill up the intervals between the letters and figures in question; but, to my mind, there was nothing suspicious in the appearance of the bill when tendered to the respondent for acceptance calculated to put him on his guard.

I cannot myself understand why the particular form of fraud adopted in this case should have any different operation in giving validity to a forged instrument rather than other forms of fraud to which instruments are subject. I am not aware of any principle known to the law which should attach such consequences to a written instrument when no such principle is applicable in any other region of jurisprudence where a man's own carelessness has given opportunity for the commission of a crime. A man, for instance, does not lose his right to his property if he has unnecessarily exposed his goods, or allowed his pocket-handkerchief to hang out of his pocket; he could recover against a bona fide purchaser of any article so lost, notwithstanding the fact that his conduct had to some extent assisted the thief. It is true that stolen goods sold in market overt could be retained by a bona fide purchaser for value, notwithstanding they had been previously stolen; but the same result would follow equally whether the owner had been careful or careless in the custody of his goods.

The truth is, that the whole doctrine, that facilitating forgery or giving opportunity for forgery, or so acting that a forgery is a possible result, affects the validity of the instrument forged, may be traced, in English law at all events, to *Young* v. *Grote* (1) and probably beyond, to certain doctrines of the Roman civil law, which, to my mind, form no part of the law merchant so far as it exists in English jurisprudence. That case has been pushed so far in argument that I think that the time has come when it would be desirable to deal with it authoritatively by your Lordships, and to examine how far it ought to be quoted as an authority for anything. It is to be observed that, when one looks at the judgments delivered, there

is an inextricable confusion, not only among the different judges, but in the judgment of each judge in turn. BEST, C.J., says (4 Bing. at p. 259):

> "If Young, instead of leaving the cheque with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up."

So that here the negligence is made to consist, so far as the drawer was concerned, in leaving a cheque, already signed in blank, with a female unacquainted with business, and in accordance with this view the learned judge goes on to distinguish *Hall* v. *Fuller* (2), because, he says, the alteration in that case was not made by the drawer's clerk, nor a person improperly trusted by him, but by an entire stranger who accidentally became possessed of the cheque. PARK, J., again distinguishing *Hall* v. *Fuller* (2), says (ibid. at p. 260):

> "Can anyone say that the cheque signed by Young is not a genuine order? I say it is. The cheques left by him to be filled up by his wife, when filled up by her, became his genuine orders."

This is an intelligible ground; but the learned judge immediately adds that the arbitrator had found negligence on the part of the drawer, and he says he concurs, and then goes on:

> "He leaves blank cheques in the hands of his wife, who was ignorant of business, but having left them with her to be filled up as the exigency of the moment might require, they became upon her issuing them his genuine orders."

It is manifest that the learned judge oscillates between the two views. In the perfectly sound view upon which he decides in the defendant's favour he adds the absolutely irrelevant statement that the cheques were left in the hands of the wife, who was ignorant of business. BURROUGH, J., seems only to deal with the question of negligence, and says the blame is all on one side, while GASELEE, J., points out the circumstances negativing the general authority of the clerk, who was the actual forger, either to fill up cheques or to receive money from the bank; these circumstances, he says, might have strengthened the case.

It is not very surprising that a variety of reasons have been given by various judges for not disagreeing with the case. The arbitrator had decided that there was negligence, and PARK, J., as is apparent, puts forward, and justly puts forward, the argument that by the act of the drawer's wife that cheque became the husband's genuine order. Shortly put, the argument is that he attached his genuine signature, leaving it to be filled up by his wife, and, as the learned judge emphatically says, "when filled up by his wife they became his genuine orders." If that is a true view of the case, and that is the learned judge's reasoning, it could not be doubted but that it was the drawer's genuine order. I am not concerned to discuss whether the particular mode in which a written order which was given by the banker to his customers for the purpose of being filled up in the usual way before signing it may afford ground for saying that the banker was misled by his own customer. If, to use LORD CRANWORTH'S phraseology, the customer by any act of his has induced the banker to act upon the document by his act or neglect of some act usual in the course of dealing between them, it is quite intelligible that he should not be permitted to set up his own act or neglect to the prejudice of the banker whom he has thus misled, or by neglect permitted to be misled: *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (3). I do not say that, had I been the arbitrator, I could have agreed that there was in the particular case any such neglect as would have come up to this proposition; but the principle, as LORD CRANWORTH says, is a familiar one, though it may not have been properly applied to the then state of facts. Your Lordships have acted upon it in *Ireland* v. *Livingston* (4), and in *Bank of England* v. *Vagliano Bros.* (5), and the minuteness with which the arbitrator described the printed forms of drafts which were supplied by the bankers to their

customers indicates what was in his mind as to what I will describe as an agreed or assumed course of business between banker and customer, and under those circumstances the finding of negligence which was conclusive upon the court might have justified it in assuming that the facts brought it up for the proposition which LORD CRANWORTH suggests; but, unfortunately I think, BEST, C.J., adopted the argument presented to him that POTHIER might be quoted as an authority decisive of the case, and I think that some of the confusion that has arisen upon the frequent occasions when the case has been quoted has resulted from a misapplication of what POTHIER, in fact, has said, and the more serious assumption that what he has said forms any part of the mercantile law of England.

POTHIER, in his TREATISE ON BILLS OF EXCHANGE, commenting on SCACCHIA, a Roman lawyer of the seventeenth century, gives a variety of illustrations sometimes adopting and sometimes modifying the rules which SCACCHIA lays down. But I think it impossible adequately to deal with the matter without having both the text and the commentary before us. They are as follows (SCACCHIÆ TRACT DE COMMER. pp. 390, 391):

"Summaria.—Falsificatis litteris cambii ab eo, cui litteræ illæ solui debent; et proinde, soluta majori summa, cujus sit damnum (n. 393 et seqq.). Falsificationis vitium aliquando est patens (sub nu. 393 vers. primus, et n. 394). Et quandoque latens (n. 395). Bancherii debent esse cauti in solutionibus cædularum, etc. (n. 397). Falsificatio litterarum cambii raro posset hodie contingere (n. 399). Quæro XV. Tu in civitate Genuæ das Viuiano scutos 100 ut eorum valorem faciat solui Petro Romæ, Viuianus, ut moris est, facit et dat tibi litteras apertas, soluendas Petro Romæ a Bergonzo; tu litteris acceptis, mittis eas Romam ad Petrum, qui eas Romæ falsificat in numero, et illis falsificatis, exigit a Bergonzo majorem pecuniarum summam, puta scutos 200, faciendo litteram 2 ex littera 1 vel aliter ex litteris C. litteram O. Dubitatur, an hoc damnum pati, debeat Bergonzus quia male soluerit, vel Viuianus, quia non cautelate scripserit characteres, vel tu, quia elegeris malum virum ad exigendum, et sic ad quem ex his spectet hoc periculum? Pro resolutione distinguo in primis duos casus falsificationis seu vitiationis litterarum.

"Primus casus est, quando falsificatio seu vitium litterarum est ita patens et evidens ut a quolibet campsore, qui accurata, et debita uteretur diligentia, cognosceretur, et isto casu concludo, quod periculum pertinet ad Bergonzum, qui malè soluit; et ratio est, quia ipse soluendo illas litteras falsas fuit in culpa, cum teneretur inquirere veritatem, et sua culpa sibi et non aliis debet nocere (Ang. cons. 370 creditor, sub n. 1 vers. pro hoc adduco ibi, sed si falsific. et in fine consilii. quem sequitur Foll. ad Maran. in spec., par. 6, Act. 6, n. 54 vers. sed nunquid campsor. fol. 387). Exemplifica istum casum, quando ex comparatione litterarum, adhibito peritorum judicio, cognosci potuisset falsificatio (Ang. ubi sup.) vel quando appareret aliqua rasura, seu aliud vitium visibile, et demum esset in culpa, quoties in litteris esset tale quid quod ipsas redderet suspectas de falso, quia paria sunt, civiliter loquendo, litteras esse falsas vel esse suspectas de falso ut secutus sum in meo trac. de judic. caus., etc., lib. 2, cap. ii., n. 165, præsertim in futura impressione.

"Secundus casus est, quando falsificatio erat ita latens, ut etiam a perito et diligenti campsore cognosci non potuisset, quia nulla præ se ferebat suspicionem; et isto casu concludo contrarium; nempe periculum non pertinere ad Bergonzum, quia solvendo, non fuit in aliqua culpa et consequenter recte solvendo, est liberatus, tam a Viuiano, qui scripsit quam a te, qui es creditor (Ang. d. cons., 370, sub num. 1, ibi. sed si culpa campsori nulla, etc., et sub n. 2, in fine consilii, vers. concludo igitur, et Foller. ubi sup.). Declara, hujus secundi casus conclusionem esse veram, quando mercator scripsit litteras et sic supposita substantia negotii; secus quando mercator nullas scripsisset litteras, quia tunc licet aliquis ita mercatoris manum contrafecisset, i.e., imitatus esset,

ut nullus peritus potuisset cognoscere diversitatem manus, i.e., litterarum, et consequenter nulla posset attribui culpa, desidia, negligentia, seu inexperientia ipsi campsori, quia quilibet fuisset deceptus tamen adhuc damnum erit ipsius solius, et ratio est, quia si mercator secum in hoc non contraxit periculum remanet ipsi soli campsori. Infero ex hac declaratione, quod Bancherii, seu nummularii debent esse cauti in scripturis, et subscriptionibus cedularum, et illarum recognitionibus, quia si soluerint pecuniam cum cedulis, seu apochis falsis, quæ eis præsentantur, et quas ipsi veras præsupponunt, quando soluunt, cogentur iterum soluere veris dominis pecuniarum, quia male soluerunt: Vinc. de Franchi dec. 304, sæpe sæpius, dicens, sæpe sæpius id evenire in Civitate Neapolis.

"Supposito nunc isto Secundo casu, quod Bergonzus rectè solverit, superest, ut absolvendo propositam quæstionem videamus, an Viuianus qui scripsit litteras, teneatur facere novas litteras solvendas; vel tu, qui fuisti in mala electione mandatorii, habeas solum regressum contra Petrum, cessa tibi condictione furtiva a Bergonzo? Et agendo breviter, concludo Viuianum esse liberatum; idea non teneri ad alias litteras, et tibi cedendam esse condictionem furtivam, quia omnis culpa quæ posset adscribi Viuiano, quòd scripserit litteras, seu characteres culposos tollitur ex quo tu habuisti illas litteras apertas, et acquievisti, cum deberes potius, non acquiescendo, facere scribi litteras characteribus bene compositis ut variari non possent ut concludit Ang. d. consil. 470, sub n. 1 vers. Secunda culpa et sub n. 2. Sed casus hujus quæstionis hodie raro potest contingere, tum quia campsores non solet cambire, nisi per illas partes, in quibus adsunt publici tabellarii, et ideo ultra litteras cambii mittunt litteras d'aviso, quas habes, supra q. 5, nu. 78, et mercatores, nisi habeant litteras d'aviso, non soluunt, et in illis litteris d'aviso, stat veritas incorrupta, tum quia campsores sagaces hodie substantialia litterarum scribunt ita per extensum, ut falsificari non possint, sine evidenti, et notoria falsificatione."

"Pothier, Contrat de Change, Part 1, c. 4, s. 99, vol. 4, Ed. Bugnet, pp. 516-518:—"99, Scacchia, Tract. de Comm., § 2, gl. 5, quæst. 15, propose cette question: Le porteur de la lettre de change l'a falsifiée, et a écrit une plus grande somme que celle portée par la lettre; la falsification est faite de manière qu'elle peut tromper une personne attentive et intelligente. Le banquier qui, trompé par la falsification de la lettre que lui a été présentée, a payé au porteur la somme entière que paraissait portée par la lettre; aura-t-il la répétition contre le tireur, son mandant, de ce qu'il a payé de plus que la somme qui était effectivement et véritablement portée par la lettre? Scacchia décide pour l'affirmative. On peut dire pour son opinion, que, selon les règles du contrat de mandat, le mandant s'oblige à rembourser le mandataire de tous les déboursés auxquels le mandat aura donné lieu, pourvu que le mandataire n'ait pas par sa faute déboursé plus qu'il ne fallait: Mandator debet refundere mandatario quidquid ei inculpabiliter abest ex causâ mandati, comme nous l'avons établi en Pand. Justin., tit. Mand., No. 53 et seq. Or, le paiement qu'a fait le banquier de la somme entière qui, par la falsification de la lettre, paraissait être portée dans la lettre qu'on lui a présentée, est un déboursée auquel le mandat du tireur a donné lieu; et l'on ne peut en cela reprocher aucune faute à ce banquier [Non, sans doute, mais il a été victime d'une fraude] puisqu'on suppose que la falsification était telle qu'elle pouvait surpendre un homme intelligent; le tireur ne peut donc pas se dispenser de rembourser le banquier sur qui il a tiré la lettre, de la somme entière qu'il a payée; sauf au tireur à exercer l'action du banquier, condictionem indebiti, contre le porteur de la lettre, pour la répétition de ce qu'il a reçu du plus que la somme qui était véritablement portée par la lettre. Si ce porteur de la lettre est un homme insolvable, c'est le tireur qui doit souffrir de cette insolvabilité, puisque son mandataire n'est pas en faute.

"On peut dire, au contraire, en faveur du tireur, qu'il ne faut pas confondre ce qu'il en a coûté au mandataire pour l'exécution du mandat ex causa mandati, avec ce qu'il lui en a coûté a location du mandat, non ex cause mandati, sed tantum occasióne mandati. Ce qu'il en coûte ex causâ mandati, est tout ce qui tend à l'exécution du mandat. Par exemple, si je vous ai chargé d'aller visiter une terre que je voulais acquérir, les frais de voyage, les salaires que vous avez payés aux ouvriers dont vous vous êtes fait assister et autres choses semblables, sont des déboursés que tendaient à l'exécution du mandat dont je vous ai chargé, et qui sont faits ex causâ mandati : ce n'est que de ces choses que je suis censé, par le contrat de mandat intervenu entre nous, m'être obligé de vous rembourser. Mais si vous avez été attaqué en chemin par des voleurs qui vous ont volé, je ne suis pas obligé de vous indemniser de cette perte; car, quoique ce soit à l'occasion de mon mandat dont vous vous êtes chargé, que vous l'avez soufferte, et que vous ne l'eussiez pas soufferte, sans cela, néanmoins ce n'est pas pour l'exécution de mon mandat, mais seulement à l'occasion de ce mandat, qu'il vous en coûte ce qu'on vous a volé; c'est par un cas fortuit, dont on ne peut pas dire que j'aie voulu m'obliger de vous indemniser, puis'qu'il n'a pas même été prévu; Non omnia quæ impensurus non fuit, mandatori imputabit; veluti quod spoilatus sit a latronibus . . . nam; hæc magis casibus quam mandato imputari oportet; L. 26, § 6, Mandat.

"Ces principes s'appliquent naturellement a l'espèce proposée. Lorsque le banquier sur qui j'ai tiré une lettre de change de 100 livres, trompé par la falsification de la lettre, paie 300 livres au porteur de la lettre, le paiement qu'il a fait de la somme de 200 livres de plus qu'il n'est porté par la lettre, n'est pas un paiement qu'il fasse ex causâ mandati en exécution du mandat dont je l'ai chargé; on peut seulement dire qu'il l'a fait à l'occasion du mandat; la falsification de la lettre qui l'a induit en erreur, et qui lui a causé la perte de la somme qu'il a indûment payée, est un cas fortuit, qui n'a ni été ni pu être prévu, et dont on ne peut dire par conséquent, que j'aie voulu me charger de le dédommager.

"100. Cependant si c'était par la faute du tireur que le banquier eût été induit en erreur, le tireur n'ayant pas eu le soin d'écrire sa lettre de manière à prévenir les falsifications, puta s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eût ajouté un zéro, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur, par sa faute, a donné lieu; et c'est à ce cas qu'on doit restreindre la décision de Scacchia. [Pourquoi cette distinction? si la lettre de change dans laquelle la somme est énoncée en chiffres est valable, il n'y a aucune faute reprochable à celui qui l'a ainsi créée; la raison de décider reste la même.] La distinction que nous faisons entre le cas auquel un mandataire a souffert quelque dommage à l'occasion du mandat, sans qu'il y eût eu aucune faute de la part du mandant et celui auquel le mandant a donné occasion au dommage par sa faute, est fondée sur des textes de droit. Paul, en la loi 26, § 7, ff. Mandat, décide que, si je vous ai chargé de m'acheter un certain esclave, et que cet esclave, après que vous l'avez acheté, et avant que vous me l'ayez envoyé, vous a volé, je suis obligé de vous indemniser de cette perte que vous avez soufferte à l'occasion du mandat, dans le cas auquel j'aurais connu cet esclave pour être un voleur; parce que, dans ce cas, je suis en faute de ne vous en avoir pas averti; mais que, hors ce cas, je ne suis point obligé de vous indemniser du vol que vous avez souffert à l'occasion du mandat, mais seulement de vous abandonner l'esclave pour le vol, de même que j'y serais obligé envers tout autre auquel il aurait fait quelque vol ou causé quelque dommage.

"Il est vrai qu' Africain, en la loi 61, alias 63, § 5 ff, de Furtis, décide que vous êtes tenu de m'indemniser du vol, même dans le cas auquel vous n'auriez pas eu connaissance que cet esclave était voleur, etiamsi ignoraveritis qui certum hominem emi mandaverit furem esse nihilominus tamen damnum

decidere cogetur. . . . Mais c'est qu'Africain pensait que, même en ce cas, c'était la faute du mandant qui avait donné lieu au dommage qu'avait souffert le mandataire, et que le mandant était en faute de ne s'être pas informé des mœurs de l'esclave dont il avait chargé son mandataire de faire l'emplète; nam certe, dit-il, mandantis culpam esse qui talem servum emi sibi mandaverit. C'est donc à ce cas auquel le dommage, souffert pas le mandataire à l'occasion du mandat, pourrait être attribué à quelque faute du mandant, qu'on doit restreindre tout ce qui est dit dans cette loi : Justissime procuratorem allegare, non fuisse se id damnum passurum si mandatum non suscepisset; et plus bas : Æquius esse, nemini officium suum (quod ejus cum quo contraxerit, non etiam sui commodi causâ suscepit) damnosum esse. Lorsque c'est la faute du mandataire qui a donné lieu au dommage qu'il a souffert à l'occasion du mandat, il n'est pas douteux qu'il ne peut pas demander à en être indemnisé : (ead. l. 6, s. 7).

"101. Il résulte de tout ceci qu'on ne doit pas décider indistinctement que le tireur doive indemniser le banquier de la perte qui lui a causée l'erreur en laquelle l'a induit la falsification de la lettre, et qu'on doit décider, au contraire, que le tireur n'est tenu de cette indemnité que dans le cas auquel, par quelque faute de sa part ou par celle de son facteur, il aurait donné lieu à cette falsification, faute d'avoir, en ecrivant la lettre, pris les précautions qu'il pouvait prendre pour la prévenir. [Comment rendre le tireur de bonne foi, responsable d'un fait qui est absolument étranger et auquel il n'a pu participer en rien? il serait d'ailleurs impossible de préciser les précautions qu'il y aurait à prendre. Il s'agit d'une fraude commise par un tiers au préjudice du tiré, après que la lettre de change a été mise en circulation.] Dans le cas même où le mandant n'aurait pas eu le soin de prendre ces précautions, le mandataire ne pourra pas répéter du tireur ce qu'il a payé de plus que a somme qui était véritablement portée par la lettre, si la falsification pouvait s'apercevoir avec quelque attention; car, en ce cas c'est la faute, du banquier de n'avoir pas bien examiné la lettre qui lui a été présentée; et il n'est pas recevable, suivant les principes ci-dessus, à l'indemnité d'une perte à laquelle il a donné lieu par sa faute."

I do not myself think that either the original by SCACCHIA or the commentary by POTHIER are relevant to the matter in hand. We are not dealing here with either "mandant" or "mandatory," and I do not think that it is part of the commercial law of England, howsoever applied, and before accepting the modified doctrine of POTHIER it is well to see what that doctrine is. That learned author, who gives the case of the forger who has added a cipher to the sum written in figures, and gives it expressly as an example illustrative of his principle, proceeds to show that it is founded on certain pronouncements of the civil law, and proceeds accordingly to show that a slave sold with a knowledge that he was a thief makes his master responsible to the purchaser for any theft he may commit. M. BUGNET, the learned commentator, points out in the note quoted, that it is impossible to render the drawer responsible for an act to which he is no party, and it would be impossible to particularise all the precautions that it would be necessary to take. The language used, la faute du tireur, may be satisfied by a great many things which certainly the English law would not recognise as an answer, but which the language of POTHIER would obviously include. The careless keeping of a cheque-book, like the careless keeping of the seal in *Bank of Ireland (Governor & Co.)* v. *Evans Charities Trustees* (3), might well satisfy the words faute du tireur, and I confess I should regard with great apprehension a decision that anything that a jury should regard as faute du tireur should render a forged instrument valid. As M. BUGNET truly says, it is impossible to particularise all the things that might have to be considered; the sort of paper, the ink. There are well-known precautions, which, for greater security, some banks take to prevent the forgery of their notes. There is some colour which prevents, or at all events renders difficult, imitations by

photography, and is it to be in each case a question for the jury whether this or that precaution was omitted in drawing a bill, or in accepting it when drawn? It seems to me that it would be a very serious proposition to lay down that such questions should be permitted to arise when dealing with such an instrument as a bill of exchange, and other questions would then arise, as, I think, was pointed out in the course of the argument—a minute examination of every bill tendered for acceptance, and a consideration of how far its form might give an opportunity to a forger to forge and escape detection.

This very case has in almost precisely similar circumstances been already decided in the *Adelphi Bank* v. *Edwards* (6), and I regret very much that that case has not been reported. I entirely concur with what LINDLEY, L.J., said in that case, that it was wrong to contend that it is negligence to sign a negotiable instrument so that somebody else can tamper with it; and the wider proposition of BOVILL, C.J., in a former case, *Société Générale* v. *Metropolitan Bank, Ltd.* (7), that people are not supposed to commit forgery, and that the protection against forgery is not the vigilance of parties excluding the possibility of committing forgery, but the law of the land. It appears to me that even the modified rule laid down by POTHIER, considering the principles on which that learned author relies for its acceptance, is not and never has been the law of England. I think that this appeal ought to be dismissed with costs.

LORD WATSON (having stated the facts): The case was tried before CHARLES, J., upon the facts already stated, with these further admissions made by the appellant: (i) that the respondent was ignorant of bill transactions; (ii) that he knew nothing about the stamp laws, and (iii) that he had good reason to place implicit confidence in the honesty of Scott Sanders. With regard to the first and second of these admissions, I must observe that, in my opinion, ignorance of bill transactions or of the stamp laws will not, in a question with an onerous and bona fide holder, absolve persons who, notwithstanding their ignorance, choose to engage in such transactions, from the fulfilment of any duty or obligation which the law imposes upon the parties to a bill of exchange. The reasonable belief of the respondent in the honesty of the person by whom the bill was drawn and presented to him for acceptance might, if he was under a legal duty to take precautions against its fraudulent alteration, be an element of importance in considering whether, as matter of fact, he acted negligently as the appellant alleges.

The appellant did not maintain that the respondent either directly authorised, or meant to authorise, Scott Sanders to alter the amount of the bill. Nor did he maintain that the respondent had by his subsequent conduct, homologated or adopted the alteration. He contended that the law merchant imposes upon every person who either draws or accepts a bill of exchange with a view to its circulation, the duty of taking reasonable precautions, in order to prevent the possibility of its amount being fraudulently increased; that the respondent negligently failed to perform that duty, inasmuch as he accepted a bill written upon a stamp sufficient to cover the altered amount, and having spaces left blank in the writing, which enabled the drawer to fill them up in such a manner as to effect, and at the same time to conceal, his fraud; and that, by reason of such negligence, the respondent is estopped from denying his liability for the full amount of £3,500 appearing on the face of the bill. CHARLES, J., who appears to have relied upon the authority of *Young* v. *Grote* (1), held in point of law that, if the acceptor of a bill of exchange "signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument." Upon the facts of the case the learned judge came to the conclusion that the respondent had not been guilty of negligence; but, in respect that the alteration of the bill was not apparent, he found that the appellant was entitled to the money which had been paid into court, and entered judgment for the respondent. His decision was affirmed, but not upon the same grounds, by a majority of the Court of Appeal. The Master of the Rolls and RIGBY,

L.J., were of opinion that, although the rule contended for by the appellant might prevail as between a customer and his banker, it was not applicable, according to English law, as between the acceptor of a bill of exchange and subsequent holders. Their Lordships were further of opinion that the rule, assuming it to have previously existed, was abolished by s. 64 of the Bills of Exchange Act, 1882. LOPES, L.J., dissented, being of opinion that the principle of *Young* v. *Grote* (1) applied, as between the acceptor and an indorsee acquiring right to the bill after his acceptance; and his Lordship also, differing from CHARLES, J., held that the respondent had been negligent, and that the appellant ought, therefore, to have judgment for the full amount of the bill as fraudulently altered.

In these circumstances it becomes necessary to examine the authorities which were noticed by the learned judges, or were cited in the able argument addressed to us on behalf of the appellant. Such of these authorities as really bear upon the doctrine propounded by the appellant are few in number. Of the rest, some have a very distant relation to it; while others are irrelevant. The basis of the appellant's argument is to be found in *Young* v. *Grote* (1). In that case the customer of a bank signed several blank cheques, and gave them to his wife to be filled up and negotiated by her as she required. In one of these the sum of £50 was inserted, in her presence, and at her request, by a clerk, to whom she then gave the cheque in order that he might get the money for her. In writing the sum the clerk had left spaces, with fraudulent intent, so as to enable him to increase the amount to £350, which was paid to him by the banker. BEST, C.J., and three other learned judges of the King's Bench held, in these circumstances, that the banker was entitled to take credit, in account with his customer, for the full amount which he had paid upon the cheque. The doctrine laid down by POTHIER (TRAITE DU CONTRAT DE CHANGE, c. 4, art. 3, s. 99) was referred to with approval by some of the learned judges. In that passage the author deals with the mutual rights and obligations arising out of the contract of mandate which subsists between a banker and the mandant whose cheques or orders he has undertaken to pay. He notices the rule of the Roman law, which had been followed by SCACCHIA to the effect that mandator debet refundere mandatario quicquid ei inculpabiliter abest ex causâ mandati. According to that rule the customer would be liable for the amount of a fraudulently altered cheque, in every case where the banker could not have detected the alteration by the exercise of reasonable care. POTHIER qualifies the rule, and in so far favours the customer by limiting his liability to those cases in which his own negligence in drawing the cheque has given the opportunity for its alteration. The reported opinions of the learned judges leave it doubtful whether their decision in *Young* v. *Grote* (1) went upon the doctrine of POTHIER, or upon the ground that the customer, by signing a blank cheque, had undertaken liability for any sum which might be filled in before it was presented for payment.

I think that LORD CRANWORTH, L.C., must have had the first of these grounds in view when he said in *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (3) (5 H.L.Cas. at p. 413):

> "Now, the case of *Young* v. *Grote* (1) went upon that ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the cheque for £350, and if the circumstances are such, whether arising from negligence or from any other cause, that, as between the customer and his banker, the customer is estopped from saying that he did not sign the cheque for a particular amount, that, as between them, is the same as if he had signed it."

On the other hand, PARKE, B., when delivering the opinion of seven judges of the Exchequer Chamber in *Robarts* v. *Tucker* (8), indicates that *Young* v. *Grote* (1) was decided upon the second ground. After referring to the facts of that case, he observed (16 Q.B. at p. 580):

A "This was in truth considering that the customer had, by signing a blank cheque, given authority to the person in whose hands it was to fill up the cheque in any way the blank permitted."

Halifax Union v. *Wheelwright* (9) appears to me to be a decision in entire conformity with the doctrine of POTHIER. The guardians were in the habit of passing B orders upon their treasurer, who was local agent of the bank in which their money was deposited. Some of these orders were written by their clerk and thereafter signed by the guardians, having been drawn by the clerk in such a way that he was enabled to increase their amounts before he presented them for payment. The court held that the treasurer was in the same position as if he had been their banker; and that the guardians were estopped, by their negligent drawing of the C orders, from maintaining that he had not their authority to pay the full amount of these orders, as fraudulently increased.

In my opinion, *Young* v. *Grote* (1) can have no bearing on the present case, if it was decided on the ground that the customer, by signing a blank cheque, had given implied authority to fill it up, to any subsequent holder. Whoever signs a cheque or accepts a bill in blank, and then puts it into circulation, must necessarily intend D that either the person to whom he gives it, or some future holder, shall fill up the blank which he has left. No such inference would be reasonable in the case where the drawer or acceptor signs for a particular sum specified on the face of the document. If, on the other hand, the decision in *Young* v. *Grote* (1) was based upon the ratio that the customer, in filling up the cheque through his wife, whom he had constituted his agent for that purpose, had failed in the duty which he owed to E his banker by giving facilities for its fraudulent alteration, I am not prepared to affirm that it cannot be supported by authority. But it does not, in my opinion, necessarily follow that the same rule must be applied between the acceptor of a bill of exchange and a holder acquiring right to it after acceptance. The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the F drawer or acceptor and possible future endorsees of a bill of exchange. The duty which the appellant's argument assigns to an acceptor is towards the public, or, what is much the same thing, towards those members of the public who may happen to acquire right to the bill after it has been criminally tampered with. Apart from authority, I do not think that the imposition of such a duty can be justified on any sound legal principle. In many, if not most cases which occur in the course of G business, the bill is written out by the drawer, and sent by him to the acceptor, who is under an obligation to sign it. Assuming the appellant's argument to be well founded, it would be within the right of the acceptor to return the bill unsigned, if it were not drawn so as to exclude all reasonable possibilities of fraud or forgery. The exercise of that right might lead to very serious complications in commercial transactions. Besides, it is not consistent with the general spirit of the law to hold H innocent persons responsible for not taking measures to prevent the commission of a crime which they may have no reason to anticipate, although there may be an exception in the case where one of the parties to the instrument has, either by express agreement or by implication established in the law, become bound to use such precautions.

I am, therefore, unwilling in the case of an acceptor to affirm the doctrine upon I which the appellant relies, unless it can be shown to be established by authority as part of the English law merchant. I shall briefly refer to four decisions because they were either cited in argument or have been discussed in this or similar cases by the courts below. All of these cases related to bills of exchange; but in none of them had there been any alteration of the amount for which the acceptor signed. In *Ingham* v. *Primrose* (10) the facts were that a blank acceptance was returned to the acceptor in the same condition in which it had been issued by him. He tore the bill in two, and threw away both parts in the street, where they were picked up by a passer by who pasted them together and negotiated the restored bill. The

acceptor was found liable to an onerous holder, not because he had signed a bill which facilitated fraud, but upon the obvious consideration that he had negligently put into circulation a negotiable document which had not been properly cancelled. *Arnold* v. *Cheque Bank* (11) had its origin in these circumstances. A firm in New York purchased there a genuine bill on London, which they endorsed to an English creditor, and inclosed in a letter addressed to him. The letter inclosing the bill was stolen from the firm's letter-box by one of their clerks, and the stolen bill was paid by the Cheque Bank in London, upon a forged endorsement [purporting to be that of the creditor]. It was held that such payment did not afford a good defence to the bank against a claim by the genuine endorsee and true owner of the bill. No question arose as to any duty owing by the acceptor of the bill. In *Baxendale* v. *Bennett* (12) it was decided that an acceptor was not liable to a holder upon a bill accepted by him in blank, which had been stolen from his drawer and filled up and circulated by the thief. A different decision was given in *London and South Western Bank* v. *Wentworth* (13), where a bill signed by him in blank was entrusted by the acceptor, for the purpose of its being negotiated, to a person who fraudulently filled in a larger sum than the acceptor intended, disposed of the bill, and appropriated its proceeds. The difference of result in those two cases was plainly due to the fact that in the one the acceptor had not, and in the other he had, issued the bill as a negotiable document. But in neither case did the decision of the court turn upon the supposed duty of the acceptor to guard against fraudulent alterations of the bill.

I shall now proceed to consider the remaining and only English authorities which appear to me to be in point. Before doing so I think it is not immaterial to observe that POTHIER, who is the real author of the doctrine relied on by the appellant, in the passage cited by the learned judges who decided *Young* v. *Grote* (1), only applies it to the case of a banker and his customer. But in art. 3 of the same chapter of his treatise, the learned author discusses the nature of the contract which is constituted between the drawer and acceptor of a bill which he asserts to be "un vrai contrat de mandat, mandatum solvendæ pecuniæ." I think it is apparent, from the context of art. 3, that the rule laid down by POTHIER in s. 99, was meant by him to apply, not only as between banker and customer, but as between a drawer and an acceptor who pays in compliance with his drawer's mandate. But the rule has no application to parties between whom there is no subsisting contract of mandate. According to its terms an acceptor who paid the full sum appearing upon the face of a bill which he knew, or had reason to believe, had been fraudulently increased after his acceptance, would have no right to recover the increased amount from his drawer.

It was argued that certain expressions used by BLACKBURN, J., in *Swan* v. *North British Australasian Co.* (14), tend to show that the rule which POTHIER applies to a customer who draws a cheque upon his banker has application also as between the acceptor of a bill and possible future holders. His Lordship there said (2 H. & C. at pp. 182, 183), with reference to *Young* v. *Grote* (1):

> "It may be that the case is to be supported upon some of the grounds there stated, or upon the broader ground apparently supported by the authority of POTHIER in the passage cited in *Young* v. *Grote* (1) that the person putting in circulation a bill of exchange does, by the law merchant, owe a duty to all parties to the bill to take reasonable precautions against the possibility of fraudulent alterations in it; it is not necessary to inquire how that may be."

LOPES, L.J., infers from these words that

> "it is impossible not to see that in the case of negotiable instruments BLACKBURN, J., thought that the duty did exist."

I am unable to assent to that inference. The words convey anything but a hearty approval of the decision in *Young* v. *Grote* (1); and at the most they do not even amount to obiter dicta. They contain no expression of judicial opinion, and do

nothing more than state the tenor of an argument which the noble and learned Lord had not found it necessary to consider. One thing seems certain, namely, that his Lordship had not examined the text of POTHIER, which contains no such doctrine as his words impute.

Several points were raised for the decision of the Court of Common Pleas in *Société Générale* v. *Metropolitan Bank, Ltd.* (7), and one of these came very near to the question which your Lordships have to consider in this case. The time of payment of a bill of exchange had, after issue, been fraudulently altered from eight to eighty days after date. The alteration being material, it was sought to make the acceptor liable, upon the ground that he had negligently left a vacant space in the bill, between the words "eight" and "days," which enabled the fraudulent holder to add the letter "y" without risk of the fraud being detected upon inspection of the document. The Court, consisting of BOVILL, C.J., with KEATING and BRETT, JJ., came to the conclusion that the acceptor was not liable. None of the learned judges affirmed that there was any duty incumbent upon the acceptor to take precautions against forgery, and on that assumption, they all held that there had been no negligence. Two of them used language which does not appear to me to be consistent with the existence of such a duty. The Chief Justice observed (27 L.T. at p. 856):

> "Persons are not to be supposed to commit forgery, and the protection against such a claim is the law of the land, not the vigilance of parties in excluding all possibility of committing it."

BRETT, J., said (ibid. at pp. 857, 858):

> "I not only protest that there was no negligence, but say that no judge ought to leave to a jury the fact as evidence of negligence. But there is no duty on anyone to suppose that those, against whose character there is no imputation, will commit forgery whenever the opportunity occurs."

The next and the last of the English authorities, which raised the same questions of law and fact which occur in this appeal, is *Adelphi Bank* v. *Edwards* (6), decided in the year 1882. The case has not been reported; but in the course of the argument your Lordships had the advantage of considering the shorthand-writer's notes of the opinions delivered by the learned judges, both in the court of first instance and in the Court of Appeal. From these it appears that the defendant Edwards had accepted a bill for £22 10s., which was written on a stamp sufficient to cover £300. Spaces were left in the writing, which enabled a fraudulent holder to increase the amount of the bill to £222 10s. by inserting the figure "2" between the letter "£" and the figures "22" in the corner of the bill, and by adding the words "two hundred" at the end of one line and the word "and" at the beginning of the next. The plaintiff bank, having paid the increased amount, sued the acceptor upon the same arguments which have been submitted to your Lordships on behalf of the appellant. CHITTY, J., before whom the case was tried, was of opinion that, upon the law contended for by the plaintiff, the defendant had not been guilty of negligence. At the same time the learned judge did not accept that law. He said:

> "The defendant, in my opinion, as a prudent man of business, was not bound to contemplate that the bill was coming into fraudulent hands, nor that by the perpetration of a crime it would be altered in the manner in which it has been altered."

In the Court of Appeal the learned judges took the same view of the facts as CHITTY, J.; but they also negatived the existence of any rule or principle requiring the acceptor of a bill to exclude facilities for its alteration. BAGGALLAY, L.J., said:

> "It seems to me impossible to say that there was any duty on the part of the acceptor of this bill towards the party who might subsequently become the

holder of the bill so to criticise, and so to examine the bill before he signed, as to put it out of the possibility of any additional words being afterwards inserted in it."

BRETT, L.J., stated forcibly the same opinions which he has expressed, in stronger language and at greater length, in this case. LINDLEY, L.J., after referring to *Young* v. *Grote* (1) and "that class of cases," proceeded thus:

"We cannot say there was negligence here, unless we go the whole length of saying that it is negligent to sign a negotiable instrument so that somebody else can tamper with it. I cannot go that length. I think it would be wrong. There is no authority which compels us to do anything of the sort."

Two decisions of the Court of Session belonging to a period when the commercial law of Scotland was yet in its infancy, *Graham* v. *Gillespie* (15) and *Pagan and Hunter* v. *Wylie* (16) were founded on by the appellant. Both cases were decided upon what I consider a false analogy, namely, that the acceptor of a bill for a definite amount, which is capable of being fraudulently increased by the insertion of additional words and figures, stands in exactly the same position as the acceptor of a blank bill. The American case of *Garrard* v. *Haddan* (17), which was also cited for the appellant, is open to the same criticism.

The result of the English authorities is, in my opinion, decidedly adverse to the appellant. Before the present action was brought, the rule for which he contends had, so far as I have been able to find, never been enforced in an English court, or affirmed by an English judge. On the contrary, it had been disapproved by BOVILL, C.J., and BRETT, J., in *Société Générale* v. *Metropolitan Bank, Ltd.* (7); and *Adelphi Bank* v. *Edwards* (6), in which four judges were unanimous, is a direct precedent against it. It is, no doubt, within the competency of this House to overrule the decision in *Adelphi Bank* v. *Edwards* (6), but I see no reason why your Lordships should do so. The doctrine of POTHIER, out of which the contention of the bill-holder in this and previous litigation has grown, is founded upon reasons which have no application to any question between a drawer or acceptor and a holder acquiring right to the bill after acceptance, and I know of no principle of law which would warrant its extension to that case. I desire to add that, had your Lordships thought fit to accept the legal argument of the appellant, I should not have been of opinion that the claim which he makes in this action was excluded by s. 64 of the Bills of Exchange Act. That section admits an action for the altered amount of the bill when the acceptor has authorised the alteration. Accordingly, on the supposition already made, if it had been shown that he had failed to discharge his legal duty to the appellant, the respondent would have been estopped from saying that he did not authorise the fraud committed by Scott Sanders. That estoppel by negligence would, in my opinion, have been sufficient to establish that the respondent had "authorised" the fraudulent alteration within the meaning of s. 64. For these reasons I also am of opinion that the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN.—CHARLES, J., and LOPES, L.J., are both of opinion that a person who accepts a bill of exchange, intending that it should be put into circulation, owes to everyone who may become the holder a duty which they define or describe as the duty "not to be negligent with regard to the form of the instrument." Agreeing so far, the opinions of the learned judges diverge at this point. It is part of the history of the case that the bill presented to Lord Londesborough for his acceptance was designed to facilitate a premeditated forgery. But CHARLES, J., finds that under the circumstances the instrument as presented would not have aroused suspicion in the mind of a reasonably prudent person, and, therefore, he comes to the conclusion that Lord Londesborough was not guilty of that sort of negligence which would make him liable for the consequences of the crime after-

wards consummated. LOPES, L.J., on the other hand, thinks that the bill before acceptance presented such obvious opportunities for alteration, and such a combination of suspicious circumstances, as ought to have attracted the attention of any man of ordinary prudence. He considers that Lord Londesborough, by his want of care and caution, "enabled" the drawer to commit the forgery. Thinking that forgery was the result "to be anticipated," he holds that Lord Londesborough must suffer for his neglect.

Assuming the existence of the duty which both these learned judges would cast upon the acceptor of a bill of exchange, I should be disposed to agree with CHARLES, J., rather than with the lord justice. To me it seems extravagant to suggest that the acceptor of a bill is bound to be familiar with the different steps in the scale of stamp duties, and to recognise a stamp of a higher grade than is required for the purpose in hand as an indication of fraud. With regard to the gaps, or vacant spaces in the bill as presented to Lord Londesborough, I think that a person of ordinary prudence who had confidence in the man with whom he was dealing, and never had had his attention called to this species of fraud, might well have passed them by unnoticed; or, if he had happened to notice them, might have thought them of no moment. I cannot think that there is any rule which forbids you to give a person with whom you are acquainted, and whom you believe to be honest, some little credit for honesty even when he comes for your promised acceptance to a bill of exchange. I cannot think that even on such an occasion you are bound to scan his handiwork with the eye of a detective, as if it were the production of a would-be forger. The prevention of crime is, perhaps, better left to the operation of the criminal law.

However that may be, I agree with your Lordships in thinking that the supposed duty does not in fact exist. Both the learned judges who are in favour of the doctrine refer it to "the principle of *Young* v. *Grote* (1)." *Young* v. *Grote* (1) is a case which has excited as much diversity of opinion as any case in the books. It has given rise to various explanations not altogether uniform or consistent. That circumstance of itself is regarded by some judges as a badge of merit, and a passport to the confidence of the profession. But when you are in search of a principle, the effect is rather embarrassing. And, therefore, it is with some diffidence that I venture to inquire what, after all, is the true principle of *Young* v. *Grote* (1)?

In *Orr and Barber* v. *Union Bank of Scotland* (18), in 1854, and again in *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (3), in 1855, LORD CRANWORTH, L.C., had occasion to comment on *Young* v. *Grote* (1). In the former case, referring to *Young* v. *Grote* (1), he says:

> "Whether the conclusion, in point of fact, was in that case well warranted is not important to consider. The principle is a sound one, that when the customer's neglect of due caution has caused his bankers to make a payment on a forged order, he shall not set up against them the invalidity of a document which he has induced them to act on as genuine."

If that be the principle of *Young* v. *Grote* (1), I do not think it helps the appellant much. It will be observed that LORD CRANWORTH treats the relation of banker and customer as the governing feature in the case. That relation is, I think, a long way off from the connection between the acceptor of a bill and a subsequent holder. The observations of PARKE, B., on *Young* v. *Grote* (1), in delivering the opinions of the judges in *Bank of Ireland (Governor & Co.)* v. *Evans' Charities Trustees* (3) are much to the same effect. Nor do I think that there is any difference in substance between the views expressed by LORD CRANWORTH himself in the two cases. In the later case he seems to treat the decision in *Young* v. *Grote* (1) as founded on estoppel, though, as COCKBURN, C.J., points out, *Young* v. *Grote* (1) was "decided without reference to estoppel at all": *Swan* v. *North British Australian Co.* (14). Other judges, including PARKE, B., himself, in the earlier case of *Robarts* v. *Tucker* (8), in 1851, have held that *Young* v. *Grote* (1) is to be supported on the ground

that the customer had by signing a blank cheque given authority to anyone in whose hand it was to fill it up in any way the blank permitted. If that is the real ground of the decision it has still less bearing on the present case, where nothing further was required to be added after Lord Londesborough's acceptance to give effect or negotiability to the instrument.

Whatever may be the better ground for supporting the decision in *Young* v. *Grote* (1), it is obvious, on referring to the report in BINGHAM, that the court went very much on the authority of the doctrine laid down by POTHIER, that in cases of mandate generally, and particularly in the case of banker and customer, if the person who receives the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder. The only other case on which much reliance was placed on the part of the appellant was *Swan* v. *North British Australasian Co.* (14), which was cited for the observations of BLACKBURN, J., 2 H. & C. at p. 182. With the comments which have been made on those observations by LORD WATSON I quite agree. If the report is correct, the reference to POTHIER is certainly inaccurate.

Passing from authority I must say that I am not at all persuaded that the contention on the part of the appellant can be supported on principle or on grounds of convenience. It was said that the negotiability of bills of exchange would be seriously impaired if persons who act as Lord Londesborough acted are not to be held liable for all the consequences of their want of caution. But I must say that I was very much struck with some observations which fell from one of your Lordships during the argument, that the consequences to the transaction and despatch of mercantile business would be serious indeed if it were laid down that a person under obligation to accept a bill was at liberty to refuse or delay acceptance on the ground that there was something in the form of the instrument of which a skilful forger might perhaps take advantage. After all, it is the drawer of a bill of exchange who has control over its form; the obligation of the acceptor is to pay the bill at maturity. Censorship over the form of the instrument is, I think, no part of his duty. I am of opinion that the appeal must be dismissed.

LORD MORRIS.—I am of the same opinion. The liability of the respondent must arise from either, first, his complicity in the fraud, or, secondly, from some contractual relation, express or implied, between him and the holder of the bill of exchange, or, thirdly, from some duty he owed to the holder. There is no pretence of any complicity by the respondent; there is no privity between the appellant and the respondent from which any contract can be spelled out. Is there any duty on the acceptance of a bill to a subsequent holder that the acceptor should scrutinise the bill presented to him for acceptance? In my opinion, none beyond this, that he should see that he accepts a bill filled up, because, if he accepts a bill in blank, that implies an authority to the person getting the acceptance to fill up the amount. In *Young* v. *Grote* (1) the cheque was in blank. Even if well decided on its particular facts as a case between banker and customer, I fail to see how it governs this case where the defendant accepted a regularly filled up bill. If the defendant could be held liable it appears to me that an indorser would also be bound to enter on a scrutiny of the bill in order to protect himself from a subsequent holder. This case is an attempt to impose a new duty on an acceptor of a bill of exchange. The doctrine of estoppel binds an acceptor who accepts a blank bill because by doing so he is precluded from setting up as defence that he did not authorise the filling up; that doctrine has no application to the present case.

LORD SHAND.—I concur in thinking the appeal ought to be disallowed. The weight of judicial opinion and authority is clearly against the contention of the appellant, unless, indeed, it could be shown that *Young* v. *Grote* (1) had a direct application and that the grounds of that decision were applicable to the facts which have been here proved. The question here raised was expressly decided in 1882 against

A the view contended for by the appellant, in *Adelphi Bank* v. *Edwards* (6), in which the judgment of CHITTY, J., was unanimously affirmed by the Court of Appeal, and besides the opinion of BOVILL, C.J., and BRETT, J., in *Société Générale* v. *Metropolitan Bank, Ltd.* (7), the same judgment has now been repeated by a majority of the Court of Appeal.

B As to *Young* v. *Grote* (1), I find nothing in the grounds of the judgment which supports the proposition that an endorsee of a bill of exchange for value has a legal claim against the acceptor against whom no want of bona fides can be alleged, for a sum beyond the amount for which the acceptance was given, on the ground of negligence in his having given his acceptance to a bill in such a form and impressed with such a stamp as enabled the drawer to commit a forgery by enlarging the C amount for which the acceptance was granted in such a way as to escape detection by the endorsee. *Young* v. *Grote* (1), between a banker and his customer, was a case in which there was the relation of parties contracting with each other. It appears to me that the ground of decision, as reported, was in conformity with the limited doctrine of POTHIER, that this relation inferred, if not expressly at least by implication, the duty and obligation on the customer's part, in issuing cheques on D his banker to third parties, to take care that these were not in such a form as to give the means of enlarging their amount without this being readily detected. In that view of the case the decision does not apply here, where the acceptor and the endorsee of the bill were strangers to each other, having no relation as contracting parties which could imply the duty and obligation of the banker's customer to the banker. If, as has been suggested, the decision in *Young* v. *Grote* (1) turned on the fact that E the customer had signed cheques wholly blank in amount, by which the person acquiring possession might be held to have a mandate to fill in any sum he chose, the case has no application to the present. The acceptor here signed no bill blank in the sum, for there was expressed in writing in the body of the bill the amount for which he agreed to undertake liability.

I agree with your Lordships in holding that there is no sound reason or legal F principle to support the view that, on the ground of negligence, an acceptor of a bill becomes liable to a subsequent holder for a sum beyond the amount of his acceptance because the form of the document and the stamp used admit of a forgery in the hands of a dishonest person, such as occurred in this case. As to the stamp, I do not believe that in the course of ordinary business persons accepting bills scrutinise the paper on which a bill is written to see the amount it will carry, and G I am certainly not prepared to say they are in any way required, as a matter of duty or obligation, to do so. Stamps of higher value than necessary must be often used when it is difficult or inconvenient to get a stamp of the precise value wanted. As to the form of the document, I think an acceptor, while himself acting bona fide, who has the sum for which he has agreed to grant his acceptance expressed in the body of the bill, is not called upon to anticipate and provide against forgery. To H hold the contrary would lead to great inconvenience in business. An acceptor scrutinising a bill might think it left room for a fraudulent addition, and might refuse acceptance to the serious injury of the drawer residing at a distance or abroad, or of a drawer who might have endorsed the bill for value given before acceptance, and he might be involved in litigation and found to have been unduly apprehensive and in the wrong, while after acceptance numerous and difficult I questions might frequently arise as to what constituted negligence in particular cases like the present, in which two learned judges have differed on the point.

I think that the appellant has failed to show that his contention is founded on sound legal principle; and though cases of successful fraud and forgery will no doubt occur from time to time, notwithstanding the risk of penal consequences incurred by the forger, yet a decision giving effect to the appellant's argument would, I think, lead to so great inconvenience in business, and so much litigation, as to create a greater evil than can arise under the existing law as now settled by your Lordships' judgment.

LORD DAVEY.—I have had an opportunity of reading and considering the opinion which has been delivered by LORD WATSON, and I so entirely agree in the conclusion at which he has arrived and the reasons which he has expressed in support of his view, that I have not felt it necessary to write an opinion of my own. I only desire to say that, in my view, our decision in this case is outside *Young* v. *Grote* (1). The doctrine of that case was one arising out of the relation of mandant and mandatory, which does not exist in the case of the drawer and holder of a bill of exchange.

Appeal dismissed.

Solicitors: *Smith, Fawdon & Low; Saltwell, Tryon & Saltwell.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

GOSLING *v.* GASKELL AND GROCOTT

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Morris and Lord Davey), May 6, 7, July 27, 1897]

[Reported [1897] A.C. 575; 66 L.J.Q.B. 848; 77 L.T. 314; 46 W.R. 208; 13 T.L.R. 544]

Company—Debenture—Receiver—Appointment by trustees—Business carried on by receiver—Agent of company—Winding-up order—Continuance of receiver as manager—Liability of trustees for goods supplied after winding-up order.

A company conveyed all their property to trustees for debenture-holders by a deed which gave the trustees power, in the events which happened, to appoint a receiver who was empowered to carry on the business and was to be the agent of the company. On appointing a receiver the trustees stipulated that he should pay all moneys received into an account at their bank, and that all cheques drawn should be countersigned by the solicitor to the trustees, who was also chairman of the company. An order to wind-up the company was made, and a liquidator was appointed, but he did not interfere in any way with the business, which was still carried on by the receiver. In an action against the trustees by suppliers for the price of goods supplied on the order of the receiver after the date of the winding-up order,

Held: at the date of his appointment the receiver, although appointed by the trustees on behalf of the debenture-holders, was the agent of the company; his position was not altered by the order for the winding-up of the company; and, therefore, he never became the agent of the trustees so as to render them liable as principals for the price of the goods.

Cox v. *Hickman* (1) (1860), 8 H.L.Cas. 268, applied.

Notes. Considered: *Deyes* v. *Wood*, [1911] 1 K.B. 806. Applied: *Thomas* v. *Todd*, [1926] All E.R. Rep. 564. Considered: *Re Northern Garage, Ltd.*, [1946] 1 All E.R. 566. Referred to: *Re Hale, Lilley* v. *Foad* (1899), 68 L.J.Ch. 517; *Robinson Printing Co.* v. *Chic*, [1905] 2 Ch. 123; *Gough's Garages, Ltd.* v. *Pugsley*, [1930] 1 K.B. 615; *I.R. Comrs.* v. *Thompson*, [1936] 2 All E.R. 651; *Telsen Electric Co.* v. *Eastick & Sons*, [1936] 3 All E.R. 266; *Re Brown & Co. (General Warehousemen), Ltd.*, [1940] 3 All E.R. 638; *Central London Electricity, Ltd.* v. *Berners*, [1945] 1 All E.R. 160.

A As to enforcement of debentures, see 6 HALSBURY'S LAWS (3rd Edn.) 500 et seq.; and for cases see 10 DIGEST (Repl.) 817 et seq.

Cases referred to:

(1) *Cox* v. *Hickman* (1860), 8 H.L.Cas. 268; 11 E.R. 431; sub nom. *Wheatcroft* v. *Hickman*, 9 C.B.N.S. 47; sub nom. *Cox* v. *Hickman*, *Wheatcroft* v. B *Hickman*, 30 L.J.C.P. 125; 3 L.T. 185; 7 Jur.N.S. 105; 8 W.R. 754, H.L.; 36 Digest (Repl.) 435, *91*.

(2) *Mollwo, March & Co.* v. *Court of Wards* (1872), L.R. 4 P.C. 419; 9 Moo. P.C.C.N.S 214; 17 E.R. 495, P.C.; 36 Digest (Repl.) 426, *25*.

Also referred to in argument:

C *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11*.

Owen & Co. v. *Cronk*, [1895] 1 Q.B. 265; 64 L.J.Q.B. 288; 11 T.L.R. 76; 2 Mans. 115; 14 R. 229, C.A.; 10 Digest (Repl.) 821, *5366*.

Re Henry Pound, Son, and Hutchins (1889), 42 Ch.D. 402; 58 L.J.Ch. 792; D 62 L.T. 137; 38 W.R. 18; 5 T.L.R. 720; 1 Meg. 363, C.A.; 10 Digest (Repl.) 844, *5568*.

Burt, Boulton and Hayward v. *Bull*, [1895] 1 Q.B. 276; 64 L.J.Q.B. 232; 71 L.T. 810; 43 W.R. 180; 11 T.L.R. 90; 39 Sol. Jo. 95; 2 Mans. 94; 14 R. 65, C.A.; 10 Digest (Repl.) 834, *5463*.

Re Wreck Recovery and Salvage Co. (1880), 15 Ch.D. 353; 43 L.T. 190; 29 W.R. E 266, C.A.; 10 Digest (Repl.) 969, *6686*.

Collen v. *Wright* (1857), 8 E. & B. 647; 27 L.J.Q.B. 215; 30 L.T.O.S. 209; 4 Jur.N.S. 357; 6 W.R. 123; 120 E.R. 241, Ex. Ch.; 1 Digest (Repl.) 758, *2957*.

Jefferys v. *Dickson* (1866), 1 Ch. App. 183; 35 L.J.Ch. 376; 14 L.T. 208; 12 Jur.N.S. 281; 14 W.R. 322, L.C.; 35 Digest 372, *1156*.

F *Re Batey, Ex parte Emmanuel* (1881), 17 Ch.D. 35; 50 L.J.Ch. 305; 44 L.T. 832; 29 W.R. 526, C.A.; 4 Digest (Repl.) 236, *2126*.

Redpath v. *Wigg and O'Beirne* (1866), L.R. 1 Exch. 335; 4 H. & C. 432; 35 L.J.Ex. 211; 14 L.T. 764; 12 Jur.N.S. 903; 14 W.R. 866, Ex. Ch.; 1 Digest (Repl.) 733, *2766*.

G **Appeal** from a decision of the Court of Appeal (LORD ESHER, M.R., and LOPES, L.J., RIGBY, L.J., dissenting), reported [1896] 1 Q.B. 669, affirming a decision of LORD RUSSELL, C.J., in a case tried by him without a jury.

The following statement of the facts is taken from the opinion of LORD HERSCHELL.

Prior to the month of May, 1892, a company designated Poole and Wright, Ltd., were carrying on business as makers of electrical instruments, and had raised H £7,000 by mortgage debentures charged upon the lands and property of the company. On May 18, 1892, they borrowed a further sum of £3,000 from Messrs. Goslings and Sharpe, in respect of which debentures were to be issued, and by a deed of that date all the land and property and all the business and undertaking of the company were conveyed to the present appellant and William Cunliffe Gosling, since deceased (two of the partners in Goslings and Sharpe), by way of second mortgage, as trustees I for the second debenture-holders. By cl. 13 of this deed it was provided that, if the trustees should certify that in their opinion the security thereby given was endangered, they might, by writing under their hands, appoint a receiver of the mortgaged premises, and might, from time to time, remove any such receiver and appoint a new receiver in his place. It was further provided that any person so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The deed empowered the receiver, with the consent of the trustees, inter alia to carry on the business of the company, and for that purpose to use the mortgaged premises, to purchase stock-in-trade, and generally to use and

deal with the mortgaged premises as the company might have done before such appointment. On June 22, 1892, the security not having then become enforceable, the trustees certified that, in their opinion, the security was endangered, and appointed William John Kelly, the then secretary of the company, receiver. The appointment purported to be made by the trustees in pursuance of the power in that behalf vested in them by the indenture already referred to. The instrument appointing the receiver contained a proviso in these terms:

> "Provided that such receiver shall forthwith open an account in his name as receiver at the bank of Messrs. Goslings and Sharpe, and that his receipt for any moneys to be received by him as such receiver as aforesaid shall, in order to discharge the persons paying such money, be countersigned by John Tryon [solicitor to the trustees], and that all moneys so received shall, on the day of their receipt, be paid into the said account as aforesaid, and that the said bank shall not honour any cheques drawn upon the said account by him unless the same shall be countersigned by the said John Tryon."

Immediately after his appointment Kelly, as such receiver, commenced carrying on the business of the company, and continued to carry it on until February, 1895, when the first debenture-holders displaced Kelly as receiver and put an end to the carrying on of the business. All orders for goods given by Kelly were signed "Poole and White, Ltd.; W. J. Kelly, receiver." On Sept. 1, 1892, a petition was presented for the compulsory winding-up of the company, and a winding-up order was made on Sept. 14. The official receiver thereupon became liquidator of the company until displaced by the appointment of a Mr. Wilding as liquidator. The liquidator did not take possession of the assets of the company or interfere in the carrying on of the business. Between Dec. 5, 1893, and Jan. 31, 1895, goods were supplied by the respondents upon the order of Kelly, given in the form above mentioned, and the present action was brought by them to recover the price of these goods. LORD RUSSELL, C.J., gave judgment for the respondents, and his judgment was affirmed by the Court of Appeal, RIGBY, L.J., dissenting. The defendant appealed to the House of Lords.

Jelf, *Q.C.*, and *W. F. Hamilton* appeared for the appellant.
Reed, *Q.C.*, *Hansell*, and *Gregson* for the respondents.

Their Lordships took time for consideration.

July 27, 1897. The following opinions were read.

LORD HALSBURY, L.C.—I am of opinion that this case is governed by authority. *Cox* v. *Hickman* (1) appears to me expressly in point. Before that case was decided, I could have well understood the arguments presented to your Lordships on this appeal on the part of the respondents; but it appears to me to be too late to take up the position which was then very plausibly occupied. The facts in this case are complicated to some extent by one of the parties being a company, but in truth there is nothing in that circumstance which can alter the application of the law.

A company called Poole and White, Ltd., had borrowed a large sum of money upon a mortgage of the whole property of the company to certain trustees who, among other powers given to them, were entitled to enter into possession of the property mortgaged for the purpose of paying to certain debenture-holders the loan and handing over to the company whatever should remain after the debt and the sums due upon debentures had been paid. In the events which happened the trustees, in pursuance of this power, entered into possession, and in pursuance of the same power, appointed a receiver to take possession of the property, and to carry on the business of the company. Some months after the date of the mortgage Mr. Kelly, the receiver so appointed, was put into possession of the property mortgaged, and for a period of between two and three years he carried on the business

of the company. If during the period of so carrying on the business of the company Mr. Kelly or the trustees had been personally sued, the exact question which arose in *Cox* v. *Hickman* (1) would have arisen, and, though I shall proceed to discuss what happened afterwards, I believe that the statement might stop there so far as the decision of the present case is concerned.

It is the fact that Mr. Kelly on behalf of the trustees, ordered goods and incurred liabilities on behalf of some one in the conduct of the business, and I could well understand that, but for *Cox* v. *Hickman* (1), it might very reasonably have been argued that the trustees here, like the creditors and their agent there, were carrying on a business for their own profit, and the agency, such as it was, might well have been held to bind the persons entering into these trading operations as partners in the business. As BLACKBURN, J., in that case said (8 H.L.Cas. at p. 284), it was very reasonable that those sought to be charged in *Cox* v. *Hickman* (1) had authorised the managers of the business that was being carried on to bind them, as it was

> "an incident attached by law to a participation in the profits that such authority is given to those managing the concern."

What LORD CRANWORTH says seems to me to be the answer to the argument in that case, as it is the answer to the argument here. His Lordship says (ibid. at pp. 306, 307):

> "It seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtor, or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees; the debtor or the trustees are the persons by or on behalf of whom it is carried on."

This is the principle, and I am wholly unable to distinguish the reasoning of the noble and learned lord from the propositions of law that are applicable to this case. After the period of Mr. Kelly's management an order was made for winding-up the company under the provisions of the Companies Acts, and no difference was made in the management of the business or in the mode in which it was carried on after that order was made. For some reason or another, which I have not been able to follow, it is apparently assumed that, immediately on the winding-up order, Mr. Kelly, who, it is assumed, had been up to that time the agent for the company (as indeed he was so described, and as by the terms of the mortgage deed he was bound to be), suddenly became the agent of the trustees. That no new authority was in fact given to Mr. Kelly is admitted, but why the making of the order to wind-up the company should suddenly convert Mr. Kelly—who was there as the agent of the company—into the agent of the trustees, is a problem that I have not been able to solve.

There is a circumstance which appears to me to be absolutely irrelevant, but, as it is relied on, it is proper to notice it—namely, that one of the conditions on which the security should become enforceable, and under which it was enforced, was that, if, in the opinion of the trustees, the security should become endangered, they —the trustees—should appoint a receiver, and that when they had appointed a receiver, that receiver was to open an account with the bank in which the trustees themselves were partners, and all moneys received by the receiver appointed must

immediately be paid into that bank, and when cheques were drawn by him on the account so created, a Mr. Tryon, the solicitor for the trustees, was to countersign the cheques. Mr. Tryon was chairman of the company. As I have said, this fact is irrelevant. The fact of the trustees keeping a check upon the mode in which the produce of the trade was dealt with (which was all that was done by this provision) appears to me to reflect no light whatever on the relation of the trustees to outside creditors, who were supplying goods to the receiver of Poole and White, Ltd.

As I have pointed out before, but for *Cox* v. *Hickman* (1) it might well have been argued that the trustees, though called trustees in the deed, were really managers, and, as far as the management of the concern went, the mere agents of the creditors, who had the entire control over them, and as CROMPTON, J., in *Cox* v. *Hickman* (1) actually asked (8 H.L.Cas. at pp. 291, 292):

> "In what then, does the present case differ from that of ten persons setting up a new business in the names of two or three managers, they having to divide all the profits? The present case, indeed, is not even one of a trading in the names of the managers, but in a name which may comprehend any partners, and the clause of the deed so much relied on by the plaintiffs in error, which stipulates that they shall carry it on in the name of the Stanton Iron Co., must surely be quite inoperative as to any limitation of the liability to such persons when the rule of law is so well recognised that no agreement amongst partners can prevent the liability to third persons arising from the participation of profits. I can see no hardship under this particular deed in the creditors, who are to have the profits, being liable for the funds and goods from which the profits are to be made, except the general hardship of large liability from small investments, attempted to be remedied by the Limited Liability Acts."

The answer is one which I have already quoted from LORD CRANWORTH, and if I were to substitute the word "company" for the word "debtor" in LORD CRANWORTH'S language, every word of that very learned judge's observations would be applicable in this case. The company is still the person solely interested in the profits, save only that it has mortgaged them to its creditors. It receives the benefits of the profits as they accrue, though it has precluded itself from applying them to any other purpose than the discharge of its debts. The trade is not carried on by, or on account of, the creditors, though their consent is necessary in such a case, but the trade still remains the trade of the company. The company is the person by, or on whose behalf, the business is carried on. I am not able to understand in what way the winding-up order is supposed to have affected the persons now sued. I am not aware that there is anything in proof which shows that they accepted any other liability than that which they had already incurred, whatever that liability was. No specific act of adoption of any order given subsequently to the winding-up is even suggested. If the agent was acting under a misapprehension that he could still have the authority of the company to carry on the trade it would not make those who originally appointed him in pursuance of the powers of the deed liable for his acts. They appointed him, as they were entitled to appoint him, under the express powers of the deed, and, if the argument addressed to your Lordships were to prevail, that the authority of the company can no longer be invoked to sanction the trading, inasmuch as his power to trade with the company had ceased with the winding-up order, it could not operate to involve the trustees in a new liability without their knowledge. It could not be said that they were the real proprietors of the business even if—as two of the learned judges say—the company had ceased to exist. It was not, and it never could be, their business. Anything that their authorised trading had procured in the way of profit would not have belonged to them; but though, even if unauthorised, it was carried on ostensibly for and on behalf of the company, and if they neither professed to be the principals, nor were in fact the principals, I do not understand how they can be made principals.

A Under the circumstances, I am of opinion that the judgments of the courts below were wrong, and I think this appeal ought to be allowed, and the respondents ought to be made to pay the costs both here and below.

LORD WATSON stated the facts and continued: This action was brought by the respondents against both trustees under the indenture of May 18, 1892 (one of whom, B the late William Cunliffe Gosling, died before service of the writ), for the sum of £448 9s. 3d., being the balance still unpaid of the price of goods supplied at various times to Mr. Kelly in his capacity of receiver for Poole and White, Ltd., between Dec. 5, 1893, and Jan. 31, 1895. They have obtained judgment against the appellant for that amount with costs. It is not part of the respondents' case, and it was not maintained by their counsel at your Lordships' Bar, that the appellant and his C co-trustee were either real or ostensible partners of the concern carried on by Mr. Kelly as receiver of Poole and White, Ltd. Their sole contention, which succeeded in both courts below, was that the relations established between them and the receiver whom they appointed, professedly under the power conferred upon them by the indenture, were such that they must, in law, be held, if not before, at least after the liquidation order, to have given authority to Mr. Kelly to purchase D goods for the purpose of carrying on the business, and that, the purchase of the goods in question having been within the scope of that authority, the appellant and his co-trustee were conjointly and severally responsible for their price.

In view of that argument, it appears to me to be expedient to consider separately the legal position of the trustees before and after the liquidation of the company, especially seeing that their liability during those two periods was rested upon E different considerations. If, before the order, the trustees had given the receiver authority to pledge their credit, cadit quæstio. If they had not, the question still remains whether they subsequently gave him such authority. Neither of these questions involves any controversy of fact. Every fact in the case, whether relevant or not, has been made matter of mutual admission; and, to my apprehension, the only matter which your Lordships have to determine is, whether the admitted F facts, which I have stated in so far as they were represented to be material, are in law sufficient to sustain the inference that such authority was given.

I think that it would be impossible to affirm that any liability attached to the trustees during the earlier of these periods, unless your Lordships were prepared to ignore or reverse the doctrine approved and applied by this House on *Cox* v. *Hickman* (1), and followed by the Judicial Committee of the Privy Council in G *Mollwo, March, and Co.* v. *Court of Wards* (2). In *Cox v. Hickman* (1) a firm of ironmasters trading as B. Smith & Son, being unable to meet their obligations, entered into a deed of arrangement with their creditors, by which the whole business of the firm was assigned to certain of the creditors as trustees, to be carried on by them under the name of "The Stanton Iron Co." Provision was made for H meetings of the creditors, at which the majority in value present were to have the power to make rules as to the mode of conducting the business, or to order the discontinuance of it. The purposes of the trust were to distribute the net income of the business rateably among the creditors of the firm, which net income was always to be deemed the property of the firm of B. Smith & Son, for whom the trustees were to hold the trust estates when all the debts were paid. The trustees, I in the course of their management, bought goods of Hickman, and accepted bills to him for the price "per proc. The Stanton Iron Co." The object of the action was to make two of the creditors, who were parties to the deed of arrangement but were not trustees, personally liable for the amount of these bills. The learned judges of the Court of Exchequer Chamber, and also the judges who attended the House, were equally divided in opinion; but the four noble and learned Lords who constituted the House were unanimous in holding that these creditors were not made partners of the Stanton Iron Co. by the provisions of the deed of arrangement, and that there were no grounds for inferring that they had given authority to the

trustees to pledge their credit for goods purchased in the course of carrying on the business.

In the present case the business was carried on by a receiver, who was, until it went into liquidation, the agent of the company; and the trustees upon whom it is now sought to impose liability, had no power either to conduct the business or to control the receiver in its management, and never attempted to do either the one of the other of these things. I have had difficulty in speculating upon what principle the Lord Chief Justice, who makes no reference to *Cox* v. *Hickman* (1), arrived at the conclusion that, consistently with the principle of that decision, the appellant could be held to have given authority to Mr. Kelly to pledge his credit to the respondents. Unfortunately, his Lordship, after expressing an opinion to that effect, indicates that he did not consider it necessary to give his reasons, probably because he was also of opinion that the appellant had, at all events, given such authority at the time when the goods, the price of which is in question, were purchased by the receiver. In the Court of Appeal Lord Esher, M.R., took the same view in regard to the liability of the appellant before the liquidation, and has assigned his reasons. His Lordship regarded the proviso inserted in Mr. Kelly's appointment, requiring him to open a bank account, and to make daily payments into it of the receipts of the business, and also that his cheques should be countersigned by Mr. Tryon, as introducing conditions which not only were in excess of the power of appointment conferred upon the trustees by the indenture of May 18, 1892, but conditions which gave the trustees control over the management of the receiver.

I am unable to assent to either of these propositions. Both conditions appear to me to have been reasonable checks imposed upon the agent of the company, for whose acts and defaults the company alone was liable, in the interest of the company itself. Then as to the power of controlling the management of the receiver, which the trustees are supposed to have derived from the fact that Mr. Tryon was selected to countersign his cheques, Lord Esher observed that the receiver ought not to have been put in the position of ordering goods,

> "and then having to say to the tradesmen who supplied them that he could not pay for them because those who appointed them had reserved control over all such payments themselves."

That reasoning ignores the fact that Mr. Tryon was not only solicitor for the trustees but chairman of the company and holder of the third issue of debentures, and that in these latter capacities he had a material interest in the success of the business carried on by the receiver, and, therefore, an interest in seeing that its receipts were properly applied in extinction of its current liabilities. He had no right whatever to refuse to countersign cheques drawn in payment of goods actually purchased; his only function was to satisfy himself before countersigning, that the cheque represented a real transaction by the receiver. It must also be kept in view that the company acquiesced in the terms of the appointment as made by the trustees, and on that footing transferred its assets and the conduct of its business to Mr. Kelly, and that circumstance, in my opinion, affords a conclusive answer to the suggestion that the addition of these provisos, which constituted a mere check to prevent any improper application of the receipts of the business, and gave neither Mr. Tryon nor anyone else power to control the course of its management by the receiver, were in excess of the power to appoint him conferred by the company upon the trustees for the second debenture-holders. The provisos must, in these circumstances, be treated on the same footing as if they had been expressed at length in the indenture of May 18, 1892.

The Lord Chief Justice, the Master of the Rolls, and also Lopes, L.J., who held that the appellant would not have been liable for goods bought by the receiver before the liquidation order, were all of opinion that, whether the trustees were or were not responsible for the receiver's purchases before the event, they became so liable upon its occurrence. I am unable to follow the reasoning by which these

learned judges have arrived at that result. The Lord Chief Justice says that the company qua company, then "ceased to have any real actual existence at all as a going or trading concern," and that the liquidator took no part, direct or indirect, in the carrying on of its business by Mr. Kelly. LOPES, L.J., says that

"from the date of Mr. Wilding's appointment as liquidator the company ceased to exist as a going concern."

These statements are approximately correct. The company, when in liquidation, although by no means defunct, could no longer act by its directors, and appoint or employ agents capable of binding the corporation or its estate, and was represented by the liquidator, who could not himself carry on its business without the special leave of the court. But the radical right to the business continued to be an asset of the company; and if it had been so successful under the management of Mr. Kelly as to yield profit sufficient to meet the claims of debenture-holders, who had no interest beyond that of mortgagees, it would, no doubt, have been at once reclaimed by the liquidator for the behoof of the general creditors. In point of fact the management of the receiver appears to have been so far successful that neither the first debenture-holders, nor the liquidator, seem to have thought it expedient to disturb it.

None of these circumstances appears to me to be sufficient to afford a solution of the question which your Lordships have to decide. If I had been of opinion that the trustees for the second debenture-holders stood in the relation of principals to Mr. Kelly before the liquidation, I should not have hesitated to hold that such relation was not altered by the supervening incapacity of the company to act by, or incur any obligation through, an agent. But not being of that opinion, I am at a loss to understand upon what principle the trustees of the debenture-holders became subrogated as principals, in room and stead of the company, as soon as it incurred a statutory incapacity to occupy that position. The reasoning of the learned judges who were adverse to the appellant appears to me to involve this proposition, which, to my mind, is fallacious, that in cases where an individual, acting under a power of attorney or similar warrant, appoints an agent for a company, he necessarily becomes the principal of that agent, whenever the company ceases to be legally capable of imparting any authority to the agent, if the agent, without obtaining any new authority from him, chooses to continue his management.

Apart from that general and doubtful proposition, it was admitted by the respondents' counsel that, after liquidation, nothing occurred which could alter the relation in which the appellant and his co-trustee stood to Mr. Kelly, the receiver, with the single exception of the fact that, from and after September, 1893, the counter-signature of Mr. Tryon to the cheques passed upon his bank account by the receiver, was discontinued. It was curious to observe that the respondents' counsel, who strenuously maintained the view of the Master of the Rolls, that the observance of that condition was sufficient to make the trustee liable before liquidation, were driven to argue, with equal vigour, that its non-observance, after liquidation, at the time when their clients sold goods to the receiver, was attended with the same legal result. In point of fact it does not appear by whom, or under what authority that check was removed; but, assuming its removal to have been sanctioned by the trustees, it appears to me that the circumstances could not of itself, or in combination with the other features of this case, have the effect of transforming the trustees into principals of the receiver.

I am, therefore, of opinion that the judgment appealed from ought to be reversed, with costs to the appellant here, and in both courts below.

LORD HERSCHELL stated the facts as set out ante p. 301 and continued: The question in the case was, in the opinion of the Lord Chief Justice, one of fact, and not of law at all. But the facts were not in dispute. The goods were ordered by Kelly, and not by the appellant and his co-trustee. They certainly gave Kelly no

express authority to purchase for them, nor did they expressly appoint Kelly to act as their agent in carrying on their business, or indeed to act as their agent at all, or to pledge their credit. If, then, they are liable to pay for the goods, it must be because in the circumstances which I have detailed, and notwithstanding the facts to which I have just referred, the law made them Kelly's principals, and imposed such liability upon them. Though the Lord Chief Justice did not decide the point, he indicated the impression, at least, that from the outset Kelly was carrying on the business, not for the company, but for the appellant and his co-trustee, and that, from the time when he was appointed receiver, they and not the company were the principals. The Master of the Rolls, while agreeing with the Lord Chief Justice that it was not necessary to decide the point, expressed a distinct opinion that Kelly was appointed, not such a receiver as was contemplated by the contract, but as agent for the trustees.

Though it may not be essential, I think it very important to determine in what capacity Kelly originally acted, and whose agent he was. For so far as he and those with whom he dealt were concerned, he carried on the business in precisely the same manner from the beginning to the end. He gave the orders in the same form. He received in terms no new authority. If the trustees were originally his principals, no doubt they continued so to the end. If, on the other hand, the company were at the outset the principals, it will be necessary to inquire whether there were any acts done by the trustees which, in the absence of an express authority to act for them, made Kelly their agent to purchase goods, or generally to carry on the business. It is to be observed that at the time when Kelly was appointed receiver the trustees had no power to interfere with the company in the conduct of their business except by appointing a receiver under cl. 13 of the deed of May 18, 1892. The security was not then enforceable; they had no power to enter into possession of the mortgaged premises.

Apart, then, from the proviso to be found at the end of the instrument appointing Kelly receiver, I do not think that it could be doubted that he was duly appointed receiver for the company, and that the company and not the trustees was alone liable for his acts and defaults. Mortgage deeds frequently empower the mortgagee to appoint a receiver for the mortgagor. What, then, was the effect of the added proviso? The Master of the Rolls regarded it as depriving the receiver of the freedom ordinarily incident to his position, and reserving to the trustees a control over him with regard to every step which he might take. I cannot so view it. Its object seems to me clear. I do not think that it was intended to reserve to the trustees any control over the management of the business, but only to act as a check to prevent any improper use by the receiver of the moneys of the company, and to ensure that they should be properly applied. Mr. Tryon, by whom the cheques were to be countersigned, was, it is true, solicitor to the trustees, but he was also the chairman of the company. His function was merely to see that the cheques were drawn for payment of the company's liabilities. But, even assuming that the company would have been entitled to refuse to let Kelly occupy the position of receiver for the company on the ground that the terms of his appointment were not such as were warranted by the deed of May, 1892, they did not do so. They allowed him from the date of his appointment to conduct their business as a receiver appointed under that deed. If the proviso introduced a check upon the acts of the receiver which the deed did not authorise, it was quite competent for the company to assent to and sanction the introduction of that check. And one can well understand that the company would regard it as in their interest, and would desire that there should be such a check upon the action of the receiver.

I cannot myself entertain any doubt that when Kelly took over the management of the business under his appointment, he did so with the full assent of the company and as receiver for them. Supposing that before they went into liquidation an action had been brought against them for the price of goods ordered by Kelly, what answer would they have had? Could they possibly have maintained that he was not

A receiver for them, but for the trustees, when the trustees had at the time no power to appoint a receiver, except for the company, and when the company had recognised his appointment and permitted him to act as receiver? I cannot think so. As soon as the order was made for the winding-up of the company it became, as from the date of the petition, incapable of entering into contracts without the sanction of the court. The contracts made by Kelly after that date certainly did not bind B the company. They could not be principals in those contracts. The reasoning which led to the conclusion in favour of the respondents appears to have been this: that after the winding-up order the company could no longer be principals; that Kelly, who contracted in the same terms as before, was not liable upon the contracts as principal: that the appellant and his co-trustee were aware that the company were no longer principals; that they permitted Kelly to carry on business as C before when they could at any time have displaced him; that the business was really being carried on for them; and that, therefore, they are liable as principals on Kelly's contracts.

It is clear that after the winding-up order the appellant and his co-trustee did not in terms give Kelly any new authority. They did not interfere in any way. He carried on the business afterwards just as he had done before. They did not D expressly authorise him to enter into any contracts, or to carry on the business on their behalf. If, then, they are liable as principals it must be because an authority to do so is to be implied from the circumstances. I have to observe, in the first place, that even if Kelly could not be made liable on the contracts, and if the company could not be treated as his principals, it by no means follows, in my opinion, that there must be some other principal. Where an agent purports to E contract for another in such terms as not to make himself a contracting party, and he has no authority from that other to bind him as principal, neither the agent nor anyone else can be sued on the contract, though the agent may be subject to the same liability as if he had been a party to the contract in respect of his breach of an implied warranty that he possessed the authority which he represented himself to have.

F If, then, neither Kelly nor the company is liable on the contract this does not show that someone else must be, or go a step towards proving that the appellant and his co-trustee were the principals. It is not necessary to decide whether Kelly could be made liable for the price of the goods. It is said that the appellant and his co-trustee might have displaced Kelly, and so put an end to his carrying on of the business. This is true. But the holders of the first mortgage G might equally have taken this step, as indeed they did at a later date. This non-interference by the appellant and his "permitting" Kelly, in this sense, to carry on the business, cannot of itself make Kelly his agent if he was not so otherwise. Kelly was certainly not held out to the world as the agent of the trustees for the second debenture-holders. The respondents knew nothing about them, and did H not give credit to them.

The respondents, therefore, can only succeed by showing that the contracts were made on behalf of the appellant and his co-trustee and with their authority. What, then, wrought the change by which Kelly not only ceased to be agent for the company but became the agent of these trustees? I gather that the answer to this question would be that from the date of the winding-up order the business I was carried on for the benefit of the trustees. I do not see, however, that it was any more carried on for the benefit of the trustees after that date than before. The profits made by the carrying on of the business of the company, were, before as well as after the winding-up order, part of the security for the payment of the debts due to the debenture-holders, and after as well as prior to the winding-up, the profits of the business, subject to the claim of the mortgagees, belonged to the company. It had not ceased to exist; it could still hold and also acquire property. If the business had proved profitable and the assets of the company had been more than sufficient to discharge the mortgage claims the liquidator of the company could, and doubtless

would, have intervened, and applied the surplus to the payment of the creditors of the company, and all that remained after they had been paid would have been the property of the company.

Prior to the decision in *Cox* v. *Hickman* (1) in this House, it would, no doubt, have been open to contention that, under the circumstances which existed in this case, the business was being carried on for the benefit of the mortgagees, and must be treated as their business, and that they would, therefore, be liable upon contracts made by the person who carried it on. But since the decision of that case such a proposition can no longer be maintained. I think that the effect of the judgments in *Cox* v. *Hickman* (1) has been overlooked in the judgments appealed from. In that case an insolvent firm, by a deed of arrangement with the creditors, assigned their business to certain of the creditors as trustees. These trustees carried on the business under the name of "The Stanton Iron Co." In that name they ordered goods of the plaintiff, and accepted bills for the price. The question in the action was whether the other creditors (two or whom were sued) were liable as principals in the contract? It was contended that they were so, because they were parties to the deed of arrangement by which the net income of the business was to be distributed rateably among the creditors of the firm, and a majority in value of the creditors present at meetings called for the purposes, were empowered to make regulations as to the mode of conducting the business or to order its discontinuance. Notwithstanding these circumstances, this House held the defendants not liable. There the business was being carried on for the benefit of the creditors of the insolvent firm, just as much as it was here carried on for the benefit of the appellant and his co-trustees or those whom they represented. And those creditors as much authorised and permitted it to be carried on in the way it was carried on, as did the appellant and his co-trustee in the present case. Moreover, the persons who conducted the business in the case referred to were subject to a control and interference by the creditors generally, to which there is no parallel in the present case. It appears to me that the plaintiff in *Cox* v. *Hickman* (1) had a stronger ground for contending that the defendants were liable than the present respondents have. And I think that it would be impossible to decide in favour of the respondents on the ground that the appellant permitted the business to be carried on for his benefit without overruling the decision of your Lordship's House in that case. I think that the judgment appealed from should be reversed.

LORD MORRIS.—I am of the same opinion.

LORD DAVEY.—Were it not for the judgments delivered in the courts below, I should not have thought that this case presented much difficulty. In my opinion, there can be no doubt that, at the date of his appointment, the receiver, though nominated by the mortgagees, became, both in fact and in law, the agent of the mortgagor, i.e., of the company. That he was so by the express terms of the power under which he was appointed is undisputed. The purpose for which he was appointed was in order to make provision for payment of the company's mortgage debts, which was, in my opinion, a purpose of the company. It is said that certain directions which were given to the receiver, e.g., to open a banking account with Messrs. Goslings and Sharpe, and that his receipts and cheques should be countersigned by Mr. Tryon, were in excess of the power. Perhaps they were; I do not know. But his appointment with these provisions was accepted and acquiesced in by the company, and the directors gave up the custody of the company's property to him, and allowed him to conduct the business as a duly appointed receiver in the manner directed by the terms of his appointment. If the company did not agree, any terms in excess of the power were not binding on the receiver, for it cannot be pretended that there was any intention on the part of the mortgagees to appoint a receiver except under the power, and, indeed, they had no authority at that time to do so. The fact that the mortgagees were to obtain the benefit

of the appointment through the payment of their interest or principal, or had the right to exercise certain control over the conduct of the business, would not, of course, make him their agent for the purpose of pledging their credit. One need only refer on this point to the opinions expressed in this House in *Cox* v. *Hickman* (1), and the judgment of the Judicial Committee in *Mollwo, March & Co.* v. *Court of Wards* (2).

If he was not the agent of the appellant originally, did he become so on the winding-up of the company? I assume that the power to carry on the business so as to pledge the credit of the company and make the company liable to be sued on contracts made by him came to an end. The receiver, however, continued to exercise the power of management, and to carry on the business in the same manner as he had done before the winding-up. He purported to exercise powers which I will assume that he no longer possessed. I forbear to say what may be the legal consequence to himself if he did so. But I am unable to see how, without any act or assent on their part, it made him the agent of persons who, for the purpose of pledging their credit, had not previously conferred that authority on him, and never contemplated or intended doing so, or held themselves out as his principals. I concur with your Lordships in the order proposed.

Appeal allowed.

Solicitors: *Saltwell, Tryon & Saltwell; C. J. Rawlinson.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

HARDAKER AND ANOTHER *v.* IDLE DISTRICT COUNCIL AND ANOTHER

[Court of Appeal (Lindley, A. L. Smith and Rigby, L.JJ.), January 17, February 17, 1896]

[Reported [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273]

Negligence—Contractor—Liability of employer for contractor's negligence—Duty of employer to see work properly done—Construction of sewer—Interference with gas main—Escape of gas—Damage to plaintiffs, adjoining householders.

A local authority, acting under statutory powers, employed a contractor to construct a sewer under the highway. The contractor negligently failed to give proper support to a gas main under which he had cut in the course of the carrying out of the works, and in consequence the main sank and broke so that gas escaped into the plaintiffs' house which abutted on the highway and there exploded, causing injury to the female plaintiff and damage to the plaintiffs' furniture. In an action by the plaintiffs to recover damages from the local authority and/or the contractor,

Held: the local authority would not perform the duty which they owed to the plaintiffs by merely constructing a proper sewer; to fulfil that duty they were also bound to see that as a result of the work, which must necessarily be attended by the risk of interfering with gas and other pipes, no breakage of a gas pipe occurred which might lead to injury or damage to the plaintiffs; therefore, the negligence of the contractor could not be said to be collateral to the work, for which the local authority would not be liable, and, the damage not being too remote, the plaintiffs were entitled to succeed.

Notes. The Towns Improvement Clauses Act, 1847, and the Public Health Act, 1875, s. 150, referred to infra, have been replaced by the Highways Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.) 402), s. 149, s. 189, s. 190, and s. 213. Section 160 of the Act of 1875 was amended by the Act of 1959: see Sched. 25.

Referred to: *Groves* v. *Wimborne*, [1898] 2 Q.B. 402; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1898] 2 Ch. 614; *Holliday* v. *National Telephone Co.*, post p. 359; *Penny* v. *Wimbledon U.D.C.*, ante p. 204; *The Snark*, [1900] P. 105; *Maxwell* v. *British Thomson Houston Co.* (1902), 18 T.L.R. 278; *Shrimpton* v. *Hertfordshire County Council* (1910), 74 J.P. 305; *The Devonshire* (1911), 106 L.T. 241; *Robinson* v. *Beaconsfield U.D.C.*, [1911-13] All E.R. Rep. 997; *Hurlstone* v. *London Electric Rail. Co.* (1914), 30 T.L.R. 398; *Brooke* v. *Bool*, [1928] All E.R. Rep. 155; *Honeywill and Stein, Ltd.* v. *Larkin Bros. (London's Commercial Photographers), Ltd.*, [1933] All E.R. Rep. 77; *North-Western Utilities* v. *London Guarantee and Accident Co., Ltd.*, [1935] All E.R. Rep. 196; *Hanson* v. *Wearmouth Coal Co.*, [1939] 3 All E.R. 47; *Cassidy* v. *Minister of Health*, [1951] 1 All E.R. 574; *Mulready* v. *J. H. & W. Bell, Ltd.*, [1953] 2 All E.R. 215; *Norton* v. *Canadian Pacific Steamships*, [1961] 2 All E.R. 785.

As to liability for the negligence of a contractor, see 28 HALSBURY'S LAWS (3rd Edn.) 22-27, and cases there cited.

Cases referred to:

(1) *Reedie* v. *London and North Western Rail. Co.*, *Hobbit* v. *Same* (1849), 4 Exch. 244; 6 Ry. & Can. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 27, *56*.

(2) *Hole* v. *Sittingbourne and Sheerness Rail Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, *1263*.

(3) *Pickard* v. *Smith* (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest 162, *1264*.

(4) *Grey* v. *Pullen* (1864), 5 B. & S. 970; 5 New Rep. 249; 34 L.J.Q.B. 265; 11 L.T. 569; 29 J.P. 69; 13 W.R. 257; 122 E.R. 1091, Ex. Ch.; 34 Digest 165, *1279*.

(5) *Wilson* v. *Merry* (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675, H.L.; 34 Digest 211, *1747*.

(6) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 34 Digest 163, *1274*.

(7) *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 45 L.J.Q.B. 446; 35 L.T. 321; 40 J.P. 789; 34 Digest 164, *1275*.

(8) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 30 W.R. 191, H.L.; 34 Digest 158, *1234*.

(9) *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 42 Digest 982, *124*.

(10) *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 6 R. 394, P.C.; 34 Digest 162, *1266*.

(11) *Butler* v. *Hunter* (1862), 7 H. & N. 826; 31 L.J.Ex. 214; 10 W.R. 214; 158 E.R. 702; 34 Digest 156, *1226*.

(12) *Quarman* v. *Burnett* (1840), 6 M. & W. 499; 9 L.J.Ex. 308; 4 Jur. 969; 151 E.R. 509; 34 Digest 23, *29*.

(13) *Steel* v. *South-Eastern Rail. Co.* (1855), 16 C.B. 550; 25 L.T.O.S. 129; 139 E.R. 875; 34 Digest 31, *87*.

(14) *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 36 Digest (Repl.) 36, *173*.

(15) *Rapson* v. *Cubitt* (1842), 9 M. & W. 710; 11 L.J.Ex. 271; 6 Jur. 606; 152 E.R. 301; 34 Digest 31, *92*.

Application by the plaintiffs for judgment or the new trial of an action tried by WRIGHT, J., with a jury.

The plaintiffs, husband and wife, and tenants and occupiers of a house in Moorfield Place, Idle, in the county of York, brought this action to recover damages for personal injuries to the wife and damage to household furniture, the property of the plaintiffs, which was caused by an explosion of gas. On Oct. 10, 1894, the Idle District Council served a notice, under s. 150 of the Public Health Act, 1875, upon the husband requiring him to make a sewer under the road in Moorfield Place near his house. He did not comply with the terms of the notice, and the district council, acting under their statutory powers, proceeded to execute the works. On Dec. 14, 1894, the district council entered into a contract with Abraham Thornton, a contractor, for the construction of the sewer. By an indenture of that date made between Thornton, of the first part, G. Watkinson, his surety, of the second part, and the Idle District Council, therein called the local board, of the third part, it was agreed that, in consideration of the moneys therein mentioned, Thornton should construct any complete the works described in the specification and bill of quantities annexed in all respects in accordance with the specification. The specification contained the following clauses.

"7. The contractor to execute the whole of the work in the most workmanlike and substantial manner, particular attention being paid to any directions or instructions of the inspector which may be given by him from time to time as the work proceeds, and if any difference of opinion shall arise as to the description, quality, and quantity of materials or workmanship, or anything relating to the works, the opinion of the inspector shall be final and binding on all parties concerned.

"8. The contractor shall give or provide all necessary personal superintendence during the execution of the works, and shall employ competent foremen to superintend the same during their progress, and should any such foreman or the contractor's workmen at any time disobey the orders of the inspector, or conduct themselves improperly, or be in his opinion incompetent, the inspector shall have full power to discharge them forthwith, and the contractor shall not employ any discharged man on the works again without the permission of the inspector, but shall be bound within three days to replace any person or persons so discharged by others approved by the inspector. The person employed by the contractor to superintend the work shall be competent to carry out the same from the contract drawings, and to obtain therefrom all requisite particulars, as no further information or enlarged details will necessarily be supplied.

"11. The inspector shall have power to stop the works, or any portion thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of the materials to be used from time to time, and such alterations shall not annul or invalidate the contract, which shall, nevertheless, remain in full force and effect. Any extension, reduction, alteration, modification, or variation as aforesaid, shall, to all intents and purposes, be deemed and taken as having formed part of the contract. And the price or value of any additions to or deductions from the contract price, consequent thereupon, shall be ascertained and determined by the inspector, whose decision shall be final and binding upon all parties.

"14. The care of the entire works until their completion shall remain with the contractor, who shall be held responsible for all accidents and damage to persons or property arising therefrom from any cause whatsoever, and chargeable for anything that may be stolen, removed, or destroyed. The contractor shall at his own expense protect all walls, buildings, gas-pipes, water-pipes, or other property which may be laid bare or otherwise interfered with, and make good any such property which may be damaged, removed, disturbed, or injured during the progress of the works, or in consequence thereof; and shall also make good all damage occasioned by delay or neglect, or carelessness, deficiency in strutting, fencing, watching, or lighting either to the works or to the buildings,

or premises adjoining or near thereto, whether such damage or defects be discovered during the progress of the work, or appear or become known after the completion thereof; and no payment on account of the works, or certificate, or approval of any work by any officer of the local board shall effect or prejudice the rights of the local board against the contractor in this respect. If it shall appear to the inspector that the contractor has failed with all practicable despatch to make good or to pay and satisfy the expense of making good, the said several matters and things hereinbefore referred to, or any portion of them, the local board shall have power to make good the same or any of them, at the expense of the contractor, and the expense of making good the same and incident thereto shall (without prejudice to any other remedy) be deducted from the moneys due or to become due to the contractor under his contract or shall be paid by the contractor to the local board. In case of any claim, action, suit, or proceedings being brought or taken against the local board or any of their officers or servants, in respect of any loss, damage, or injury caused by the works, or consequent thereupon, the contractor or his sureties shall fully indemnify them and each of them therefrom, and forthwith pay to him or them all costs, charges, damages, and expenses which he or they shall have been put to or have incurred in reference thereto, and the local board may, if they shall see fit, compromise any such action, suit, or other proceedings, or any clause in respect of any such damage as aforesaid on such terms as they shall think proper; and the contractor shall thereupon repay the sum or sums thus paid by the local board. The local board shall not be liable to, for, or in respect of any damages or compensation, or claim therefor, under the Employers' Liability Act, 1890, or any Act amending the same, because, or by reason, or in consequence of, any accidents to workmen or others in the employment of the contractor or of any acting under him or on his behalf, and the contractor shall save the local board harmless thereof, and of any and all costs and expenses consequent thereon.

"32. In all trenches and excavations requiring refilling after the introduction of the structural works, the softest materials free from stones must be chosen, especially for covering the sanitary pipes, and a layer not less than six inches thick must first be put in and well pounded, particularly at the sides; the succeeding layers may be put in nine inches thick, each layer to be well pounded; there shall be used one pounder of every spade or shovel, and the inspector may have it watered as well as pounded if he considers necessary. The surplus material must be carted away to a place which will be provided by the board; nothing of value will be allowed to be carted away or disposed of by way of sale or for a profit from private property, and anything of value resulting from the trenches or excavations made in the public highways, or on property over which the board have jurisdiction, shall be deemed to be the property of the local board, and may only be disposed of under the special written consent of the board.

"45. Where gas or water pipes are found in the line of the sewer, care shall be taken that no breakages occur. Where needful the contractor shall place strong timbers across the trench and sling the gas or water pipes to them by wrought iron chains of sufficient strength."

Under the terms of this contract, Thornton proceeded to construct the sewer under the road in Moorfield Place. The sewer passed in a slanting direction underneath a gas main, and for the purpose of its construction it was necessary to take away the soil from underneath a considerable length of this main which was supported while the sewer was being constructed by four props. The soil was then put back under the gas main and the road restored to its former condition. By the end of January, 1895, the works were completed, but the soil underneath the gas main was so negligently packed that the pipe sank and cracked, the gas which escaped from

it penetrated into the cellar of the plaintiffs' house, and, on Mar. 16, 1895, the gas exploded in the plaintiffs' house, and caused the damage which was the subject of the action. At the trial of the action before WRIGHT, J., the jury assessed the damages at £45 and the learned judge gave judgment for the plaintiffs for that amount against Thornton, but he ordered judgment to be entered for the Idle District Council on the ground that the accident was caused by an independent contractor for which the district council was not responsible, there being no evidence of any negligence on their part. The plaintiffs now moved for judgment against the Idle District Council or for a new trial.

Kershaw, *Q.C.*, and *Waugh* for the plaintiffs.
Tindal Atkinson, *Q.C.*, and *Longstaffe* for the district council.

Cur. adv. vult.

Feb. 17, 1896. The following judgments were read.

LINDLEY, L.J., stated the facts, read cll. 7, 8, 11, 14, 32, 45, and 46 of the specification of the contract between the Idle District Council and Thornton, referred to the Public Health Act, 1875, ss. 150 and 160, and to the Towns Improvement Clauses Act, 1847, ss. 22 and 79, and continued: The powers of the district council, under the Public Health Act, 1875, can only be exercised by some person or persons acting under their authority. Those persons may be servants of the district council or they may not. The district council are not bound in point of law to do the work themselves, i.e., by servants of their own. There is nothing to prevent the district council from employing a contractor to do their work for them. But the district council cannot, by employing a contractor, get rid of their own duty to other people, whatever such duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects as they would be if he was their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do, or to get done, their duty is not performed, and they are responsible accordingly.

This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes of cases is well illustrated by comparing *Reedie* v. *London and North Western Rail. Co.* (1) with *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (2). In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second of these cases the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustratd by *Pickard* v. *Smith* (3), the coal-cellar case; and in *Gray* v. *Pullen* (4), where the Court of Exchequer Chamber, reversing the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had constructed a drain. BLACKBURN, J., at the trial, and the Court of Queen's Bench, held the defendant not liable on the ground that he was not responsible for the negligence of the contractor in doing the work. But on appeal it was held that it was the defendant's duty to fill up the drain, or to see that it was filled up, and that he was liable for the non-performance of this duty. LORD CHELMSFORD, in *Wilson* v. *Merry* (5) (L.R. 1 Sc. & Div. at p. 341), expressed doubt as to the correctness of this decision, but I cannot find that it has ever been overruled or considered unsatisfactory by any other judge.

The same principle was again applied in *Tarry* v. *Ashton* (6), the case of the lamp on the defendant's property which fell on the plaintiff while passing under it. So again in *Bower* v. *Peate* (7), *Dalton* v. *Angus* (8) (6 App. Cas. at p. 829), and *Hughes*

v. *Percival* (9), in all of which the defendants' contractor let down the plaintiff's wall. In each of these cases the defendant was held responsible because it was his duty not to let the wall down and to take whatever care was necessary to prevent injury from what he was doing. *Black* v. *Christchurch Finance Co., Ltd.* (10), in the Privy Council, is the last case on the subject, and there a landowner who had employed a contractor to burn the bush on his land was held liable for his negligence in burning it so as to be unable to stop the spread of the fire to the land of the plaintiff.

It is not always easy to avoid mistakes in applying this or any other principle to difficult cases, as is shown by *Gray* v. *Pullen* (4) and *Butler* v. *Hunter* (11), which is inconsistent with *Bower* v. *Peate* (7), and was distinctly disapproved in *Hughes* v. *Percival* (9). Neither is it easy to express the principle in terms which will apply to all cases, as is shown by LORD BLACKBURN'S criticisms in *Hughes* v. *Percival* (9) when referring to *Bower* v. *Peate* (7) and *Quarman* v. *Burnett* (12), the well-known jobmaster's case. I will take the law as laid down by LORD BLACKBURN in *Dalton* v. *Angus* (8). LORD BLACKBURN there said (6 App. Cas. at p. 829):

> "Ever since *Quarman* v. *Burnett* it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (2); *Pickard* v. *Smith* (3); *Tarry* v. *Ashton* (6)."

LORD BLACKBURN, in this passage, contrasts a contractor's negligence, which he calls collateral, with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable. For the second he is, whether the failure is attributable to negligence or not. LORD BLACKBURN'S language in *Hughes* v. *Percival* (9) (8 App. Cas. at p. 446) shows that this is really what he meant, for he points out that the employer's duty was to see that his contractor did his work properly. LORD WATSON said the same.

I pass now to consider the duty of the defendants in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was not only to do that, but also to take care not to break any gas-pipes which they cut under. This involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to do so. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the defendants' duty for them, but did so carelessly. The case is one in which the duty of the defendants, so far as the gas-pipes were concerned, was not performed at all. It, therefore, falls within the second of LORD BLACKBURN'S propositions and not within the first. It was contended for the defendants that, although they might be liable to the owner of the gas-pipes, they were not liable to the plaintiffs as they were under no duty to them. But this is not consistent with *Gray* v. *Pullen* (4) nor with *Tarry* v. *Ashton* (6) in neither of which was the defendant under any duty to the plaintiff except as one of the public.

On these grounds I am of opinion that the defendants, the Idle District Council, are liable to the plaintiffs. Counsel for the plaintiffs contended that the relation of the council to Thornton was that of master and servant. Of course, if this were so, the liability of the defendants would be clear enough. But I am not prepared to decide the case on this ground. It is not proved that the surveyor

gave orders which led to the mischief; and large as his powers were, Thornton was not, in my opinion, the servant of the defendants. *Reedie* v. *London and North Western Rail. Co.* (1) and *Steel* v. *South-Eastern Rail. Co.* (13) support this conclusion. With respect to the remoteness of damage little need be said. The nature of gas, its certainty to escape and to find its way wherever it can get, and to explode if it escapes in large quantities and comes into contact with fire, all render the breaking of a gas main very dangerous if houses are near. The fact moreover that free escape upwards through the surface of the road was greatly hindered by the hardness of the surface after it was left by the contractor, would force the gas laterally to some considerable distance and very probably into some passage or place near a fire. Such an accident as that which actually happened is only what might have been reasonably expected. *Sharp* v. *Powell* (14) does not, therefore, apply to the present case. The appeal must be allowed and judgment entered for the plaintiffs for £45 and the costs of the action, and the defendants must pay the costs of the appeal.

A. L. SMITH, L.J., stated the facts and the relevant provisions of the contract between the council and Thornton and continued: To render a person liable for an act of negligence which he did not himself commit, it must be shown by the person injured either that the person sought to be made liable authorised the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not by delegating its performance to a contractor rid himself of that duty. I pass by a liability which may be imposed upon an owner or occupier of land for injury to another occasioned by the user of his land, which will be found referred to by PARKE, B., in his judgment in *Rapson* v. *Cubitt* (15) (9 M. & W. at p. 714).

It was not contended at the Bar that this liability had any application to the case in hand, and, indeed, if it had, it would impose a very onerous obligation upon local authorities which, as far as I know, has never before been attempted to be imposed upon them when executing works by their contractor in a public street. In the present case, in my judgment, the relationship of master and servant did not exist between the council and Thornton, for the true relationship was that of principal and contractor. It is true that the district council by their inspector had the right of fully superintending and supervising the execution of the works and giving directions thereon, but *Steel* v. *South-Eastern Rail. Co.* (13) and *Reedie* v. *London and North Western Rail. Co.* (1) show that these circumstances do not of themselves render a principal liable for the negligent act of his contractor unless brought about by the order of the inspector. If the fracture of the gas-pipe in this case had been caused by reason of the orders of the district council's inspector, that would have rendered the district council liable, for, as between the district council and the inspector, the relationship of master and servant existed, and for his acts within the scope of his employment the council would be liable; but no proof was given that the fracture was occasioned by anything that the inspector either said or did. If the inspector was guilty of any negligent omission, that was a breach of a duty which he owed to his employers, not to the plaintiffs.

The plaintiffs have not shown that the district council authorised the act of negligence complained of, nor that the contractor stood to them in the relation of servant to master; but the important question still remains, whether the plaintiffs have not shown that the district council owed such a duty towards them, that the council could not, by delegating that duty to a contractor, thereby escape liability thereunder should the contractor be guilty of negligence in the performance of the work he had contracted to execute. In *Dalton* v. *Angus* (8) LORD BLACKBURN states the law applicable to a case like the present thus. He said (6 App. Cas. at p. 829):

> "Ever since *Quarman* v. *Burnett* (12) it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them. So that a person employ-

ing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it."

LORD BLACKBURN, it will be seen, here points to two distinct cases: the one where the cause of action is founded upon the negligence either of the servant acting within the scope of his employment or of a contractor, and the other where it is founded upon a breach of a duty, the performance of which a person could not escape by delegation to another. As illustrations of this duty, I will refer to that class of cases of which *Hole* v. *Sittingbourne and Sheerness Rail. Co.* (2), *Pickard* v. *Smith* (3), *Tarry* v. *Ashton* (6), and *Gray* v. *Pullen* (4) in error, are instances, in which it was held that a duty was imposed by law upon the defendant towards the plaintiff as one of the public not to interfere with the right which the plaintiff possessed of using a public way so as to impede or injure him when passing, and also to that class of cases exemplified by *Bower* v. *Peate* (7) and *Dalton* v. *Angus* (8), in which it was held that a legal duty was imposed upon the defendant towards the plaintiff not to interfere with the right he possessed of having his land supported by that of the defendant. In each of these cases it was held that the defendant was liable to the plaintiff for breach of the duty thus imposed on him, although the act which caused the injury was the act and default of the defendant's contractor and not of the defendant. The ratio decidendi of these cases is that, as the duty was imposed by law upon the defendant, he could not escape this liability by delegating its performance to a contractor, for the obligation imposed upon the defendant was to take the necessary precautions to see that the duty was performed.

If there were no other legal duty upon the district council in the present case than that which appears in the above-mentioned cases, inasmuch as the district council have invaded no right either of transit or of support to which the plaintiffs were antecedently entitled, I should have thought that the plaintiffs would have had difficulty in bringing the district council within these authorities; but this I need not determine, for there is another duty imposed by law upon the district council in the circumstances of the case which, in my judgment, settles the question. LORD WATSON, in *Dalton* v. *Angus* (8), states it thus (6 App. Cas. at p. 831):

"When an employer contracts for the performance of work, which properly conducted can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed and is therefore liable, as well as the contractor, to repair any damage which may be done."

When the decision in the House of Lords in 1883 in *Hughes* v. *Percival* (9) is rightly understood, and the judgment in the Privy Council in *Black* v. *Christchurch Finance Co.* (10) is considered, it appears to me clear that in the circumstances of the present case a duty was imposed upon the district council which they could not evade by employing a contractor to do the work. What this duty is was thus formulated by the Queen's Bench Division (COCKBURN, C.J., and MELLOR and FIELD, JJ.) in the year 1876 in *Bower* v. *Peate* (7), in which the Lord Chief Justice, delivering the judgment of the court, said as follows (1 Q.B.D. at p. 326):

"The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to

A be executed from which in the natural course of things injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent B person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

It must be noted that, in *Hughes* v. *Percival* (9), LORD BLACKBURN doubted whether this duty was not too broadly stated, for he said (8 App Cas. at p. 447):

C "If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers."

It is not for me to criticise this statement of LORD BLACKBURN, but, with all respect, I would point out that it seems to me not to be in the natural course of things to be D expected, when a man hires post-horses and a coachman from an innkeeper, unless means are adopted to prevent them, that injurious consequences would arise to his neighbour. In the ordinary course of events in such a case no injuries would occur to anyone. The driver would drive and the hirer ride in the carriage, and in ordinary course the transit would come to an end without injury to anyone. The facts in *Hughes* v. *Percival* (9), upon which judgment was given as ascertained E by the House of Lords, were these. The defendant had employed a contractor to take down his house, which stood between the plaintiff's house and the house of B., and to erect a new house for him upon the old site. In performing this work the contractor negligently cut into the party wall between the defendant's house and that of B., which caused the defendant's house to fall, and that caused the injury complained of to the plaintiff's house. The question arose whether the defendant F was liable to the plaintiff for the negligent act of his contractor. No question of the plaintiff having any right to support from the defendant's house arose in this case. It was held that the defendant was liable upon the ground that the work ordered by the defendant was necessarily attended with risk to the plaintiff's house, and that it was, therefore, the defendant's duty to see that proper precautions were taken to prevent injury to the plaintiff.

G LORD BLACKBURN said (8 App. Cas. at p. 447):

"The question is, I think, narrowed to this: Was the operation, during which the defendant's duty required him to see that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party wall between the defendant's house and Barron's."

H LORD WATSON said (ibid. at p. 449):

"The appellant does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily or possibly imperil the stability of the party wall if no precautions were used; nor does he dispute that it was incumbent upon him to I see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury was, that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house."

LORD FITZGERALD said (ibid. at p. 455):

"What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting

them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances, it was the duty of the defendants to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid of the responsibility thus cast upon him by transferring that duty to another."

The learned Lords, finding as a fact, as indeed the majority of the Court of Appeal had found, that the hazardous operation was not over when the negligent acts of the contractor had taken place, held the defendant liable for this negligent act of the contractor, the defendant not having, therefore, performed his duty to the plaintiff.

The recent case of *Black* v. *Christchurch Finance Co.* (10) was decided upon the same principle, and is pertinent to the present case. In that case the plaintiff sued the defendants for damages by reason of having had his crops burnt by a fire lighted upon the defendants' land by their contractor which spread into the plaintiff's land. It was found by the court below, and this finding was adopted by the Privy Council, that the defendants had contracted with a contractor to clear certain bush off their lands, partly by cutting the bush and partly by burning it, and that, pursuant to such contract, the contractor lighted the fire which subsequently spread on to the land and caused the injuries complained of. The Privy Council upon these facts held the defendants liable upon the ground that the lighting of a fire on open bush land where it might readily spread to adjoining property was an operation necessarily attended with danger, and a proprietor who executed such an operation was bound to use all reasonable precautions to prevent fire extending to his neighbour's property, and if he authorised another to act for him, he was bound, not only to stipulate that such precautions should be taken, but also to see that these are observed, otherwise he was responsible for the consequence, and *Hughes* v. *Percival* (9) was cited in support of this proposition.

Applying the principle laid down in these cases, it appears to me that the district council in the present case owed the above-mentioned duty to the plaintiffs, and they have not performed it. Digging under gas-pipes in use must necessarily be attended with risk, unless all reasonable precautions are taken to guard against such risk. If a gas-pipe be left unsupported it is obvious that it may thus become fractured, when an escape of gas with its attendant consequences will necessarily result, and indeed it is obvious from cll. 14, 45, and 46 of the contract in this case that risk was apprehended, for specific clauses were inserted therein so as to obviate the danger. It was not attempted to be proved on behalf of the district council that they had taken any precautions whatever; the sole point taken at the trial on their behalf was that they had delegated the performance of the works to a contractor, and, therefore, were not liable. Upon that they asked the learned judge to enter judgment for them, which he did.

It was argued before us that, even if the learned judge should not have done so, and that even if the district council were liable, the damages sought to be recovered were too remote, and *Sharp* v. *Powell* (14) was referred to as showing that this was so. In that case it was not known to the defendant's servant (and I apprehend that the court concluded that it was not to be held that he ought to have known), who was washing a van in a street, that the water he was using would not as usual run down a grating, which was there for that purpose, and so escape, but, by reason of a severe frost which existed would not do so, so that the grating got blocked with ice, and the water overflowed, whereby the plaintiff's horse slipped up, and was injured. If in the present case it was not in the ordinary course of things, if a gas-pipe were broken and the gas allowed to escape underneath a battened-down surface, that it would percolate where it could and escape upwards upon the first opportunity, then the case cited might have some application. But, in my opinion, the explosion in the present case was the direct consequence of the act of negligence

A complained of, and occurred in the ordinary course of events attended thereon, which would be known to anyone of intelligence who could think about the matter.

For the reasons above mentioned the district council are, in my judgment, liable, and the learned judge should not have acceded to their application and entered judgment for them. This appeal must be allowed, and judgment entered for the B plaintiffs against the defendant council, with costs here and below.

RIGBY, L.J.—In my judgment the defendants, the Idle District Council, are liable to the plaintiffs in this action. I mention, in order to dispose of it at once, the objection that the damages claimed are too remote. The cause of damage was an explosion of gas, which escaped from a main broken by the negligence of the C defendant Thornton while excavating or filling up a hole for a sewer. The gas found its way into the house occupied by the plaintiffs and was there ignited. On the question of remoteness the case would have been the same if the gas company had negligently caused the escape. In my opinion, the explosion in the plaintiffs' house was the natural and probable result of the negligence. Gas will find its way by the line of least resistance, and in this case it was prevented by the ramming D down of the earth from escaping into the open air. Where it would go could not have been predicted without examination of the surrounding soil, but that it might find its way to some place where, being mixed with atmospheric air, it would be in great risk of being exploded, so as to do damage to person or property, was not only possible, but in a high degree probable and quite natural. That place happened to be the plaintiffs' house, and damage resulted which, in my judgment, was E not too remote.

Apart from the question of remoteness, the only defence set up on the appeal was, that the defendant Thornton was an independent contractor for whose negligence the district council were not liable. I will assume at first that he was an independent contractor. His interference with the street would have been illegal but for the fact that he was acting as the agent and delegate of the district council F who, having power to do the work under s. 150 of the Public Health Act, 1875, and other statutory provisions, employed Thornton to do it for them, so that he entered by reason of their authority, and their authority only. If they had done the work by the hands of their servants, it cannot be doubted that it would have been their duty to use all reasonable skill and care to prevent damage to any persons arising from their operations. The plaintiffs were, as the event proved, within the range G of those operations, and not too remotely connected with them, and the duty would have been owed to them among others.

Notwithstanding a great conflict of judicial opinion, many dicta and some decisions to the contrary, I consider it always to have been on the balance of authority, and to be now clearly recognised as the law, that no one can get rid of such a duty by imposing it upon an independent contractor. As authorities it is sufficient to refer H to the passage from the opinion of LORD BLACKBURN in *Dalton* v. *Angus* (8) already quoted by LINDLEY, L.J., and the cases therein mentioned; and as approaching more nearly in its facts to the present case, and in principle not to be distinguished from it, *Gray* v. *Pullen* (4). The true distinction between the cases of master and servant, and employer and independent contractor, seems to be that, where the person actually doing the work does something for which he would himself be liable, the I master is, while the employer is not, liable for what is conveniently called collateral negligence, meaning thereby other negligence than the imperfect or improper performance of the work which the contractor is employed to do. Here the contract in express terms imposed upon the contractor the duty of taking proper precautions against injury to any gas-pipe that he might fall in with in the course of the excavation, the very duty (among others) which the law would have thrown upon the district council if acting by the hands of their servants.

I am, however, for myself satisfied that under the contract in this case Thornton and his workpeople were, for the purposes of the rule of law imposing liability for

the negligence of servants on a master, in the position of servants of the district council. Under cll. 7 and 8 of the contract, as I read them, Thornton, his foreman and workmen, are bound to defer to the instructions and opinion of the inspector and obey his orders in every particular. Under cl. 11 the inspector has power to stop the works, or any part thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, without invalidating the contract. Clause 14 provides expressly that the contractor shall, as between himself and the district council, be responsible for any neglect or carelessness in terms apparently sufficient to cover any breach of duty which would be imposed by law on the district council, including particularly the protection of any gas-pipes laid bare or otherwise interfered with; but this would not affect the nature of the relation between the parties. Independently of the wide general provisions before referred to, it is made plain (cll. 45 and 46), with regard to gas and water pipes, that the inspector is to have full control over the means adopted for the protection of gas-pipes. In fact, I have not been able to discover any single particular in which the contractor can act with greater freedom or independence than a hired servant could do. It is this unlimited right of control, whether actually exercised or not, which, in my opinion, is the condition for inferring the responsibility of a master. The case is manifestly widely different from *Reedie* v. *London and North Western Rail. Co.* (1), where a power of superintendence only was reserved, coupled with a power to dismiss any workman, not for disobedience to orders, but for incompetence only —a power analogous to that of rejecting improper materials during the progress of works, and not depriving the contractor of his right of doing the work according to his own initiative so long as he did it in accordance with his contract. It is distinguishable also from *Steel* v. *South-Eastern Rail. Co.* (13), where the contract was not produced, but the foreman of the contractor, speaking of Mr. Phillips, the company's surveyor, said: "Mr. Phillips was the person who told me what to do. But I was the responsible person to determine in what manner that which Mr. Phillips directed me to do should be carried out." The damage in that case was caused by negligence in doing work that was not only not ordered, but positively forbidden to be done.

On these grounds I am of opinion that the appeal should be allowed, and judgment entered for the plaintiffs against the district council according to the verdict of the jury.

Appeal allowed.

Solicitors: *Jaques & Co.*, for *Lancaster & Wright*, Bradford; *Flower, Nussey & Fellowes*, for *Killick, Hutton & Vint*, Bradford.

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

A

GRIFFITH *v.* TOWER PUBLISHING CO., LTD., AND ANOTHER

[Chancery Division (Stirling, J.), October 30, 1896]

B [Reported [1897] 1 Ch. 21; 66 L.J.Ch. 12; 75 L.T. 330; 45 W.R. 73; 13 T.L.R. 9; 41 Sol. Jo. 29.]

Contract—Assignment—Author and publisher—Publishing agreement.

The principle that a publishing agreement between an author and his publisher or firm of publishers is personal to the parties and cannot be assigned C without the author's consent applies to such an agreement between an author and a limited company.

Notes. Assignment of copyright generally is provided by for s. 36 of the Copyright Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 130).

Considered: *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549. Referred to: *Messager* v. *British Broadcasting Co.*, [1927] 2 K.B. 543.

D As to assignment of rights by act of the parties, see 8 Halsbury's Laws (3rd Edn.) 259 et seq.; and for cases see 12 Digest (Repl.) 665.

Cases referred to in argument:

Hole v. *Bradbury* (1879), 12 Ch.D. 886; 48 L.J.Ch. 673; 41 L.T. 153; 28 W.R. 39; 12 Digest (Repl.) 662, *5132*.

E *Stevens* v. *Benning* (1855), 6 De G.M. & G. 223; 3 Eq. Rep. 457; 24 L.J.Ch. 153; 24 L.T.O.S. 205; 1 Jur.N.S. 74; 3 W.R. 149; 43 E.R. 1218, L.JJ.; 12 Digest (Repl.) 662, *5130*.

Reade v. *Bentley* (1858), 4 K. & J. 656; 27 L.J.Ch. 254; 30 L.T.O.S. 269; 4 Jur.N.S. 82; 6 W.R. 240; 70 E.R. 273; 12 Digest (Repl.) 662, *5131*.

F **Motion** for an interim injunction to restrain the defendants, the Tower Publishing Co., Ltd. and H. A. Moncrieff, the receiver of the company who had been appointed in an action by the debenture-holders of the company, from selling without the consent of the plaintiff any of the assets in the possession of the defendants or either of them under or by virtue of three several agreements in writing made between the plaintiff and the company with reference to the printing and publication G of three novels respectively, and also from selling or assigning, or purporting to sell or assign, without the like consent the benefits, rights, or interests alleged by the defendants to be now vested in them or one of them in or under the same three agreements.

The plaintiff was the author of three novels, and had entered into three agreements respectively with the defendant company for the publication of the same. H The novels were duly published, and there was a considerable profit thereon. No formal agreements were ever drawn up, but the terms of the contracts were contained in certain letters which passed between the parties. The plaintiff shared the net profits with the defendant company, and the latter took all the risks of the adventure save the actual out-of-pocket expenses which were borne equally by them. The agreements were in fact based on what was usually called in the I publishing business the "half-profit" system. The defendant company undertook to advertise the novels and generally to use their best endeavours to sell the same. The novels had previously been published in serial parts in "Pearson's Weekly," and the copyright remained with the plaintiff and Mr. Pearson, subject to the defendant company's right to produce the books in volume form under the several agreements. The defendant company subsequently became insolvent, and the defendant Moncrieff was appointed receiver. The defendant receiver informed the plaintiff of his intention to sell the plaintiff's books, and to assign the benefits, rights, and interests under the several agreements. Negotiations were in progress with

another publishing company for the acquisition of the business of the defendant company. The plaintiff brought this action and moved for the injunction. A

Millar, Q.C., and *T. B. Napier* for the plaintiff.

Graham Hastings, Q.C., and *Edward Ford* for the defendant receiver.

The company did not appear.

STIRLING, J., stated the facts, referred to the company's obligation to publish the novels under the several agreements, and continued: The work of publication involves a discretion on the part of those who undertake it. If this agreement, instead of being made with a limited company, had been entered into with a single individual or a partnership consisting of individuals, the cases are quite clear that the contract is of a personal nature, and on that ground is not assignable. B

There were three authorities referred to in the course of the argument. I will not go through them, but they seem to be perfectly clear that agreements of this kind are not assignable. I would mention, with reference to one point, that the copyright is to remain with the plaintiff and Mr. Pearson, subject to the right of the defendant company to produce the novels in volumes under the several agreements. That seems at first sight to give something in the nature of copyright in the right of production in the volume work; but it simply forms a licence to produce the work for the purposes of the agreement. Unfortunately the defendant company has become insolvent. It is now unable to perform the agreements, and a receiver has been appointed. It is suggested that there is a difference between a company contractor and an individual contractor, and that, although a contract of this nature entered into between an author and a publisher who is an individual and publishers who are a firm consisting of individuals may not be assignable, yet a contract entered into with a limited company is assignable. I certainly should hesitate long before I laid down any such law as that. C D E

If the contract is assignable, then it is not merely assignable in the case of a winding-up or liquidation, but must be assignable at any moment, and I think that it would be startling to authors who have entered into agreements with publishers who have recently converted their business into limited liability companies to be told that, although the agreements they entered into were not to be assignable by the old firms who converted themselves into companies, yet they were assignable by the limited company. But in truth it seems to me that it would be pushing too far the doctrine as to the non-assignability of such agreements to say that it rests on the personal confidence placed in individuals. I cannot hold that the non-assignability of such agreements as this rests on the view that the contract is entered into with persons in whom the author has confidence. The author may have confidence in a limited company just as much as in a private individual. A limited company may have a reputation for producing books in a particular manner and in a mode to attract the attention of the public, and the author selecting such a company as publishers may very naturally do so in the reasonable expectation that the company—although its members and its officers may fluctuate—may nevertheless consider themselves under an obligation to maintain the reputation which they have acquired. In the present case, what attracted the plaintiff to the defendant company (as appears from the evidence) was partly the fact that they had published a novel in a style which he approved and partly that he was satisfied that the company had a very efficient manager. True, they might have discharged the management next day and new officers of the company might at any time be appointed; but I repeat that the plaintiff might well act on the presumption that the defendant company would maintain its reputation. F G H I

It seems to me that I should be doing wrong if I drew any distinction in law in respect of an agreement made between an author and a private individual or firm of publishers on the one hand and agreements made between an author and an incorporatd company on the other hand. If the first kind are non-assignable as is well established, it seems to me that the second kind are also non-assignable. I,

therefore, think that, as regards the second part of this motion, an injunction must go. It is true that the assignment might be ineffective; but, nevertheless, it might give rise to conflicts between the plaintiff and other persons who might become innocent assignees of the defendant under instruments purporting to be valid assignments, and besides it might also tend to increase the costs of this action.

HIS LORDSHIP considered the question of what ought to be done with the books which had been printed and the books and other assets which were in the possession and control of the defendant receiver under the agreements, and held that they ought to be sold for the benefit of all parties interested and other creditors. There would be an undertaking not to deal with the assets in question under the control of the defendant receiver except under the direction of the court in this action, and also with the exception, that, as regards the books, the defendant receiver might offer them for sale in the ordinary course of business.

Solicitors: *Harrison & Davies; McKenna & Co.*

[*Reported by* W. L. RICHARDS, ESQ., *Barrister-at-Law.*]

WILLSON *v.* LOVE

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), April 30, 1896]

[Reported [1896] 1 Q.B. 626; 65 L.J.Q.B. 474; 74 L.T. 580; 44 W.R. 450]

Contract—Breach—Damages—Liquidated damages or penalty—Tenancy agreement—Agricultural holding—Covenant against selling hay and straw off premises subject to "the additional rent of £3 per ton by way of penalty for every ton sold"—Stipulations of varying importance—Presumption of penalty.

A farm was let on lease for a term of years at a fixed rent and "the additional rent of £3 per ton by way of penalty for every ton of hay or straw which should be sold off the premises during the last twelve months of the tenancy." The lessee also covenanted that during the last twelve months of the term he would not sell or carry away any hay or straw produced on the demised premises, but would use it on the farm. There was a difference of about 5s. per ton between the manurial value of hay and that of straw.

Held: as there was a substantial difference between the damage resulting from a breach of the covenant by a sale of hay and that resulting from a sale of straw, the agreed sum of £3 per ton was a penalty and not liquidated damages.

Per A. L. SMITH, L.J.: When there is a contract for the payment of a fixed sum of money in order to secure performance of more than one matter, the damages for breach of which vary in the several cases, there is a presumption that the sum so agreed to be paid is a penalty, and not liquidated damages.

Notes. Considered: *Re White and Arthur* (1901), 84 L.T. 594; *Bradley* v. *Walsh* (1903), 88 L.T. 737. Distinguished: *Diestal* v. *Stevenson*, [1906] 2 K.B. 345. Considered: *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, [1914-15] All E.R. Rep. 739. Referred to: *Cooden Engineering Co.* v. *Stanford*, [1952] 2 All E.R. 915; *Alder* v. *Moore*, [1961] 1 All E.R. 1.

As to liquidated damages or penalty, see 11 HALSBURY'S LAWS (3rd Edn.) 298 et seq.; and for cases see 17 DIGEST (Repl.) 148 et seq.

Cases referred to:

(1) *Wright* v. *Tracey* (1873), 1 R. 7 C.L. 134; 17 Digest (Repl.) 160, **386.*

(2) *Wallis* v. *Smith* (1882), 21 Ch.D. 243; 52 L.J.Ch. 145; 47 L.T. 389; 31 W.R. 214, C.A.; 17 Digest (Repl.) 77, *14.*

(3) *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; 35 W.R. 17, H.L.; 17 Digest (Repl.) 158, *555.*

(4) *Kemble* v. *Farren* (1829), 6 Bing. 141; 3 Moo. & P. 425; 7 L.J.O.S.C.P. 258; 130 E.R. 1234; 17 Digest (Repl.) 157, *546.*

Also referred to in argument:

Pollitt (*Pollett*) v. *Forrest* (1847), 11 Q.B. 949; 16 L.J.Q.B. 424; on appeal (1848), 11 Q.B. 962; 17 L.J.Q.B. 291; 11 L.T.O.S. 414; 12 Jur. 560; 116 E.R. 732, Ex.Ch.; 2 Digest (Repl.) 65, *366.*

Sainter v. *Ferguson* (1849), 7 C.B. 716; 18 L.J.C.P. 217; 13 L.T.O.S. 72; 13 Jur. 828; 137 E.R. 283; 17 Digest (Repl.) 148, *487.*

Law v. *Redditch Local Board*, [1892] 1 Q.B. 127; 61 L.J.Q.B. 172; 66 L.T. 76; 56 J.P. 292; 8 T.L.R. 90; 36 Sol. Jo. 90, C.A.; 17 Digest (Repl.) 151, *496.*

Green v. *Price* (1845), 13 M. & W. 695; 9 Jur. 857; 153 E.R. 291; on appeal sub nom. *Price* v. *Green* (1847), 16 M. & W. 346; 16 L.J.Ex. 108; 9 L.T.O.S. 296; 153 E.R. 1222, Ex.Ch.; 17 Digest (Repl.) 153, *516.*

Dimech v. *Corlett* (1858), 12 Moo. P.C.C. 199; 33 L.T.O.S. 21; 14 E.R. 887, P.C.; 17 Digest (Repl.) 152, *503.*

Application by the plaintiffs for judgment or a new trial after the trial of the action before HENN COLLINS, J., with a jury.

By an indenture of lease Rowley Farm, in the county of Durham, was demised for a term of twenty-one years, which expired in May, 1895, at the rent therein mentioned,

> "and the additional rent of £3 per ton by way of penalty for every ton of hay or straw which shall be sold off the premises during the last twelve months of the tenancy, provided also that for every ton of hay or straw so sold off the premises before the lastly hereinbefore mentioned twelve months the lessees shall bring an equivalent in manure on the land."

The lessees also covenanted that they would not during the last twelve months of the term sell, or dispose of, or carry away any hay, straw, grass or clover, turnips or fodder which should grow upon or be produced from the said demised premises or any part thereof, but would spend and consume the same upon the said premises. The present action was brought to recover damages at the rate of £3 per ton in respect of a breach of the covenant above set out by the sale of fifty tons of hay and straw off the demised premises during the last twelve months of the tenancy. The defendants paid money into court. At the trial of the action before HENN COLLINS, J., with a jury, evidence was given that there was a difference of about 5s. per ton between the manurial value of hay and that of straw. The learned judge ruled that the sum of £3 per ton payable under the lease was a penalty and not liquidated damages, and he therefore left to the jury the question of the amount of damages. The jury assessed the damages at a sum less than that which the defendants had paid into court, and the learned judge gave judgment for the defendants. The plaintiffs moved for judgment or a new trial.

Forbes, *Q.C.*, and *Manisty* for the plaintiffs.

Channell, *Q.C.*, and *Meek* for the defendants.

LORD ESHER, M.R.—The question which we have to decide, upon this application for a new trial, is whether the sum of £3 per ton which under this lease is to be paid for every ton of hay or straw which shall be sold off the demised premises during the last twelve months of the tenancy is a penalty, or whether it is liquidated damages. That is a question of the true construction of the document, and is a

question for the judge alone. HENN COLLINS, J., ruled that this sum was a penalty, and the court has now to say whether or not his ruling was right.

In construing the lease, we must take into consideration the facts which existed at the time when it was made. There was a difference of about 5s. per ton between the manurial values of hay and of straw for the purposes of this farm. It has been argued that that is so small a difference as to be of no consequence, but I cannot agree with that contention. The difference seems to me to be a most material one. In this lease the parties have agreed that one sum, viz., £3 per ton, shall be paid for a breach of this covenant whether that breach occur through the sale off the premises of hay or of straw. They have also agreed that this sum is to be paid as penal rent. An attempt was made to draw a fine distinction on this point, because the parties to the lease speak of this penalty as an "additional rent by way of penalty," and not as a penalty simply. I cannot myself see any difference between the two expressions, and I take it that the parties have agreed that this sum of £3 per ton is simply to be paid by way of penalty. But that matter is not decisive. It is not the first time that this point has been considered by the court, and a succession of judges have held that the use by the parties to a contract of the term "penalty" is not conclusive. Circumstances may show that upon the true construction of the document a sum agreed to be paid as a penalty, is to be treated as liquidated damages. Still, no case decides that the word chosen by the parties to the contract is to be disregarded altogether, and I think that, if they have chosen to use the word "penalty," it lies on those who maintain that the agreed sum is liquidated damages, and not a penalty, to show that their contention is correct.

I know of no absolute decision on this point, except the Irish case that has been cited of *Wright* v. *Tracey* (1), but there is a series of dicta by several learned judges. In *Wallis* v. *Smith* (2) SIR GEORGE JESSEL, M.R., went through all these dicta, and found fault with all of them. He said that, if he could, he would have overruled all of them, but it was not possible for him to do so. Since his judgment the point has been before the House of Lords, and, though it has not been actually decided, they cannot be said to have intended to overrule all those dicta. In fact the House of Lords seems to me to have confirmed them. In the Scottish case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (3), LORD WATSON used these words (11 App. Cas. at p. 342):

> "When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification."

If, instead of saying "trifling damage," he had said "much less damage," or "substantially less damage," then he would have laid down a proposition in accordance with all the dicta of earlier judges, and it is to be observed that this case was decided in 1886, that is to say, after the judgment of SIR GEORGE JESSEL in *Wallis* v. *Smith* (2). Then LORD HERSCHELL says (ibid. at p. 345):

> "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance."

He there means to lay down the same proposition as LORD WATSON. In the case now before us there is a substantial difference between the damage which would result from a breach of the covenant by a sale of hay and the damage resulting from a breach by a sale of straw, but the same sum is payable in either event. I am therefore of opinion that the money agreed to be paid is a penalty, and not liquidated damages.

An Irish case has been cited in the argument, namely, *Wright* v. *Tracey* (1); in which a sum of £200 was agreed to be payable for a breach of any one of several agreements for keeping in repair some gates and palings, and a churn, and that the tenant would not underlet or assign. If the dicta in the English cases are right,

it seems to me to be obvious that that sum was a penalty, and not liquidated damages. It is unnecessary to say more about that case, because it does not in any way bind us in this court. I think this application must be dismissed.

A. L. SMITH, L.J.—I have not the least doubt that this sum of £3 per ton is a penalty, and not liquidated damages. From the decision in *Kemble* v. *Farren* (4) down to the present day the general opinion has been that when there is a contract for the payment of a fixed sum of money in order to secure performance of more than one matter, the damages for breach of which vary in the several cases, there is a presumption that the sum so agreed to be paid is a penalty, and not liquidated damages. In the present case an additional rent is payable by way of penalty at the rate of £3 per ton for every ton of hay or straw which shall be sold off the premises during the last twelve months of the tenancy. This sum has been agreed upon to secure the performance of two stipulations, one regarding hay, the other regarding straw, and the evidence shows that these stipulations vary in importance. Since they are in fact of varying importance, it seems to me to follow that the sum agreed to be paid in order to secure their performance is a penalty, and not liquidated damages.

In many cases that have come before the courts, the question has been whether an agreement between the parties that a certain sum should be considered as liquidated damages could be cut down in such a way that the sum should be considered to be in reality a penalty. In the case before us the £3 per ton has been agreed by the parties to be payable by way of penalty, not as liquidated damages. If the parties had meant to say that which the plaintiff contends that they meant to say, they would have described this sum as liquidated damages, and not as a penalty. It is not a conclusive argument that the agreed sum must be a penalty or liquidated damages, according as in each particular case the parties may have described it; but I think that where the parties have chosen to call the sum a penalty, strong evidence must be given to show that it is nevertheless liquidated damages, and there is not such evidence in the present case. I think that Henn Collins, J., was right, and that this application should be dismissed.

RIGBY, L.J.—Upon the main question, that this application should be dismissed, I agree. But I do not think that the cases are yet very clear upon the point that has here been raised. The judgment in *Kemble* v. *Farren* (4) has been construed in different ways by two such eminent authorities as Sir George Jessel, M.R., and James, L.J. The difference between them has arisen as to the real meaning of a sentence in the judgment in that case. The result of looking at the cases seems to me to be this, that the courts went wrong when they departed from the simple rule that the parties to a contract meant that which they have expressed in their agreement, and consequently it is now difficult to get at any clear rule on the subject. I cannot say that I feel I have any such grasp of the principle of the authorities as to say that Henn Collins, J., was wrong, or to entitle me to differ from the judgments that have been delivered. *Wallis* v. *Smith* (2) does not seem to me to be of much use in the present case. The question in that case was as to the forfeiture of a deposit, and the principles governing that case are not the same as those applicable to the question now before the court.

Appeal dismissed.

Solicitors: *Wilmer & Reeves*, for *Alfred W. Granger*, Durham; *Cunliffes & Davenport*, for *J. G. Wilson*, *Ornsby & Cadle*, Durham.

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

Re ATHLUMNEY. Ex parte WILSON

[QUEEN'S BENCH DIVISION (Wright, J.), July 18, August 12, 1898]

[Reported [1898] 2 Q.B. 547; 67 L.J.Q.B. 935; 79 L.T. 303; 47 W.R. 144; 42 Sol. Jo. 740; 5 Mans. 322]

Statute—Retrospective operation—Presumption against—Impairment of existing right or obligation.

A retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is capable of being construed prospectively or retrospectively it ought to be construed as being prospective only.

Section 23 of the Bankruptcy Act, 1890 [see now s. 66 of the Bankruptcy Act, 1914], provided: "Where a debt has been proved upon a debtor's estate under the principal Act [Bankruptcy Act, 1883] and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum. . . ." This section **held** not to be retrospective and not applicable to a debt including interest in excess of the five per cent. proved under a scheme allowed by the court prior to the passing of the Act.

Notes. Section 23 of the Bankruptcy Act, 1890, has been repealed. See now s. 66 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 398).

Considered: *Bowling* v. *Camp* (1922), 128 L.T. 342; *National Real Estate and Finance Co.* v. *Hassan*, [1939] 1 All E.R. 712; *R.* v. *Oliver*, [1943] 2 All E.R. 800; *Fairey* v. *Southampton County Council*, [1956] 2 All E.R. 843. Referred to: *Re Nepean, Ex parte Ramchund*, [1903] 1 K.B. 794.

As to the retrospective effect of statutes, see 36 HALSBURY'S LAWS (3rd Edn.) 423 et seq.; and for cases see 42 DIGEST 693 et seq.

Cases referred to:

(1) *Main* v. *Stark* (1890), 15 App. Cas. 384; 59 L.J.P.C. 68; 63 L.T. 10, P.C.; 42 Digest 694, *1091.*

(2) *Gilmore* v. *Shuter* (1678), T. Jo. 108; Freem. K.B. 466; 1 Vent. 330; 2 Lev. 227; 84 E.R. 1170; sub nom. *Gillmore* v. *Shooter*, 2 Mod. Rep. 310; sub nom. *Helmore* v. *Shuter*, 2 Show. 16; 42 Digest 628, *297.*

(3) *Moon* v. *Durden* (1848), 2 Exch. 22; 12 J.P. Jo. 164; 154 E.R. 389; sub nom. *Moore* v. *Durden*, 12 Jur. 138; 42 Digest 695, *1102.*

(4) *Hickson* v. *Darlow* (1883), 23 Ch.D. 690; 48 L.T. 449; 52 L.J.Ch. 453; 31 W.R. 361; on appeal, 23 Ch.D. 693; 48 L.T. 450; 31 W.R. 417, C.A.; 42 Digest 704, *1204.*

(5) *Waugh* v. *Middleton* (1853), 8 Exch. 352; 22 L.J.Ex. 109; 20 L.T.O.S. 262; 155 E.R. 1383; 42 Digest 626, *274.*

(6) *Larpent* v. *Bibby* (1855), 5 H.L.Cas. 481; 24 L.J.Q.B. 301; 25 L.T.O.S. 289; 3 W.R. 622; 3 C.L.R. 1057; 10 E.R. 988, H.L.; 5 Digest 1257, *10087.*

(7) *Williams* v. *Harding* (1866), L.R. 1 H.L. 9; 35 L.J.Bcy. 25; 14 L.T. 139; 12 Jur.N.S. 457; 14 W.R. 503, H.L.; 4 Digest (Repl.) 119, *1052.*

(8) *Hough* v. *Windus* (1884), 12 Q.B.D. 224; 53 L.J.Q.B. 165; 50 L.T. 312; 32 W.R. 452; 1 Morr. 1, C.A.; 42 Digest 702, *1188.*

(9) *Ellis* v. *McCormick* (1869), L.R. 4 Q.B. 271; 10 B. & S. 83; 38 L.J.Q.B. 127; 20 L.T. 223; 17 W.R. 500; 20 Digest (Repl.) 578, *2814.*

(10) *Re Joseph Suche & Co., Ltd.* (1875), 1 Ch.D. 48; 45 L.J.Ch. 12; 33 L.T. 774; sub nom. *Re Joseph Suche & Co., Ltd., Ex parte National Bank*, 24 W.R. 184; 42 Digest 706, *1236.*

(11) *Re Raison, Ex parte Raison* (1891), 60 L.J.Q.B. 206; 63 L.T. 709; 39 W.R. 271; 7 T.L.R. 185; 8 Morr. 11; 4 Digest (Repl.) 587, *5250.*

(12) *R.* v. *Griffiths*, [1891] 2 Q.B. 145; 60 L.J.M.C. 93; 56 J.P. 87; 39 W.R. 719; 7 T.L.R. 478, C.C.R.; 5 Digest (Repl.) 1124, *9055.*

Also referred to in argument:

Young v. *Adams*, [1898] A.C. 469; 67 L.J.P.C. 75; 78 L.T. 506; 14 T.L.R. 373, P.C.; 42 Digest 696, *1117.*

Re Home, Ex parte Home (1885), 54 L.T. 301; 5 Digest (Repl.) 913, *7553.*

Re Waverley Type Writer, D'Esterre v. *Waverley Type Writer*, [1898] 1 Ch. 699; 67 L.J.Ch. 360; 78 L.T. 593; 46 W.R. 685; 14 T.L.R. 354; 42 Sol. Jo. 473; 5 Mans. 269; 42 Digest 694, *1093.*

Re Pulborough School Board Election, Bourke v. *Nutt*, [1894] 1 Q.B. 725; 63 L.J.Q.B. 497; 70 L.T. 639; 58 J.P. 572; 42 W.R. 388; 10 T.L.R. 349; 38 Sol. Jo. 327; 1 Mans. 172; 9 R. 395, C.A.; 4 Digest (Repl.) 12, *26.*

Re Anglo-French Co-operative Society, Ltd., Ex parte Pelly (1884), 50 L.T. 754; 32 W.R. 748; 10 Digest (Repl.) 994, *6837.*

Motion by the assignee of a creditor of the debtor, for a declaration that he was entitled to payment of all dividends already declared, or thereafter to be declared, on the full amount of his assignor's proof for £10,153 1s. 8d., a part of which was for interest at a higher rate than £5 per cent. per annum.

The receiving order was made on Jan. 31, 1890, and on April 15, 1890, a scheme was accepted, and, in pursuance of the scheme, a deed of assignment for the benefit of his creditors was executed by the debtor on June 23, 1890. The scheme received the approval of the court on June 25, 1890. The scheme of arrangement, the terms of which were embodied in the deed of assignment for the benefit of the creditors, provided (inter alia) as follows:

> "(1.) That the property of the debtor divisible amongst his creditors shall vest in the trustee hereafter appointed for administration as in bankruptcy subject to the provisions of this scheme, and that before approval of this scheme by the court the debtor shall execute in favour of the trustee a deed embodying the terms of this scheme.
>
> (4.) That all debts directed to be paid in priority to other debts in the distribution of the property of a bankrupt shall be so paid by the trustee under this scheme out of the property of the debtor.
>
> (5.) That the trustee shall distribute the net proceeds of the debtor's property among the creditors in accordance with the law of bankruptcy."

The deed of assignment provided for the conversion of the debtor's property, the net proceeds of the sale to be held by the trustee, after the payment of his costs and expenses:

> "To pay all claims which are by law entitled to be paid in full or priority to other debts in case of bankruptcy, and to pay, divide, and distribute the residue of the said moneys rateably unto and among the creditors of the said debtor who are entitled to prove against his estate under the said receiving order, and upon the amounts for which they are entitled to prove by such instalments and at such times as the committee of inspection shall direct."

No dividend was payable until 1897, when the trustee having been advised that s. 23 of the Bankruptcy Act, 1890, which received the Royal Assent on Aug. 18, 1890, and came into operation on Jan. 1, 1891, was retrospective in its operation, applied to the applicant for particulars of his proof for £10,153 1s. 8d., a large part of which was admittedly made up of interest at a rate exceeding 5 per cent. per annum. On the trustee's refusal to pay a dividend on the whole amount of the proof, this motion was made.

The Bankruptcy Act, 1890, s. 23, provided:

"Where a debt has been proved upon a debtor's estate under the principal Act [Bankruptcy Act, 1883], and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

H. Reed, *Q.C.*, and *F. Mellor* in support of the motion.
Tindal Atkinson, *Q.C.*, and *Herbert Jacobs* for the trustee.

Cur. adv. vult.

Aug. 12, 1898. **WRIGHT, J.**, read the following judgment.—In the early part of 1890 the debtor failed, and his estate was on June 23 of that year assigned for the benefit of his creditors under a scheme accepted by his creditors on the previous April 15, and on June 25 approved by the court, which provided for "administration as in bankruptcy subject to the provisions of this scheme," and directed that, subject to payment of debts,

"directed to be paid in priority to other debts in the administration of the property of a bankrupt,"

and subject to certain other expenses, the trustee should

"distribute the net proceeds of the debtor's property among the creditors in accordance with the law of bankruptcy."

The assignment which was executed in pursuance of the scheme declared a similar trust, first for expenses, next

"to pay all claims which are by law entitled to be paid in full in priority to other debts in cases of bankruptcy, and to pay, divide, and distribute the residue of the said moneys rateably unto and among the creditors of the said debtor who are entitled to prove against his estate under the said receiving order, and upon the amounts for which they are entitled to so prove."

A creditor in the present case proved for a debt which carried interest at a rate exceeding 5 per cent. Afterwards, on Aug. 18 of the same year, the Bankruptcy Act, 1890, was passed, with a section postponing its operation until Jan. 1, 1891. Section 23 of that Act enacts as follows: [HIS LORDSHIP read the section.] And the question is whether this enactment operates so as to govern the distribution of dividend under a contract made under a scheme which had taken effect before the Act was passed or came into operation.

For the applicant it is argued that the section operates only on bankruptcies occurring or schemes taking effect after the commencement of the Act; and, further, that in any case the scheme ought to be construed as a contract for distribution of the estate according to the Act which was in force at the time when the scheme was adopted and took effect. The latter of these contentions ought not in my opinion to prevail if it stood alone. In the absence of any express provision in the scheme for this particular matter, I think that the scheme must be construed as applying the bankruptcy law for the time being in force or to be in force, in so far as such law may not be inconsistent with the express provisions of the scheme, or excluded by any rule of law or rule of construction; and if this view is correct, the only question is whether there is a rule of law or construction which prevents this section being interpreted as operating retrospectively. Perhaps no rule of construction is more deeply established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence

to the language of the enactment. If the enactment is expressed in language which is capable of either interpretation, it ought to be construed as prospective only.

Some of the many authorities for this proposition are *Main* v. *Stark* (1), *Gilmore* v. *Shuter* (2), on the Statute of Frauds; *Moon* v. *Durden* (3), on the Gaming Acts; *Hickson* v. *Darlow* (4), on the Bills of Sale Acts; *Waugh* v. *Middleton* (5), an extreme case, but not disapproved of in *Larpent* v. *Bibby* (6), *Williams* v. *Harding* (7), *Hough* v. *Windus* (8), *Ellis* v. *McCormick* (9), on the Bankruptcy Acts; and in *Re Joseph Suche Co., Ltd.* (10), on s. 10 of the Supreme Court of Judicature Act, 1875. In the last-mentioned case Sir George Jessel, M.R., said (1 Ch.D. at p. 49): "Since this question came last before me I have consulted several of the other judges;" and, referring to s. 10 of the Supreme Court of Judicature Act, 1875, he said (ibid. at p. 50):

> "I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding-up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation."

One exception to the general rule has sometimes been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in *Moon* v. *Durden* (3). Moreover, ss. 6 and 8 of this Act have been held not to be retrospective, notwithstanding, though without reference to this suspensory clause: (*Re Raison*, *Ex parte Raison* (11), and *R.* v. *Griffiths* (12)). In the present case the enactment does not merely affect procedure. If the section is construed retrospectively, it will postpone the creditor's right to dividend beyond 5 per cent., and will pro tanto deprive him of the vested right of action which he possessed at the commencement of the Act, and when the bankruptcy occurred.

Then is the section so expressed as to be plainly retrospective? No doubt the words "where a debt has been proved under the principal Act" are capable of such a meaning. But this form of words is often used to refer, not to a past which preceded the enactment, but to a time which is made past by anticipation, a time which will have become a past time only when the event occurs on which the statute is to operate. In former times draftsmen would have used the words "where a debt shall have been proved," but in modern Acts the past tense is frequently used where no retrospective operation can be intended. In *Moon* v. *Durden* (3) even the phrase last mentioned was held not retrospective. It seems to me that the case for the trustee cannot be put higher than this—that either construction is possible; but if so, the authorities to which I have referred show that retrospective force ought not to be given to the section.

It is not necessary in the present case to decide whether the section would apply where the original contract was made before the passing or commencement of the Act, but a scheme is adopted and approved after the commencement of the Act. In such a case the question would probably depend on the provisions of the scheme as approved, and if a creditor in such a case assented without qualification to a

scheme which according to its ordinary construction attracts the existing bankruptcy law, he might probably be held to have waived any right which he might otherwise have to stand upon his original contract.

It should be observed that by s. 31 of the Act of 1890 that Act and the Act of 1883 are to be construed as one Act. This enactment, however, cannot have the effect of making the provisions of the Act of 1890 operative as from 1883; nor could it be so held consistently with *Re Raison* (11) and *R.* v. *Griffiths* (12).

Declaration in terms of the motion.

Solicitors: *Collyer, Bristow, Russell & Co.; Cross & Guedalla.*

[*Reported by* J. A. THEOBALD, ESQ., *Barrister-at-Law.*]

Re RHOADES. Ex parte RHOADES

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Sir Francis Jeune, P., and Romer, L.J.), June 2, 9, 1899]

[Reported [1899] 2 Q.B. 347; 68 L.J.Q.B. 804; 80 L.T. 742; 15 T.L.R. 407; 47 W.R. 561; 43 Sol. Jo. 571; 6 Mans. 277]

Executor—Retainer—Insolvent estate—Administration order in bankruptcy—Debt due to executor—Assets paid to official receiver without retaining debt—Mistake—Right of executor to repayment by official receiver of amount of debt—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *ss.* 44, 125.

The executrix of an insolvent estate, which was being administered in bankruptcy, paid over to the official receiver the whole assets collected by her prior to the administration order, without, she being ignorant of her right of retainer, retaining the amount of a debt due to her from the testator. Subsequently the executrix proved for her debt in the bankruptcy, but, on ascertaining her right of retainer, she withdrew her proof before it had been adjudicated upon, and claimed for the amount of her debt.

Held: (i) the executrix had a right to retain her debt out of the assets in her hands as against the official receiver and only the balance of the assets vested in him under s. 125 (5) of the Bankruptcy Act, 1883; (ii) the executrix, not knowing her rights, having paid over the whole assets to the official receiver, who had not distributed them, no injustice would be done if he was ordered to repay the executrix the amount which she was entitled to retain; (iii) proof by the executrix in the bankruptcy, which was withdrawn on discovering her error, did not deprive her of her right to the return of the sum due to her; accordingly, the executrix was entitled to be repaid the amount of her debt out of the assets in the hands of the official receiver.

Notes. Section 44 and s. 125 of the Bankruptcy Act, 1883, have been repealed and substantially replaced by s. 38 and s. 130 of the Bankruptcy Act, 1914, respectively; see 2 HALSBURY'S STATUTES (2nd Edn.) 273, 425.

Considered: *Pulman* v. *Meadows*, [1901] 1 Ch. 233; *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1939] 3 All E.R. 746. Referred to: *In The Goods of Belham, Richards* v. *Yates* (1901), 84 L.T. 300; *Re Mellison, Ex parte Day*, [1904-7] All E.R. Rep. 822; *Re Broad, Ex parte Official Receiver*, [1911-13] All E.R. Rep. 454; *Wilson* v. *Wilson*, [1911] 1 K.B. 327; *Re Thellusson, Ex parte Abdy* v. *Official*

Receiver, [1918-19] All E.R. Rep. 729; *Re Wigzell, Ex parte Hart*, [1921] 2 K.B. 835; *A.-G.* v. *Jackson*, [1932] All E.R. Rep. 936.

As to when personal representative's right of retainer may be exercised, see 16 HALSBURY'S LAWS (3rd Edn.) 310, and for cases see 23 DIGEST (Repl.) 373 et seq. As to personal representative's right of retainer in cases of insolvent estates, see 2 HALSBURY'S LAWS (3rd Edn.) 485.

Cases referred to :

(1) *Re Gilbert, Ex parte Gilbert*, [1898] 1 Q.B. 282; 67 L.J.Q.B. 229; 77 L.T. 775; 46 W.R. 351; 14 T.L.R. 125; 42 Sol. Jo. 118; 4 Mans. 337; 23 Digest (Repl.) 377, *4468*.

(2) *Woodward* v. *Lord Darcy* (1558), 1 Plowd. 184; 75 E.R. 282; 23 Digest (Repl.) 373, *4425*.

(3) *Hasluck* v. *Clark*, [1899] 1 Q.B. 699; 68 L.J.Q.B. 486; 80 L.T. 454; 47 W.R. 471; 15 T.L.R. 277; 43 Sol. Jo. 352; 6 Mans. 146, C.A.; 24 Digest (Repl.) 880, *8787*.

(4) *Re Neville, Lee* v. *Nuttall* (1879), 12 Ch.D. 61; 48 L.J.Ch. 616; 41 L.T. 363; 27 W.R. 805, C.A.; 23 Digest (Repl.) 386, *4570*.

(5) *Re Williams, Ex parte Lewis and Evans* (1891), 8 Morr. 65; 23 Digest (Repl.) 386, *4573*.

(6) *Burge* v. *Brutton* (1843), 2 Hare, 373; 12 L.J.Ch. 368; 7 Jur. 988; 67 E.R. 153; 23 Digest (Repl.) 374, *4441*.

(7) *Re Compton, Norton* v. *Compton* (1885), 30 Ch.D. 15; 54 L.J.Ch. 904; 53 L.T. 410, C.A.; 23 Digest (Repl.) 377, *4469*.

(8) *Re Condon, Ex parte James* (1874), 9 Ch. App. 609; 43 L.J.Bcy. 107; 30 L.T. 773; 22 W.R. 937, L.JJ.; 4 Digest (Repl.) 226, *2031*.

(9) *Re Carnac, Ex parte Simmonds* (1885), 16 Q.B.D. 308; 54 L.T. 439; 34 W.R. 421; sub nom. *Re Rivett-Carnac, Ex parte Simmonds*, 55 L.J.Q.B. 74; 2 T.L.R. 18, C.A.; 4 Digest (Repl.) 227, *2032*.

Also referred to in argument :

Wilson v. *Coxwell* (1883), 23 Q.B.D. 764; 52 L.J.Ch. 975; 23 Digest (Repl.) 376, *4450*.

Davies v. *Parry*, [1899] 1 Ch. 602; 68 L.J.Ch. 346; 47 W.R. 429; 15 T.L.R. 186; 23 Digest (Repl.) 368, *4381*.

Croft v. *Pyke* (1733), 2 P. Wms. 180; 24 E.R. 1020, L.C.; 36 Digest (Repl.) 541, *1015*.

Re May, Crawford v. *May* (1890), 45 Ch.D. 499; 60 L.J.Ch. 34; 63 L.T. 375; 38 W.R. 765; 6 T.L.R. 461; 23 Digest (Repl.) 381, *4519*.

Sander v. *Heathfield* (1874), L.R. 19 Eq. 21; 44 L.J.Ch. 113; 31 L.T. 400; 23 W.R. 331; 23 Digest (Repl.) 383, *4544*.

Appeal by the official receiver, as trustee for administration of the testator's estate in bankruptcy, from a decision of WRIGHT, J., reported [1899] 1 Q.B. 905.

By his will, G. W. Rhoades, who died on April 14, 1898, appointed his wife his executrix, who proved the will on June 29, 1898, and proceeded to get in and realise the assets, and paid the moneys collected into a bank to an account opened in her own name. The executrix was a creditor of the estate for money lent by her to the testator amounting to £604 3s. 4d. On July 11, 1898, the executrix had notice of a petition, under s. 125 of the Bankruptcy Act, 1883, for an order for the administration in bankruptcy of the testator's estate, and at that date there was £895 3s. 3d. standing to her credit at the bank, representing such part of the testator's estate as had been realised by her. On July 25, 1898, the usual administration order was made, and the official receiver became the trustee. On July 30, 1898, the official receiver called upon the executrix to pay over to him the money standing to her credit at the bank, which then amounted to about £1,100 which she at once did, in the belief that she was bound in law to pay, and in ignorance of her right of retainer. On Aug. 9, 1898, the executrix lodged a proof for her debt, when she ascertained for

A the first time her right of retainer; and on Aug. 15, 1898, she withdrew her proof, before it had been adjudicated upon, and set up her right of retainer. The official receiver declined to recognise her claim of retainer; and thereupon she applied for a declaration that as executrix she was entitled to exercise her right of retainer in respect of the sum of £604 3s. 4d., and for an order that the official receiver might be directed to pay her that amount out of the moneys in his hands.

B Wright, J., decided that the executrix was entitled to be repaid the amount of the debt owing to her in full out of the assets in the hands of the official receiver, the mere fact of payment into his hands of assets collected by her prior to the making of the administration order not being a bar to her right of retainer any more than payment into court would have been. His Lordship also decided that the fact that the executrix, in ignorance of her right of retainer, had lodged a proof C for the amount of the debt, which was withdrawn before it had been adjudicated upon, made no difference. From that decision the official receiver appealed.

Levett, *Q.C.*, and *Whinney* for the official receiver.
Reed, *Q.C.*, and *J. Rolt* for the executrix.

Cur. adv. vult.

D

June 9, 1899. **SIR NATHANIEL LINDLEY, M.R.**, read the following judgment of the court, in which after stating the facts, he continued: Two questions arise. The first and most important is whether the executrix had a right to retain her debt as against the trustee in bankruptcy. The second is whether, if she had, she lost this right by paying the whole £1,100 over to the trustee and by afterwards proving E for her debt. It is not denied that she had a right to retain and might have exercised it before the order was made, or, to be more accurate, before she knew that an application for such an order had been made.

Ex parte Gilbert (1) settled this. But it is contended that, as she had not exercised her right before that date, she could not do so afterwards. The older common law authorities go far to show that if an executor was a creditor of his deceased testator F and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any) such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly (Blackstones Commentaries (18th Edn.), vol. 3, at p. 18). His words are: ". . . so much as is sufficient to answer his own demands is by operation G of law applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed: see *Woodward* v. *Lord Darcy* (2), 1 Plowd. at p. 186. But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact; and in the case in Plowden it had been so exercised. Until the executor does some act to show which assets he retains, it is obvious that H the property in them cannot be changed. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of plene administravit, and that he need not plead a retainer specially: (1 Wm. Saunders, 333, n. 6). The extent to which the doctrine that his debt was extinguished was carried is further illustrated by the cases collected in Williams on Executors (9th Edn.), vol. 2, at p. 1180 [see new 14th I Edn., vol. 1, at p. 479] and which show that an executor, having assets sufficient and properly applicable to pay a debt due to him from his testator, could not sue the testator's heir nor any third person who might be liable with the testator for the debt in question.

It is quite plain from these authorities that the executor's right to retain assets in his hands was as against him treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when someone seeks to take assets out of the executor's possession that

it becomes necessary for him to assert his right of retainer; and, if he asserts it then, his right must be protected, unless, of course, he has released it or done something to deprive himself of it. In the present case, when the order for the administration of the testator's estate was made, his executrix had assets in her hands to the value of £1,100. This sum was standing to her credit at her bankers. We attach no importance to the fact that the account was not in form opened in her name as executrix. The £1,100 represented the assets of the testator, and, if the executrix had become bankrupt, the whole of this sum would not have passed and been distributable as her property amongst her creditors. She was, however, a creditor of the deceased for £600. This is admitted. She had a right to retain this sum out of the £1,100 as against the other creditors of the deceased. This is quite clear. If it were to the interest of other people to say she was paid, as it might be if she was claiming interest on the £600 after she had assets sufficient to pay it, the authorities show that she could be treated as having paid herself; but then only the balance of the £1,100 could be treated as the testator's assets. On what principle can the trustee in bankruptcy claim more than the balance? We can discover none.

The question is, what property vests in him by virtue of s. 125 (5) of the Bankruptcy Act, 1883? His only claim is as trustee for the testator's creditors. The property vested in him by s. 125 (5), has to be distributed among them. What they have no right to he has no right to: see s. 44 of the Bankruptcy Act, 1883. Section 125 does not enlarge the property to be distributed or deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession, and which they have a right to retain. *Hasluck* v. *Clark* (3) shows this. It is true that an executor with a right of retainer has not all the rights of a secured creditor: see *Re Neville, Lee* v. *Nuttall* (4). He has no right to retain against creditors of a higher degree than himself, but his right to retain is a right to withdraw from the assets in his hands distributable among himself and other creditors of equal degree enough to pay himself in full. His right to retain does not extend to assets which he has not got in and which are not in his possession, nor to equitable assets; but no question as to them arises here. His right extends both in law and in equity to all legal assets which he has in his hands, and there is nothing in s. 125 to deprive him of this right. The judgment of VAUGHAN WILLIAMS, J., in *Re Williams* (5) supports this conclusion. Counsel for the official receiver relied on authorities collected in WILLIAMS ON EXECUTORS (9th Edn.), vol. 1, at p. 885 [see new 14th Edn., vol. 1, at p. 474] and which show that if an executor dies without having exercised his right, his executor cannot exercise it unless he also represents the testator. But whatever difficulty there may be in reconciling these cases with BLACKSTONE'S statement above referred to, they are quite consistent with the right of the executrix to retain her debt as against the trustee claiming her testator's assets. A similar observation applies to the judgment of WIGRAM, V.-C., in *Burge* v. *Brutten* (6). The only person who has a right of retainer is the legal personal representative of the testator, and if such representative is dead, his representative cannot himself first exercise the right unless he also represents the testator: *Re Compton* (7). This doctrine has no application to this case. There is no analogy between death and an order for administering assets in bankruptcy under s. 125 of the Bankruptcy Act. For these reasons we have come to the conclusion that the executrix in this case had a right to retain her debt out of the assets in her hands as against the appellant, and that only the balance of those assets vested in him under s. 125 (5).

The second question presents no real difficulty. The executrix, not knowing her rights, paid the whole £1,100 over to the trustee. He, however, has not distributed the assets, and no injustice will be done to him or to anyone if he is ordered to repay to her the amount which she was entitled to retain. *Ex parte James* (8) and *Ex parte Simmonds* (9) are distinct authorities to show that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the court so long as the officer of the court still has the money in his hands. Still less can the

proof by the executrix in the bankruptcy, withdrawn, as it was, when she discovered her error, deprive her of her right to have her money back. The judgment appealed from is right on all points, and the appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Solicitors: *Adams & Adams; Thomsons, Brooks & Danby.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

LANE *v.* COX

[Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), December 11, 19, 1896]

[Reported [1897] 1 Q.B. 415; 66 L.J.Q.B. 193; 76 L.T. 135; 45 W.R. 261; 13 T.L.R. 142; 41 Sol. Jo. 142]

Landlord and Tenant—Liability of landlord—House let in dangerous condition—No contract to keep in repair—Injury to third party due to condition of premises.

A landlord who, in the absence of an agreement by him, express or implied, that he will keep the demised premises in repair, lets the premises in a dangerous or unsafe condition is not liable to his tenant, or to the tenant's customers, guests or employees, for accidents occurring in consequence of the dangerous condition of the premises.

Robbins v. *Jones* (1) (1863), 15 C.B.N.S. 221, applied.

Notes. The Occupier's Liability Act, 1957 (37 Halsbury's Statutes (2nd Edn.) 832), only affects a landlord's liability in virtue of obligation to repair and does not affect a case in which there is no obligation to repair.

Considered: *Cavalier* v. *Pope*, [1906] A.C. 428; *Bottomley* v. *Bannister*, [1931] All E.R. Rep. 99; *Wilchick* v. *Marks*, [1934] All E.R. Rep. 73; *Shirvell* v. *Hackwood Estates Co.*, [1938] 2 All E.R. 1; *Howard v. Walker*, [1947] 2 All E.R. 197. Referred to: *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960.

As to a landlord's liability to third persons, see 23 Halsbury's Laws (3rd Edn.) 570 et seq.; and for cases see 31 Digest (Repl.) 194 et seq.; and 384 et seq.

Cases referred to:

(1) *Robbins* v. *Jones* (1863), 15 C.B.N.S. 221; 3 New Rep. 85; 33 L.J.C.P. 1; 9 L.T. 523; 12 W.R. 248; 143 E.R. 768; sub nom. *Robins* v. *Jones*, 10 Jur.N.S. 239; 31 Digest (Repl.) 385, *5114*.

(2) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

(3) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

Also referred to in argument:

Nelson v. *Liverpool Brewery Co.* (1877), 2 C.P.D. 311; 46 L.J.Q.B. 675; 25 W.R. 877; 31 Digest (Repl.) 380, *5083*.

Gwinnell v. *Eamer* (1875), L.R. 10 C.P. 658; 32 L.T. 835, D.C.; 31 Digest (Repl.) 382, *5097*.

Gandy v. *Jubber* (1865), 5 B. & S. 485; 9 B. & S. 15; 29 J.P. 645; 13 W.R. 1022; 122 E.R. 911, Ex. Ch. A

Todd v. *Flight* (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, *5094.*

Payne v. *Rogers* (1794), 2 Hy. Bl. 350; 126 E.R. 590; 31 Digest (Repl.) 380, *5081.*

Sandford v. *Clarke* (1888), 21 Q.B.D. 398; 57 L.J.Q.B. 507; 59 L.T. 226; 52 J.P. 773; 37 W.R. 28, D.C.; 31 Digest (Repl.) 382, *5099.* B

Bowen v. *Anderson*, [1894] 1 Q.B. 164; 58 J.P. 213; 42 W.R. 236; 38 Sol. Jo. 131; 10 R. 47, D.C.; 31 Digest (Repl.) 382, *5100.*

Francis v. *Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex. Ch.; 34 Digest 166, *1296.*

Application by the plaintiff for judgment or for a new trial on appeal from the verdict and judgment at the trial before Lord Russell, C.J., with a jury in Middlesex. C

The plaintiff brought this action to recover damages for personal injuries which he had sustained. The defendant was the landlord of a house, which had been recently built, and was let to a weekly tenant. The landlord had not agreed to do any repairs. The plaintiff was employed by the tenant to remove some furniture from the house, D and while he was removing the furniture he was injured by reason of a staircase within the house giving way beneath him. At the trial evidence was given on behalf of the plaintiff that the staircase was defective and unsafe in its construction, and that it was so at the time when the house was let by the defendant. The action was tried before Lord Russell, C.J., and a jury, and the learned judge held that there was no case to go to the jury, and directed a verdict for the defendant. The E plaintiff appealed.

E. W. Sinclair Cox and *F. Lampard* for the plaintiff.

Francis Williams, Q.C., and *F. R. Y. Radcliffe* for the defendant.

Cur. adv. vult.

F

Dec. 19, 1896.—**LORD ESHER, M.R.**—In this case the plaintiff sued the defendant, the owner of a house, to recover damages for injuries sustained by him owing to the defective condition of the staircase of the house. At the trial the Lord Chief Justice held that the plaintiff had not made out any case, and directed a verdict for the defendant. The plaintiff has appealed, and asks for a new trial.

The evidence showed that the defendant was the owner of the house, but that it G was let to a tenant who was in possession at the time when the accident happened to the plaintiff. There was also evidence that at the time when the house was let to the tenant, the staircase was in an unsafe condition, and that the defect then existed owing to which the plaintiff was afterwards injured. The plaintiff had gone into the house at the request of the tenant in order to remove the tenant's furniture, and while so doing was injured owing to the defective condition of the staircase. H The question we have now to decide is whether the defendant can be made liable under such circumstances for the injuries caused to the plaintiff. There was not any contractual relation between the plaintiff and the defendant. This case is not like that of a person who keeps a shop and intends and invites people to enter. It has been argued, however, that there was negligence on the part of the defendant which caused the injury to the plaintiff, because he had let the house in an unsafe I condition. It has been held that one person cannot be made liable to another for negligence unless there is some relation between them which gives rise to a duty towards the person injured, which has been neglected. Such a relation arises under many circumstances, as was pointed out in *Heaven* v. *Pender* (2) and *Le Lievre* v. *Gould* (3).

Was there, in this case, any duty owing by the defendant towards the plaintiff? It has been pointed out in the previous cases that persons who are upon a highway have the duty imposed upon them to take reasonable care not to interfere with

each other. So also, if a man has a house adjoining a highway, a duty towards the persons using the highway is imposed upon him; and also a man owes a duty towards his next-door neighbour. In such cases he is liable, if by negligently managing his house or allowing it to be unsafe, he causes injury to persons using the highway or to his neighbour. In the present case the negligence alleged is that the defendant let his house to a tenant in an unsafe condition. It has been held that no duty is imposed upon a landlord, as between him and his tenant, not to let his house in a dilapidated condition, apart from a special contract. If, in such case there is no duty towards the tenant, there cannot be any duty towards a stranger. There was, therefore, in this case no duty owing by the defendant to the plaintiff, and consequently there could be no liability for negligence. The ruling of the Lord Chief Justice was right, and this appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The plaintiff in this case complains of a defect in the staircase of a house belonging to the defendant, and let by him to a tenant. It is contended that the landlord is liable for injuries sustained by the plaintiff, a workman employed by the tenant. The rule is that neither the landlord nor the tenant is liable to put into repair, or to repair, the demised premises unless such a liability is created by a contract between them. There is no implied contract between them in this respect. A landlord who lets his house in a dangerous or unsafe condition is not liable to the tenant, or to his tenant's customers or guests, for accidents happening during the term, unless he has contracted to keep the premises in repair. In this case, then, there was no liability arising out of any contract. It is argued, however, that the claim may be based upon the negligence of the defendant. There is no liability for negligence unless there is a breach of some duty. No duty in a case like this exists even towards the tenant, and therefore none can exist towards strangers. A case like this is entirely different from the case in which, by reason of the dangerous condition of premises, injury is caused to persons on the highway, or to the occupier of adjoining property. I think that the Lord Chief Justice was right in holding that the plaintiff had no case, and this appeal must be dismissed.

RIGBY, L.J.—I entirely agree. I desire only to add that the liability of a landlord for letting premises in a dangerous condition is not limited to cases of public nuisances, but extends to cases where the injury is caused upon adjoining property. As to the question in the present case, I accept the proposition of Erle, C.J., in *Robbins* v. *Jones* (1), where he said (15 C.B.N.S. at p. 240):

> "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house, and the tenant's remedy is upon his contract, if any."

I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *A. Savage Cooper; Powell & Skues.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

Re AMALGAMATED SYNDICATE

[CHANCERY DIVISION (Vaughan Williams, J.), October 28, 1897]

[Reported [1897] 2 Ch. 600; 66 L.J.Ch. 783; 77 L.T. 431; 46 W.R. 75; 42 Sol. Jo. 13; 4 Mans. 308]

B

Company—Winding-up—"Just and equitable"—Substratum of company gone—Directors intending to carry out business ultra vires the company—Plans not communicated to shareholders—Companies Act, 1862 (25 & 26 *Vict.*, c. 89), *s.* 79 (5).

The main object of a company, incorporated in May, 1897, was to take over the undertakings and assets of three other companies formed with reference to the Diamond Jubilee which was celebrated in that year. Further objects of the company, stated in later clauses of the memorandum, were to carry on all kinds of promotion business, to act as agents, surveyors and builders, and to acquire, sell and deal in rooms, etc., for viewing processions, spectacles, entertainments and other public gatherings and to supply refreshments to persons attending these. The Jubilee being over, there was an admitted loss of some 70 per cent. of the subscribed capital of the company, but the directors did not intend to wind-up the company and contemplated entering into fresh business. They had not told the shareholders of these plans. One of the shareholders presented a petition to wind-up the company on the ground that it was "just and equitable" to do so within the meaning of s. 79 (5) of the Companies Act, 1862 [now s. 222 (f) of the Companies Act, 1948].

C D E

Held: the Jubilee being over, the substratum of the company had gone, and since the later object clauses must be treated merely as giving powers incidental to the main object of the company and not as defining different objects from the main object, the fresh business contemplated by the directors was ultra vires; in these circumstances it was "just and equitable" for the court to make a winding-up order even though the directors had not yet submitted their plans regarding the fresh business to the shareholders.

F

Re Irrigation Co. of France, Ex parte Fox (1) (1871), L.R. 6 Ch. App. 176, distinguished.

Notes. The Companies Act, 1862, has been repealed. As to cases in which a company may be wound up by the court see now s. 222 of the Companies Act, 1948; and on the meaning of "just and equitable" in para. (f) of s. 222 see the notes to the section in 3 HALSBURY'S STATUTES (2nd Edn.) at p. 640.

G

Considered: *Re Eastern Telegraph Co.*, [1947] 2 All E.R. 104. Referred to: *Loch* v. *John Blackwood, Ltd.*, [1924] All E.R. Rep. 200.

As to the meaning of "just and equitable," see 6 HALSBURY'S LAWS (3rd Edn.) 534; and for cases see 10 DIGEST (Repl.) 856, 857.

H

Case referred to:

(1) *Re Irrigation Co. of France, Ex parte Fox* (1871), 6 Ch. App. 176; 40 L.J.Ch. 433; 24 L.T. 336, L.JJ.; 10 Digest (Repl.) 880, *5827*.

Also referred to in argument:

Re Crown Bank (1890), 44 Ch.D. 634; 59 L.J.Ch. 739; 62 L.T. 823; 38 W.R. 666; 10 Digest (Repl.) 860, *5661*.

I

Re New Gas Co. (1877), 36 L.T. 364; on appeal, 5 Ch.D. 703; 37 L.T. 111; 25 W.R. 643, C.A.; 10 Digest (Repl.) 859, *5652*.

Re Pioneers of Mashonaland Syndicate, [1893] 1 Ch. 731; 62 L.J.Ch. 507; 68 L.T. 163; 41 W.R. 492; 9 T.L.R. 212; 37 Sol. Jo. 231; 3 R. 265; 10 Digest (Repl.) 866, *5694*.

Petition presented by a shareholder of the Amalgamated Syndicate to wind-up the company.

The company was incorporated on May 20, 1897. Its objects as set out in cl. 3 of the memorandum of association were as follows:—

"(a) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Syndicate, Ltd., incorporated in the month of April 1897, . . . (b) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Syndicate (No. 2), Ltd., incorporated in the month of April, 1897, . . . (c) To acquire and take over as a going concern the undertaking and all or any of the assets and liabilities of the Diamond Jubilee Contract Corpn., Ltd., incorporated in the month of April, 1897, . . . (d) to carry on all kinds of promotion business, and in particular to form, constitute, float, lend money to, assist, and control any companies, associations, or undertakings whatsoever, including any companies, associations, or undertakings for the purpose of acquiring all or any of the property and liabilities of this company. (e) To act as house agents, surveyors, and builders. (f) To acquire, sell, and deal in rooms, premises, stands, seats, and places of observation in connection with any procession, spectacle, entertainments, sports, exhibition, demonstration, or public gathering of any description, and to supply refreshments or lodgings and accommodation for any persons attending, witnessing, or interested in the same."

Alexander, Q.C., and *M. Macnaghten* for the petitioner.
Ashton Cross and *Stewart Smith*, for independent shareholders, supported the petition.
H. D. Grazebrook and *W. de B. Herbert* for shareholders opposing the petition.
Bramwell Davis, Q.C., and *W. E. Vernon* for the company.

VAUGHAN WILLIAMS, J.—I think I ought to make the winding-up order. The petition, I agree, can only be supported under sub-s. (5)—the "just and equitable" clause—of s. 79 of the Companies Act, 1862; but, in my judgment, it can be supported under that clause.

This company was formed, as shown by its memorandum, to acquire and take over the undertakings and assets of three companies formed with reference to the Diamond Jubilee. [His Lordship read sub-cll. (a), (b), and (c) of cl. 3 and continued:] The Jubilee is over, and any loss or profit which was to be incurred or gained by carrying out that which on the face of the memorandum was the principal and primary object of the company has come to an end. There has been admittedly a loss; it is said to be about 70 per cent. of the subscribed capital, although the amount is perhaps immaterial. All that is now to be done is to return the percentage which remains for them out of the balance or wreckage to the shareholders after deducting the losses and expenses. It is of course under the circumstances within the functions of the company acting by its directors and officers to perform this duty and to adjust these matters among the shareholders. But it is suggested by the petition that it is right, having regard to the fact that the business which the company was formed to carry on has come to an end, that the company should be wound-up by the court in order that what is left may be duly distributed.

If nothing was left to be done but make such division and adjustment, and there were no other circumstances in the case, I do not think the court ought to or could make the winding-up order. But it is said that it is "just and equitable" to wind-up the company in this particular case, because the principal business which the company was formed to carry on has come to an end, and that the directors, so far from setting about to divide and adjust the balance of assets, are contemplating entering on fresh business which is ultra vires. The company cannot enter on any business of the nature of its principal and primary business, because that is connected with the Jubilee, which is a thing of the past, and in that state of things it is said the company ought at once to be wound-up, and that, as the directors, as far as

one can judge, have no intention to wind-up this company, of which the substratum is gone in the sense I have mentioned, it is just and equitable that the company should be wound-up by the court.

It is also said that the business which the directors have in contemplation would be ultra vires the company, notwithstanding the general terms of the later object clauses of the memorandum, the terms of which are so wide that it is impossible to suggest any business which would not be included therein, if they are not read as including only matters incidental to the main or primary business. My answer is, that I think that I ought not to read the later object clauses as defining a succession of objects different from the main objects, but that I ought to consider them as general powers providing for the execution by the company of matters which are merely incidental to its main objects. It is incredible that those who subscribed for shares and read this memorandum of association thought that the Jubilee object was only one among many objects of the company. Practically one cannot doubt that anyone who took shares in the company took them under the impression that the business was to begin and finish with the Diamond Jubilee.

Arriving, as I do, at the conclusion that the business of the company has come to an end, I have further to consider whether I ought in this state of things to say that it is just and equitable to wind up the company without waiting till the views of the directors are submitted to a meeting of the shareholders. I think I ought not to wait, because I think the views of the directors, ex facie show that business which is ultra vires is intended. And there are other matters which affect my discretion, e.g., the question as to the fitness of this board to carry out the division and adjustment which I have referred to. If that were the only question, I do not say that it would not be one to be decided by the domestic forum of the shareholders, but when the substratum is gone in the sense I have mentioned, I must bear in mind that the directors are not applying themselves to distribute the salvage, but are contemplating business which is not within the scope of the memorandum.

Assuming that I ought to take into consideration the conduct of the directors with reference to the proposed carrying on of an ultra vires business, the prima facie right to have the question settled by the domestic forum is gone, and the matter is left to the discretion of the court. Under pressure of this petition the directors have issued a circular which leaves the shareholders practically in the dark as to what is to be done with their money. I am also struck with the fact that the directors have not communicated their plans to the shareholders. But it is enough to show that, whatever their plans may be, they have not waited to consult the shareholders before acting upon their own views. Without placing particular reliance upon this, I cannot help being struck by the fact that, the company having been formed to carry on these Jubilee businesses, no information has been given me as to what amount of cash was made over by the shareholders of those syndicates to those syndicates, or what amount was handed over by them to the amalgamated company.

It is said that there is already a sufficient expression of the wishes of the shareholders to show that a large majority is in favour of continuing the company. But whereas about £60,000 share capital has apparently been paid up, the shareholders supporting and opposing the petition together only represent a little over £3,000 of capital. The number of those opposing is greater than the number of those supporting, but those who oppose do not appear to have exercised any independent judgment. Under the circumstances, there is no such view or expression of wish as precludes me from making a winding-up order. The wishes of shareholders and creditors in winding-up and of the latter in bankruptcy are to be regarded, but in each case there is a difficulty in getting people to apply their reasoning faculties to matters put before them, and in this case I am not satisfied with the reasons put forward.

Counsel for the company called my attention to the decision in *Re Irrigation Co. of France, Ex parte Fox* (1), and said that the case supported the proposition which no one would dispute, that where a company is proceeding to do something which

A is ultra vires, a shareholder has a right of action to restrain the company by injunction from so acting, but that he has no right to come to the court and ask for a winding-up order under the "just and equitable" clause. I agree that this is generally a true proposition, and that there is a class of matters of an internal character which should be left to the decision of the shareholders; but I do not think that decision goes the length of saying that where the court has to consider whether B it should take upon itself the adjustment of the rights of the shareholders of a company, the substratum of which is gone, the court should not take into consideration the fact that the directors intend entering upon businesses which in the opinion of the court were outside the memorandum of association. MR. BUCKLEY in his work on the COMPANIES ACTS (7th Edn.) at p. 245, says:

C "So where a company is proceeding to do something which is ultra vires, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent, but has no right to come for a winding-up order under the 'just and equitable' clause."

D He cites *Re Irrigation Co. of France, Ex parte Fox* (1) as an authority for that proposition; but it is plain that that is a mere illustration of a passage a little earlier, where he says, stating the main proposition (ibid.):

"There is no doubt that the 'just and equitable' clause gives the court power to wind-up a company in cases not coming under any of the first four heads [of s. 79], but there must be strong ground for exercising the power, at any E rate, at the instance of a shareholder."

The case is, therefore, within sub-s. (5) of s. 79 of the Act of 1862, and, without going into details, I may repeat what I said during the argument that the stringency in the application of this ejusdem generis rule has of late been considerably relaxed. There will be the usual compulsory winding-up order.

F *Order accordingly.*

Solicitors: *W. H. Smith & Son; E. R. Donisthorpe; Julian Ellis; Cresswell & Co.; French & Co.; John Vernon, Son & Stephen.*

[*Reported by* H. M. CHARTERS MACPHERSON, ESQ., *Barrister-at-Law.*]

G

H

HOPE *v.* BRASH AND ANOTHER

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), June 28, 1897]

[Reported [1897] 2 Q.B. 188; 66 L.J.Q.B. 653; 76 L.T. 823; 45 W.R. 659; 13 T.L.R. 478]

I

Libel—Discovery—Libel in newspaper—Admission of publication—Manuscript containing words complained of.

In an action for a libel, which was set out in the statement of claim, against the proprietors of a newspaper, the defendants admitted publication of the libel, but pleaded that they had published an apology, that the libel was published without their negligence or malice and that they had paid a sum into court as sufficient amends. Issue was joined on that defence. The plaintiff having obtained an order for discovery of documents, the defendants in their

affidavit of documents admitted that they had in their possession the documents relating to the matter in issue, but objected to produce one of them, namely, the manuscript containing the words complained of, on the ground that it was the original contribution, and was that which was published by them for which they had admitted responsibility. The plaintiff obtained an order at chambers that the manuscript should be produced for his inspection. On appeal by the defendants,

Held: under the settled rule of practice referred to in *Hennessy* v. *Wright* (*No. 2*) (1) (1888), 24 Q.B.D. at p. 449, a plaintiff in a libel action, in the absence of special circumstances, was not entitled to information as to the writer of the libel, and, accordingly, the judge at chambers had wrongly exercised his discretion in favour of the plaintiff who was not entitled to inspect the manuscript.

Bustros v. *White* (2) (1876), 1 Q.B.D. 423, considered.

Notes. Applied: *Plymouth Mutual Co-operative and Industrial Society* v. *Traders' Publishing Association*, [1906] 1 K.B. 403. Referred to: *Maass* v. *Gas, Light and Coke Co.* (1911), 80 L.J.K.B. 1313; *Re Whitworth, O'Rourke* v. *Darbishire*, [1919] 1 Ch. 320; *Lyle-Samuel* v. *Odhams, Ltd.*, [1918-19] All E.R. Rep. 779; *Lawson* v. *Odhams Press, Ltd.*, [1948] 2 All E.R. 717.

As to discovery and interrogatories in actions of libel and slander, see 24 Halsbury's Laws (3rd Edn.) 99 et seq. Generally, as to inspection of documents, see 12 Halsbury's Laws (3rd Edn.) 34 et seq.; and for cases see 18 Digest (Repl.) 63. For R.S.C., Ord. 31, r. 12 and r. 18, see The Annual Practice, 1962.

Cases referred to:

(1) *Hennessy* v. *Wright* (*No. 2*) (1888), 24 Q.B.D. 445, n.; 36 W.R. 879; 4 T.L.R. 662, C.A.; 18 Digest (Repl.) 185, *1606*.

(2) *Bustros* v. *White* (1876), 1 Q.B.D. 423; 45 L.J.Q.B. 642; 34 L.T. 835; 24 W.R. 721; 3 Char. Pr. Cas. 229, C.A.; 18 Digest (Repl.) 63, *501*.

Appeal by the defendants from an order of Bruce, J., at chambers, affirming the order of a master for production of a document.

The plaintiff brought an action to recover damages for libel published in a newspaper of which the defendants were the proprietors. By their defence the defendants admitted publication, and pleaded that the libel was inserted in the newspaper without actual malice and without gross negligence, that before the action was commenced they had published a full apology, and that they paid into court a sum of money as sufficient to satisfy the plaintiff's claim. The plaintiff obtained an order for discovery of documents. The defendants, in their affidavit of documents, admitted they had in their possession or power the documents relating to the matter in question in the suit, set forth in the first and second parts of the schedule thereto. In the second part of the schedule there was the following paragraph:

"A manuscript of the story published in the [newspaper]. We object to produce it on the ground that the manuscript referred to is the original contribution to us, and is that which was published by us, as admitted in the first paragraph of the statement of defence, and as to which we admit responsibility."

The plaintiff applied at chambers for an order that the defendants should produce the manuscript for his inspection, and an order was made by the master. The defendants appealed, and the order was affirmed by Bruce, J., at chambers, leave to appeal being given. The defendants appealed.

J. Eldon Bankes and *Norman Craig* for the defendants.

Montague Lush for the plaintiff.

LORD ESHER, M.R.—I am of opinion that this is a matter of discretion, and that we can exercise a discretion in the matter. This was an action for libel brought against the proprietors of a newspaper. The defendants have admitted that they

published the whole of the matter complained of and that it is defamatory. They have pleaded that which amounts to an answer to the claim, and if that plea is proved there must be judgment for the defendants. The plaintiff has asked for an order that he may inspect the document which has been included in the defendants' affidavit of documents. That document is not the libel complained of, but is the manuscript written by a contributor to the newspaper in order that the newspaper might publish it. As to the defendants' plea, it is without doubt a plea the proof of which lies entirely upon the defendants, who must prove the whole of it. If they fail to prove any part of it, they will fail in the action.

Then comes the question whether the plaintiff ought to be permitted to see the manuscript. I take it that, in *Hennessy* v. *Wright* (*No. 2*) (1), the court had to consider this very question, whether when a libel has been published by the defendant, for which he admits that he is responsible, he should be forced to say who gave him the materials for the published libel. In that case it was stated what was the practice of the common law judges on that point, and it was laid down that the defendant ought not to be made to disclose the name of his informant. Lindley, L.J., said (24 Q.B.D. at p. 449):

> "The judges of the Queen's Bench Division have arrived, as I understand, at a tolerably settled practice never to order production of such documents as this for reasons which I appreciate, although perhaps I should not have given effect to them in the first instance."

The Court of Appeal, therefore, in that case recognised the rule that this information ought not to be given to a plaintiff suing in respect of a libel. The rule is, not that the court never will order that information to be given, but that as a general rule the court, as a matter of discretion, will not do so. This is the very point taken by the defendants in their affidavit of documents when they say that they "object to produce it on the ground that the manuscript referred to is the original contribution to us, and is that which was published by us, as admitted in the first paragraph of the statement of defence, and as to which we admit responsibility." That objection seems to be founded upon *Hennessy* v. *Wright* (*No. 2*) (1). I think, therefore, that the learned judge at chambers ought, in the exercise of his discretion, to have followed the general rule laid down by the Court of Appeal in *Hennessy* v. *Wright* (*No. 2*) (1), and to have refused to order production of this document. We must hold, therefore, that this appeal ought to be allowed, because the plaintiff has no right to inspect this document.

A. L. SMITH, L.J.—I am of the same opinion. This is an action for libel brought against the proprietors of a newspaper, and the libel is set out in the statement of claim. The defendants set up the statutory defence that they had published an apology, that the libel was published without any negligence or malice on their part, and that they have paid money into court as sufficient amends. Issue has been joined on that defence. There cannot be any doubt that the whole of that plea must be proved by the defendants. The plaintiff obtained an order for discovery of documents. In their affidavit in answer the defendants say that they have the manuscript, but that they object to produce it on the ground that it is the original contribution, and is that which was published by them and for which they admit responsibility. The plaintiff claims to have that document produced for his inspection. It is contended that he has a right to inspect it, upon the authority of *Bustros* v. *White* (2), because the defendants have admitted by their affidavit the relevancy of the document. I am of opinion that *Bustros* v. *White* (2) does not decide that in all cases inspection must be given. In 1893 new rules were added for the express purpose of making it not compulsory on the court to order discovery or inspection in all cases; those are rll. 12 and 18 of Ord. 31. In my opinion it is not obligatory to order inspection in all cases. According to the settled rule of practice, referred to in *Hennessy* v. *Wright* (*No. 2*) (1), the plaintiff is not entitled to be informed as

to the writer of a libel. That is the almost invariable practice, and there must be something very special in a case to make any exception to that general rule. I do not see that there is anything special in this case to take it out of the general rule. I think, therefore, that the learned judge at chambers exercised his discretion wrongly and came to a wrong conclusion. This appeal must be allowed.

RIGBY, L.J.—I am of the same opinion. What does the alleged admission of the defendants amount to? It is not an admission that the document is relevant to any issue in the action. It seems to me that in *Bustros* v. *White* (2) the relevancy of the document in question was admitted, and that the only question was whether the document was privileged. I think that the decision in that case was only that, where a document is clearly relevant and is not privileged, it must be produced for inspection. At any rate, in *Hennessy* v. *Wright* (*No. 2*) (1) an exception was established in libel cases such as this, and that case is binding upon us. In my opinion we ought not to attempt to refine upon the rule laid down in that case. I also think that the additions to the rules, made in rll. 12 and 18 of Ord. 31, show that production and inspection of documents is not to be ordered ex debito justitiæ in every case, and that it must be shown that the document is in some way relevant to some issue which has to be decided in the case. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors: *Speechly, Mumford, Landon & Rodgers*, for *Hayton & Simpson*, Cockermouth; *Harrison & Powell*, for *Brown & Auld*, Whitehaven.

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

CALCRAFT *v.* GUEST

[Court of Appeal (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), March 8, 9, 11, 1898]

[Reported [1898] 1 Q.B. 759; 67 L.J.Q.B. 505; 78 L.T. 283; 46 W.R. 420; 42 Sol. Jo. 343]

Discovery—Privilege—Production of document—Documents in previous action—Secondary evidence—Admissibility.

After delivery of judgment for the plaintiffs in an action, the defendant became aware of certain documents used in the defence of a previous action, dealing with the same subject-matter, and defended at the cost of the plaintiffs' predecessor in title. The defendant, having appealed, asked the plaintiffs to produce these documents, but the plaintiffs objected, claiming that the documents were privileged. At the hearing of the appeal the defendant asked for production of the documents and the question arose whether they were privileged, and, if so, whether the defendant could give secondary evidence of those of which he had copies.

Held: the documents were protected by privilege, but the defendant was not precluded from giving secondary evidence of those documents of which he had copies.

Notes. Considered: *Goldstone* v. *Williams, Deacon*, [1899] 1 Ch. 47. Distinguished: *Ashburton* v. *Pape*, [1911-13] All E.R. Rep. 708. Considered: *Schneider* v. *Leigh*, [1955] 2 All E.R. 173. Referred to: *West Riding of Yorkshire*

A *Rivers Board* v. *Tadcaster R.D.C.* (1907), 97 L.T. 436; *Kuruma* v. *R.*, [1955] 1 All E.R. 236.

As to secondary evidence of documents subject to privilege, see 15 HALSBURY'S LAWS (3rd Edn.) 266, 267; and for cases see 22 DIGEST (Repl.) 211 et seq.

Cases referred to:

B (1) *Minet* v. *Morgan* (1873), 8 Ch. App. 361; 42 L.J.Ch. 627; 28 L.T. 573; 21 W.R. 467, L.C. & L.J.; 18 Digest (Repl.) 96, *793*.

(2) *Wheeler* v. *Le Marchant* (1881), 17 Ch.D. 675; 50 L.J.Ch. 793; 44 L.T. 632; 45 J.P. 728; 30 W.R. 235, C.A.; 22 Digest (Repl.) 412, *4438*.

(3) *Kennedy* v. *Lyell* (1883), 23 Ch.D. 387; 48 L.T. 455; 31 W.R. 691, C.A.; on appeal, sub nom. *Lyell* v. *Kennedy*, 9 App. Cas. 81; 53 L.J.Ch. 449; 50 L.T.
C 277; 32 W.R. 497, H.L.; 18 Digest (Repl.) 114, *969*.

(4) *Lowden* v. *Blakey* (1889), 23 Q.B.D. 332; 58 L.J.Q.B. 617; 61 L.T. 251; 54 J.P. 54; 38 W.R. 64; 5 T.L.R. 599, D.C.; 18 Digest (Repl.) 101, *846*.

(5) *Learoyd* v. *Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686; 62 L.J.Ch. 509; 68 L.T. 158; 41 W.R. 344; 9 T.L.R. 188; 37 Sol. Jo. 212; 3 R. 252; 18 Digest (Repl.) 104, *889*.

D (6) *Lloyd* v. *Mostyn* (1842), 10 M. & W. 478; 2 Dowl. N.S. 476; 12 L.J.Ex. 1; 6 Jur. 974; 152 E.R. 558; 22 Digest (Repl.) 238, *2329*.

(7) *Fisher* v. *Heming* (1809), Phillipps & Arnold on Law of Evidence, 10th Edn., vol. 1, p. 116; 22 Digest (Repl.) 412, *4426*.

Also referred to in argument:

E *Bishop of Meath* v. *Marquess of Winchester* (1836), 4 Cl. & Fin. 445; 3 Bing, N.C. 183; 10 Bli. N.S. 330; 3 Scott, 561; 7 E.R. 171, H.L.; 22 Digest (Repl.) 350, *3744*.

Cleave v. *Jones* (1852), 7 Exch. 421; 21 L.J.Ex. 105; 18 L.T.O.S. 332; 155 E.R. 1013; 22 Digest (Repl.) 29, *94*.

Jenkyns v. *Bushby* (1866), L.R. 2 Eq. 547; 35 L.J.Ch. 820; 15 L.T. 310; 12
F Jur.N.S. 558; 18 Digest (Repl.) 94, *768*.

Appeal by the defendant from a decision of HENN COLLINS, J., at the trial of the action without a jury in Middlesex.

A question was raised as to the production of certain documents on which the appellant intended to rely. Since the trial of the action, a number of documents said to relate to the subject-matter of the action, had been discovered at the office
G of a firm of solicitors, who were the successors of the solicitors to one of the plaintiffs' predecessors in title. These documents consisted of (inter alia) the record of an action of *Fry* v. *Stevens*, concerning fishing rights, tried at the Dorchester Assizes in 1786, which was brought against the lessee of the plaintiffs' predecessor, and defended by such predecessor, with proofs of witnesses, and other papers. There was also a list of witnesses, against the names of many of whom was written "ex."
H There were also notes of witnesses' evidence comprised in six double sheets of foolscap, which contained certain important statements. There was nothing to show how they came into existence, or who took the notes, or that the witnesses were called; but it was stated that they had been prepared for the purpose of the action of *Fry* v. *Stevens*. These documents had at one time come into the possession of
I the defendant from the person in whose custody they were, and, while in his possession, copies of the notes had been taken. The documents were ultimately restored to the plaintiffs. The defendant asked that the documents should be produced, and the questions were: (i) whether they were privileged from production; and (ii) whether, if so, the defendant could give secondary evidence of the documents of which he had copies.

Cozens-Hardy, Q.C., *Bosanquet, Q.C.*, and *Macaskie* for the defendant.
Cripps, Q.C., and *Stuart Moore* for the plaintiffs.

Cur. adv. vult.

March 11, 1898. **SIR NATHANIEL LINDLEY, M.R.**—In the course of this appeal, which is not over yet, a question has arisen as to whether certain documents are privileged, by reason of their being confidential communications, as I will call them; and, if they are, whether secondary evidence can be given of some of them of which the defendant has copies. We must be a little cautious in what we say, because we shall have to consider when they are tendered in evidence each particular document, and it may be that some of these things we are going to allude to are not admissible on other grounds. Therefore, we shall confine our remarks entirely to the question we have heard counsel upon—we mean the professional privilege and the right to give secondary evidence.

As to that, on looking into the authorities, it appears to us that the case is covered by that of *Minet* v. *Morgan* (1), and that if there are any documents which were protected by the privilege to which we are alluding, that privilege has not been lost. I take it that that is a general rule. One may say "once privileged always privileged." I do not mean to say that privilege cannot be waived; but the mere fact that documents are held, and have not been destroyed, does not amount to a waiver of the privilege. I think *Minet* v. *Morgan* (1) covers them in the general way that I am now speaking of. But it was said, "No, *Wheeler* v. *Le Marchant* (2) shows the contrary." I do not think so. It seems to me that *Wheeler* v. *Le Marchant* (2) has been a little misunderstood. I think that *Wheeler* v. *Le Marchant* (2) is perfectly right. An attempt was there made to extend the doctrine to documents which were not covered upon any proper understanding of the doctrine. When you come to look at COTTON, L.J.'s, judgment in that case and at the form of the order he drew up, I think that will be seen without difficulty at all.

No doubt *Wheeler* v. *Le Marchant* (2) has given rise to a little controversy, and COTTON, L.J., has referred to that in *Kennedy* v. *Lyell* (3), where he says (23 Ch.D. at p. 407):

> "What was said by the Master of the Rolls is rather in favour of the respondent, but all that was decided was that communications between the solicitors and the surveyor of the client before any litigation was contemplated were not protected."

Then he goes on to other matters. The case was again referred to by DENMAN and CHARLES, JJ., in *Lowden* v. *Blakey* (4), where they again pointed out that there was nothing in *Wheeler* v. *Le Marchant* (2) that was in any way inconsistent with *Minet* v. *Morgan* (1). Nor is there when you come to look at it. Again, STIRLING, J., took a great deal of trouble about *Wheeler* v. *Le Marchant* (2), in *Learoyd* v. *Halifax Joint Stock Banking Co.* (5). He arrived at the conclusion, which is inevitable when you come to study the two cases, that *Wheeler* v. *Le Marchant* (2) was right, and that *Minet* v. *Morgan* (1) was right likewise. That is to say, they do not conflict. So far, therefore, *Minet* v. *Morgan* (1) may be prayed in aid as protecting those privileged documents.

Then comes the next question. It appears the defendant has got some copies of them, and is in a position to give secondary evidence of them, and the question is, whether he is entitled to do that. That appears to me to be covered by the authority of *Lloyd* v. *Mostyn* (6). I need not go closely into the facts of that case. There was a bond there, the production of which was sought to be privileged on the ground of its coming into the hands of the solicitor in confidence, and the learned judge at the trial allowed the objection, and nobody seems to have quarrelled with it. Then the plaintiff tendered in evidence a copy of the bond and proposed to give secondary evidence of it. The learned judge received the copy as admissible. Sir Fitzroy Kelly moved to enter a nonsuit, if the court should be of opinion that the copy of the bond ought not to have been received in evidence. He referred to PHILLIPPS ON EVIDENCE (8th Edn.), vol. 1, at p. 182, and a decision of BAYLEY, J., at nisi prius was relied upon. I will read the extract from PHILLIPPS ON EVIDENCE:

A "If a deed deposited confidentially with an attorney has been obtained out of his hands, for the purpose of being produced in evidence by another witness, it cannot be received. Thus, in a case tried before BAYLEY, J., [*Fisher* v. *Hemming* (7) tried at the Leicester Lent Assizes, 1809] the plaintiffs' counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the B counsel of the plaintiffs offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as an attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney, and BAYLEY, J., C refused to admit it. He said, the attorney could not give parol evidence of the contents of the deed, which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last."

D In *Lloyd* v. *Mostyn* (6) PARKE, B., said (10 M. & W. at pp. 481, 482):

"I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?"

E LORD ABINGER, C.B., said (ibid. at p. 482): "It is impossible to say this copy was not evidence." The matter dropped there, but the court consisted of LORD ABINGER, PARKE, GURNEY, and ROLFE, BB., and they all concurred in that which I take to be a distinct authority that you can give secondary evidence in a case of this kind.

The other part of the case refers to the sufficiency of a notice to produce, which I F need not trouble about. These, therefore, are the answers which ought to be given to the two questions submitted to us, and when any particular document is tendered we must consider what we ought to do with it, having regard to those principles.

RIGBY, L.J., I quite agree.

G **VAUGHAN WILLIAMS, L.J.,** I have nothing to add.

Solicitors: *Nicholson, Graham, & Graham*, for *Preston & Francis*, Bournemouth; *Meynell & Pemberton.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

R. *v.* ROSE

[Court for the Consideration of Crown Cases Reserved (Lord Russell of Killowen, C.J., Hawkins, Lawrance and Wright, JJ.), February 5, 1898]

[Reported 67 L.J.Q.B. 289; 78 L.T. 119; 14 T.L.R. 213; 42 Sol. Jo. 255; 18 Cox, C.C. 717]

B

Criminal Law—Evidence—Confession—Statement after being told that it would be better to speak the truth.

A statement made by an accused person after he has been told that it will be better for him to speak the truth cannot be admitted as evidence against him.

C

Criminal Law—Bail—When to be granted.

Semble, bail should not be withheld as a punishment, the requirements as to bail being merely to secure the attendance of the prisoner at the trial.

D

Notes. As to confessions and statements by defendant, see 10 Halsbury's Laws (3rd Edn.) 469 et seq.; and for cases see 14 Digest (Repl.) 459 et seq. As to bail, see 10 Halsbury's Laws (3rd Edn.) 373 et seq.; and for cases see 14 Digest (Repl.) 170 et seq.

Cases referred to:

E

(1) *R.* v. *Baldry* (1852), 2 Den. 430; 21 L.J.M.C. 130; 19 L.T.O.S. 146; 16 J.P. 276; 16 Jur. 599; 5 Cox, C.C. 523, C.C.R.; 14 Digest (Repl.) 480, *4589*.

(2) *R.* v. *Jarvis* (1867), L.R. 1 C.C.R. 96; 37 L.J.M.C. 1; 17 L.T 178; 31 J.P. 804; 16 W.R. 111; 10 Cox, C.C. 574, C.C.R.; 14 Digest (Repl.) 482, *4614*.

(3) *R.* v. *Thompson*, [1893] 2 Q.B. 12; 62 L.J.M.C. 93; 69 L.T. 22; 57 J.P. 312; 41 W.R. 525; 9 T.L.R. 435; 37 Sol. Jo. 457; 17 Cox, C.C. 641; 5 R. 392, C.C.R.; 14 Digest (Repl.) 468, *4521*.

F

Case Stated by the chairman of the Norfolk Quarter Sessions.

The prisoner was indicted for larceny of certain corn, chaff, sheep, poultry and grass seeds, the property of his master, one Corney. It was stated in the Case that Corney in the presence of a police constable had asked the prisoner how he accounted for the number of the sheep on the farm being less than it should be, and the prisoner then admitted that he had sold a lamb and an ewe to certain persons. In

G

giving his evidence, Corney stated that the prisoner, after making the statement as to the sheep, had, in answer to questions, stated that he had also disposed of certain quantities of corn and chaff. On cross-examination, the prosecutor admitted that he might have said to the prisoner: "You had better tell me about all the corn that is gone." Robert Corney, a nephew of the prosecutor, being called, sub-

H

sequently stated that the prosecutor had asked the prisoner to speak the truth, saying that "it would be better" for the prisoner to do so. Counsel for the prisoner submitted that these statements of the prisoner as to the corn had been made on his inducement to confess, and were, therefore, not admissible as evidence against him, but the court allowed the whole case to go to the jury, who convicted the prisoner on the whole indictment.

I

E. E. Wild for the prisoner.

The Crown was not represented.

LORD RUSSELL OF KILLOWEN, C.J.—In my opinion, this conviction cannot be allowed to stand. The prisoner, who had been employed by a farmer in a more or less confidential capacity, was charged with stealing a variety of articles the property of his master, amongst other things sheep and corn, and was tried at the Norfolk Quarter Sessions. It appears that the prosecutor, having reason to suspect

that some of his property had been improperly dealt with, spoke to the prisoner, who then, as to some of the articles, confessed, and confessed voluntarily; but after making this confession, he was pressed to make a full confession, and to confess to having taken the corn. This is clear from the evidence of the prosecutor's nephew, who said that his uncle had asked the prisoner to speak the truth, telling him that it would be better for him if he did.

This amounts to evidence that the confession was not voluntary within the meaning of the authorities. A question of some delicacy then arises as to the course which the magistrates ought to have adopted. It is clear that the evidence ought not to be admitted; but ought the court merely to tell the jury to disregard it, or ought the court to discharge the jury and try the case again? In this case, however, the whole of the evidence was allowed to go to the jury, who found a general verdict. The rule, which is very old, and is stated just as clearly in the old as in the modern authorities, will be found in East's Pleas of the Crown, Vol. 2 (Edn. 1803), at p. 659. Lord Campbell, in *R.* v. *Baldry* (1), admitted a confession made by a prisoner after he had been cautioned by a policeman, because, as is correctly stated in the head-note to the case (21 L.J.M.C. 130),

> "the observation of the policeman did not amount to any promise or threat to induce the prisoner to confess so as to render a confession which the latter made after it inadmissible."

In *R.* v. *Jarvis* (2), the prisoner's master said to him,

> "You are in the presence of two officers of the police, and I should advise you that to any question that may be put to you you will answer truthfully, so that, if you have committed a fault you may not add to it by stating what is untrue";

whereupon the prisoner made a confession which the court held to be admissible, Willes, J., saying that the case would have been different if the master had said, "It is better for you to tell the truth."

The principle is also laid down by Cave, J., in *R.* v. *Thompson* (3), with the concurrence of Lord Coleridge, C.J., that a confession is not admissible if it is preceded by an inducement held out by a person in authority. Seeing, then, that in the case before us there were used the very words which it has been held render a confession inadmissible, in my opinion this confession was not admissible, and, it having been admitted, the conviction which followed it was bad. It is to be borne in mind not only by magistrates, but by prosecuting counsel and by solicitors having the charge of prosecutions, that they must satisfy themselves before putting a confession in evidence that the confession was not obtained under such circumstances as to be inadmissible.

I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at the trial.

HAWKINS, MATHEW, LAWRANCE, and **WRIGHT, JJ.,** concurred.

Solicitor: *W. A. Watts*, St. Ives, Hunts.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

CALEDONIAN RAIL. CO. *v.* MULHOLLAND (OR WARWICK)

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten, Lord Morris and Lord Shand), November 15, 16, 1897]

[Reported [1898] A.C. 216; 67 L.J.P.C. 1; 77 L.T. 570; 46 W.R. 236; 14 T.L.R. 41]

Railway—Negligence—Liability of third party—Fatal injury to worker—Defective brake on truck property of third party.

A railway company had a contract to supply coal to some gasworks at D. Trucks belonging to the appellant company were loaded with coal, brought over their line to D., there handed over to the railway company in the ordinary course of business, and hauled by them over a tramway, without being unloaded, to the gasworks, in pursuance of their contract. While the trucks were so being hauled to the gasworks by the railway company, the husband of the respondent, who was in the employment of the company, was killed, in consequence, as was alleged, of a defect in the brake of one of the trucks.

Held: the railway company was not liable, as there was no duty resting on them to the deceased man, a breach of which caused the loss of his life.

Per Lord Shand: This being neither the case of a trap nor an invitation to use a trap, nor a case of a noxious instrument, and there being no contract or obligation between the deceased man and the appellant company about these waggons, the pursuer had failed to state a relevant ground upon which liability could be founded.

Decision of the Second Division of the Court of Session, 24 R. (Ct. of Sess.) 429, reversed.

Heaven v. *Pender* (1) (1883), 11 Q.B.D. 503, distinguished.

Notes. Although it is not clearly stated in the judgments in this case, the proper ratio decidendi must be taken to be that there was no liability as "there was ample opportunity for inspection" by the G. company; per Lord Atkin in *Donoghue (or McAlister)* v. *Stevenson*, [1932] All E.R. Rep. 1.

Distinguished: *Oliver* v. *Sadler & Co.*, [1929] A.C. 584. Applied: *Farr* v. *Butters Bros. & Co.*, [1932] All E.R. 339. Considered: *Donoghue (or McAlister)* v. *Stevenson*, [1932] All E.R. Rep. 1. Referred to: *Marney* v. *Scott*, [1899] 1 Q.B. 986; *Blacker* v. *Lake and Elliot* (1912), 106 L.T. 533; *Bottomley* v. *Bannister*, [1932] 1 K.B. 458; *Howard* v. *Furness Houlder Argentine Lines, Ltd.* v. *Brown, Ltd.*, [1936] 2 All E.R. 781; *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960; *Denny* v. *Supplies and Transport Co. and Scruttons, Ltd.* (1950), 66 (pt. 1) T.L.R. 1168.

As to the effect of intermediate examination of defective goods, see 28 Halsbury's Laws (3rd Edn.) 59-60, and for cases see 36 Digest (Repl.) 12 et seq.

Case referred to:

(1) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

Appeal from a decision of a majority of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Macdonald) and Lord Young (Lord Trayner dissenting), refusing to dismiss the case as against the appellant railway company in an action brought by the respondent against them and the Glasgow and South-Western Rail. Co., and reported 24 R. (Ct. of Sess.) 429 and 34 Sc. L.R. 317.

The Lord-Advocate (*Graham Murray, Q.C.*) and *E. B. Nicolson* (of the Scottish Bar) for the appellants.

Cyril Dodd, Q.C., and *C. E. Allan* for the respondent.

A **LORD HERSCHELL.**—The question which arises upon this appeal is, whether upon this record there is a case established as against the Caledonian Rail. Co. The action was brought in respect of an accident that happened to a servant of the Glasgow and South-Western Co. by which he lost his life, the action being brought by his widow to recover damages in respect of the loss she had thereby sustained. Not only are the Caledonian Rail. Co. sued, but the Glasgow and South-Western B Rail. Co. also, and as against the Glasgow and South-Western Rail. Co. it is not contested that the relevant case is shown upon the pleadings.

The facts that appear upon this record are these. The Caledonian Rail. Co. carried certain coals to the Dumfries station, and, as soon as those coals arrived in the waggons at the Dumfries station, every obligation undertaken by the Caledonian C Co. in respect of them was at an end. That was the place of delivery, and the parties might, if they had pleased, have taken delivery of them there; they might have emptied the waggons of their coals at the place where the Caledonian engine left them, and the Caledonian Co., of course, would have had nothing to say to their doing so. But for their own purposes and their own convenience the Glasgow and South-Western Co. made an arrangement with the Dumfries Gas Commissioners by D which they were to haul the coals from the place of delivery under the contract with the Caledonian Co., namely, the station, to the premises of the Gas Commissioners, which were about 400 yards, or something like a quarter of a mile distant. Between the place where the Caledonian Co. left the trucks of coal and the premises of the Gas Commissioners there was a tramway passing along the public streets. The trucks were hauled two at a time along this tramway to the E Gas Commissioners' premises. While two trucks were being so hauled it is alleged that the husband of the plaintiff lost his life by reason of some imperfection in the brakes connected with these trucks. It became necessary in passing along this tramway to check the motion of the trucks, and the motion of these trucks was not checked rapidly enough to prevent the one coming against the other so that the plaintiff's husband was crushed. It was averred that it was by the permission, F sanction, and consent of the Caledonian Co. that the Glasgow and South-Western Co. or the Gas Commissioners did not take delivery of the coals out of the waggons at the station, but hauled those waggons on so that the coals might be discharged direct into the premises of the Gas Commissioners.

The question is, whether these facts establish any duty on the part of the Caledonian Co., a breach of which has led to the damage complained of by the G plaintiff. It is said that the duty is this, that the Caledonian Rail. Co. inasmuch as they knew how the Glasgow and South-Western Co. were going to use these waggons, were bound when they handed them over to examine them in order to see that they were in a proper condition, and if they had examined them they would have seen that they were not in a proper condition; they were, therefore, handing over waggons which they had not so examined, and which were not in a proper H condition for use by the Glasgow and South-Western Co., and that was a duty which entitled any person in the employment of the Glasgow and South-Western Co., who might be injured while they were being used by the Glasgow and South-Western Co., to sue the Caledonian Rail. Co. if there was a breach of it.

I do not think that any such duty has been established by the arguments of the learned counsel for the respondent. The Caledonian Co. had performed all their I obligations when they handed these waggons over, and I think it would be altogether unreasonable to maintain that there was a duty on the part of the Caledonian Co., after they had fulfilled their contract of carriage, to examine these waggons and see that the brakes connected with them were in a fit condition for a subsequent journey on which for their purposes the Glasgow and South-Western Co. were going to haul them into the premises of the Gas Commissioners. With that haulage the Caledonian Rail. Co. had nothing to do—their contract was at an end—it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Rail. Co. were altogether unconnected. Can it be said

that because they handed the waggons over under the circumstances I have mentioned to the Glasgow and South-Western Rail. Co., they became liable to any workman of the Glasgow and South-Western Rail. Co. who might be injured while the Glasgow and South-Western Rail. Co. were using them on what for this purpose I may call their line and and their purposes, because they were not, when they were handed over to the Glasgow and South-Western Rail. Co., in a condition suitable for use on that journey? It seems to me impossible to maintain that there was any such duty owed by the Caledonian Co. to persons in the employment of the Glasgow and South-Western Co. I think, if we were to hold that such an obligation existed, some very strange consequences would ensue—consequences so unreasonable, it seems to me, as to show that the duty cannot exist.

Reliance was placed upon certain authorities to which your Lordships' attention was called, and particularly upon *Heaven* v. *Pender* (1). That case really seems to me totally different. There some apparatus of a dock company was being used for what I may call dock purposes. It was part of the facilities which the dock afforded, just as they did by their cranes, their warehouses, or any other appliances, to the vessels that came to use their docks. This particular appliance was in such a condition that a person going upon it, trusting, as he would have a right to trust, that he might go upon it safely because it would bear his weight, was led into what has been called a trap, by which he sustained an injury. He was there upon the invitation of the dock company, and, although it is true that the staging was used for painting a ship, it was part of the appliances, supplied by the dock company for the purposes connected with the carrying on of their business. It was one of the facilities given by which they induced vessels to use their docks that they did supply these appliances. It was said that they had invited the plaintiff to come upon that staging, and that they were responsible if the man so invited was led into the trap by means of which he was injured. That was *Heaven* v. *Pender* (1). I am quite unable to see that that case has any application to the present case at all. This waggon at the time that it was being used was being used on a new journey initiated by the Glasgow and South-Western Co. for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Co., into which they invited and led the deceased man to come. Therefore, *Heaven* v. *Pender* (1) seems to me entirely without application to the present case.

As I have said, I am quite unable to see any duty resting upon the Caledonian Co. to the deceased man, a breach of which has caused the loss of his life, and, consequently, given rise to a right of action in the plaintiff. In the Court of Session there was a difference of opinion between the learned judges. The majority were of opinion that this statement—these condescendences—did show that there was a case, and judgment was given accordingly by Lord Young, in which the Lord Justice Clerk concurred. With all respect, I think that the judgment of Lord Young is founded on the supposition that it was enough if there might have been a contract under which the Caledonian Co. were under some obligation during the haulage of these waggons, and that there being an uncertainty whether there was such a contract or not, the case ought to go to trial to see whether there was such a contract, because he says it is absurd to suppose that they were led by favour and affection to let their waggons be used, and therefore, they must have been used under some contract. That, I think, is what was in the learned judge's mind—it is only in that sense that I can interpret his language and appreciate the view which he has taken. But I think that it is for the plaintiff to make out a relevant case. If it rests upon a contract, though we may not know what has passed between the parties, and it may be a matter of speculation, still, if a contract is necessary to a relevant case, then a contract must be alleged, and of course it may be that the plaintiff will not succeed in proving it. But in the present case I can find nothing alleged in the whole of this claim to show that any responsibility rested upon the Caledonian Railway Co. after they had delivered the goods at the station, or that

A they had anything to do, or any sort of connection with the haulage which took place afterwards from the station to the works of the Gas Commissioners.

For these reasons I think that the judgment must be reversed. I may add that the Lord Chancellor desires me to say that he takes entirely the same view. I move your Lordships that the interlocutor appealed from be reversed.

B **LORD MACNAGHTEN.**—I quite agree.

LORD MORRIS.—I am of the same opinion.

LORD SHAND.—The Caledonian Rail. Co., one of the set of defenders in this case, have maintained that they are not bound to submit to a trial on this claim, C and in arrest of the proceedings they have maintained that the pursuers have made no statement relevant in law to infer the liability which is alleged against them. I agree with your Lordships in holding that that plea is well founded, and that the action, so far as the Caledonian Rail. Co. is concerned, ought to be dismissed.

In the pursuer's statement it is not alleged that any relation whatever subsisted between her deceased husband and the appellants the Caledonian Rail. Co. There D was no such relation as employer or employed, or in any other way. The deceased husband of the pursuer was a servant, not of the Caledonian Rail. Co., but of the Glasgow and South-Western Rail. Co., in whose employment he was. He was acting under their orders in the matter which led to this accident. So far as the Caledonian Co. were concerned he was an outsider or a stranger to them in every sense of the term.

E It appears from the pursuer's statement that the only part that the Caledonian Co. took in reference to the use of these waggons was this—that they, under a contract of carriage which they had entered into, carried the coal in their waggons from its place of departure (I do not know that it is very distinctly stated where that was) to its place of destination, and that place of destination was Dumfries. The moment the waggons arrived, hauled by the Caledonian Co. under that contract F of carriage into the station at Dumfries, and were placed in the station of the Glasgow and South-Western Co. there, the Caledonian Co. had done with their contract. It appears, however, that a separate arrangement was made for a subsequent journey. I call it a journey, although it was short in distance—it might have been a matter of twenty or thirty miles, but it so happens that it was not so long, but was only a distance of 300 or 400 yards through the streets of Dumfries G to the works of the Dumfries Gas Commissioners. But for this separate journey, as I call it, there was a separate undertaking between two different parties. I mean between the Dumfries Gas Commissioners, to whom the coals belonged which were carried on their behalf, and the Glasgow and South-Western Co. It was in the execution of that contract of carriage between the Gas Commissioners and the Glasgow and South-Western Co. that this unfortunate man, an employé of the H Glasgow and South-Western Co., met with the accident which led to the action. The only connection, as it appears to me, which the Caledonian Co. had with this matter after delivering the waggons at the station was that they were the owners of the waggons. Beyond that I can see nothing which can be suggested to fix responsibility upon them.

It is true, as has been pointed out and pressed upon your Lordships' consideration, I that in the pursuer's statement it is averred that, "as regards the coal conveyed by the defenders, the Caledonian Rail. Co., for the Dumfries Gas Commissioners as consignees," that is, coal carried by them to Dumfries,

> "it is, and for many years has been, the regular practice for the said defenders to give the use of the waggons belonging to them, in which coal has been carried from coal pits on their system of railway to Dumfries station, for the conveyance of the coal from the station to the gasworks without necessity for any transhipment."

That simply means that, there being an arrangement by which the Glasgow and South-Western Co. are to carry the coals on from the Dumfries station to the Gas Commissioners' premises, the Caledonian Co., in order to avoid the inconvenience of the transhipment of the coal, give the use of their waggons to the Glasgow and South-Western Co. What is said to follow from that is stated in the preceding sentence, a sentence which, logically speaking, ought to follow what I have now read,

> "In these circumstances it is the duty and is the practice of the Caledonian Rail. Co. and other railway companies to take care that waggons, of which such use is given, are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal."

It is all very well to aver that to be a duty, but a pursuer in circumstances such as these is bound not merely to say that there is a duty, but to give the grounds from which that legal duty is to be inferred, and the only ground upon which that duty is said to be inferred is set forth in the clause which I have already read, saying that the Caledonian Co. have been in the habit of giving the use of the waggons.

It is very clear to my thinking that the giving the use of waggons can infer no such duty. If there was any duty at all upon the Caledonian Co. as in a question with the pursuer's deceased husband, it appears to me that it would have been a duty really to give sound waggons, such waggons that if an accident happened from them the Caledonian Rail. Co. should only be excused on the ground of a latent defect which could not be discovered. But I can see no ground whatever for holding that, having parted with the waggons at the station, and having nothing to do with the contract of carriage subsequently, which might have been for a long or a short journey, there was a duty upon the Caledonian Co., in a question with a stranger to them, to have their waggons either in a sound condition or examined with care.

It may or may not be that the Caledonian Co. had some duty towards the Glasgow and South-Western Co.—when I say "some duty" I mean some obligation—under a separate contract, but with that we have nothing to do here, because there is no such contract alleged in the first place, and even if there were, I do not think that the husband of the plaintiff could have taken the benefit of it. I notice, as Lord Herschell has said, that there seems to have been a good deal of discussion, or rather consideration, in the Court of Session, on the part of Lord Young and Lord Trayner, who gave the conflicting decisions, whether the averment which I have read amounts to an averment that the carriages were lent by the one company to the other, or that there was some valuable consideration given for the use of them. But whether it be loan gratuitous, or whether it be a use given for payment of money, that is a transaction entirely between the two railway companies—we hear nothing about it here—we cannot look at it—but whatever that transaction may be, whether it might be such as would infer an obligation upon the part of the Caledonian Co. as in a question with the Glasgow and South-Western Co. to furnish sound waggons or to examine the waggons, whether it be such a stipulation as would possibly give the Glasgow and South-Western Co. a right to relief in the case of a claim such as is here made, if it were successful, in the court below, it certainly is a question which cannot arise here. There is one thing that is quite clear, and that is, that whatever the arrangement between the two companies one with the other might be, that would never give a stranger to the Caledonian Rail. Co.—a mere servant of the Glasgow and South-Western Rail. Co.—a direct right of action against the Caledonian Rail. Co. in circumstances such as these.

The only possible view upon which I think such an action as this could have been maintained was that pressed upon us in the case to which your Lordships have already referred, of *Heaven* v. *Pender* (1), but I agree in thinking, upon the ground

which has been stated, that that case has really no application to the present. The particular defect complained of there was in a part of the general works which the dock company was obliged to keep up, and that being so, the general rule that the dock owners would be responsible for their gangways and other appliances within the dockyard is sufficient to explain the decision arrived at in that case. Nor, as was suggested by the Lord-Advocate, is it a case in which you can say that it was an instrument noxious or dangerous in itself, which might produce an accident from the mere handling of it. It is not a case of that kind where it may be that wider and other responsibilities might arise. This being neither the case of a trap nor an invitation to use a trap, nor a case of noxious instrument, and there being no contract or obligation between the pursuer's husband and the Caledonian Rail. Co. about these waggons, I am of opinion with your Lordships that we should hold that the pursuer in this case has failed to state a relevant ground upon which liability can be founded, and that, therefore, this appeal should be sustained and the interlocutor reversed with costs.

Appeal allowed.

Solicitors: *Grahames, Currey & Spens*, for *Hope, Tod & Kirk*, Edinburgh, and *H. B. Neave*, Glasgow; *F. B. Carritt*, for *Elmslie & Guthrie*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re CARNE'S SETTLED ESTATES

[CHANCERY DIVISION (North, J.), December 20, 21, 1898]

[Reported [1899] 1 Ch. 324; 68 L.J.Ch. 120; 79 L.T. 542; 47 W.R. 352]

Settled Land—Tenant for life—Person having powers of tenant for life—Person having right to occupy land rent free.

Settled Land—Trustees—Persons having power of sale—Power to raise money by mortgage or other means.

Hereditaments were conveyed to trustees upon trust to permit M. to reside there rent free for as long as she might wish, the trustees being given power to raise money by mortgage of the premises or any other reasonable means.

Held: (i) M. had the powers of a tenant for life under the Settled Land Act, 1882; (ii) the trustees were not the trustees for the purposes of the Act.

Notes. The Settled Land Acts, 1882 to 1890, have been repealed and replaced by the Settled Land Act, 1925. For the definition of the persons who are, and persons who have the powers of, a tenant for life, see ibid. ss. 19 and 20. For the persons who are the trustees for the purposes of the Act, see ibid. s. 30.

Applied: *Re Betty, Betty* v. *A.-G.* (1899), 80 L.T. 675; *Re Trenchard, Ward* v. *Trenchard* (1900), 16 T.L.R. 525; *Re Hanover's Will, Herbert* v. *Freshfield*, [1902] 2 Ch. 679. Referred to: *Bacon* v. *Bacon*, [1947] 2 All E.R. 327; *Bannister* v. *Bannister*, [1948] 2 All E.R. 133.

As to who are the tenant for life and the trustees for the purposes of the Settled Land Acts, see 34 HALSBURY'S LAWS (3rd Edn.) 516 et seq.; and 510 et seq. respectively, and for cases see 40 DIGEST (Repl.) 800. For the Settled Land Act, 1925, ss. 19, 20 and 30, see 23 HALSBURY'S STATUTES (2nd Edn.) 55, 58 and 82 respectively.

Case referred to:

(1) *Re Eastman's Settled Estates*, [1898] W.N. 170; 68 L.J.Ch. 122, n.; 43 Sol. Jo. 114; 40 Digest (Repl.) 800, *2799*.

Also referred to in argument:

Re Paget's Settled Estates (1885), 30 Ch.D. 161; 55 L.J.Ch. 42; 53 L.T. 90; 33 W.R. 898; 1 T.L.R. 567; 40 Digest (Repl.) 811, *2906*.

Re Edwards' Settlement, [1897] 2 Ch. 412; 66 L.J.Ch. 658; 76 L.T. 774; 40 Digest (Repl.) 800, *2800*.

Summons to determine whether under the provisions of an indenture (i) Mary S. S. Carne was tenant for life under the Settled Land Acts of the St. Donats estate, which she was entitled to occupy for life, and (ii) whether the trustees of the indenture were trustees for the purposes of the Settled Land Acts.

By an indenture of voluntary settlement dated Mar. 14, 1890, and expressed to be made between Mansel Sydney Berkrolles Nicholl Carne (thereinafter called Mansel Carne) of the first part, John Devereux Van Loder Nicholl Carne of the second part, and Mary Salisbury Stradling Carne and John Stockwood of the third part, it was witnessed that Mansel Carne conveyed to John D. V. L. N. Carne and his heirs, first—the Castle of St. Donats and the Manor of St. Donats, in the county of Glamorgan, and the rectory and parsonage of the parish church of St. Donats, in the said county, with all the tithes, profits, and appurtenances thereunto belonging, and the advowson of the vicarage of the said church; and, secondly, the several messuages, or tenements, lands and hereditaments, situate in the several parishes of St. Donats, Llantwit Major, and Marcross, in the said county, which contain by admeasurement 1,132a. 1r. 8p., or thereabouts, to the use and intent that Mary S. S. Carne might thenceforth during her life receive an annual rentcharge of £50 to be issuing out of the said premises, and subject to and charged with the said annual rentcharge to the use of Mary S. S. Carne and John Stockwood, their executors, administrators, or assigns, for the term of 1,000 years from the date of the said indenture upon the trusts thereinafter declared concerning the same, and from and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof to the use of John D. V. L. Carne, his heirs, and assigns.

It was by the indenture agreed and declared that Mary S. S. Carne and John Stockwood, their executors, administrators, and assigns, should stand possessed of the premises, comprised in the term of 1,000 years upon trust in the first place to allow Mary S. S. Carne to occupy St. Donats Castle aforesaid, with the pleasure grounds, gardens, stable, coach-houses, and appurtenances thereunto belonging, and also six fields on the said St. Donats estate rent free for so long as she might wish to continue to do so, and upon further trust out of the rents and profits of the said premises, or by any other reasonable ways and means, to raise and pay the succession duty therein mentioned, and also upon trust by mortgage of the said premises or out of the rents and profits thereof, or by any other reasonable ways and means, to raise and pay the principal sum of £680 therein mentioned and all interest thereon, and upon further trust by the ways and means aforesaid and at such time or times as the trustees should think fit to raise the sum of £40,000, and to apply the same in discharge of a mortgage debt therein mentioned to the extent that the hereditaments subject thereto should be discharged therefrom. The indenture contained a covenant by Mansel Carne to permit M. S. S. Carne so long as she chose to live at St. Donats Castle, to use and enjoy all the plate, furniture, and effects, in and about or belonging to St. Donats Castle, and the stables, coach-houses, outbuildings and pleasure grounds thereto, and if after the death of Mary S. S. Carne, or of her ceasing to live at St. Donats Castle, John D. V. L. N. Carne should choose to live there to permit him while living there to enjoy the plate, furniture, and effects, but so that neither of them should be at liberty to remove the same or any part thereof therefrom.

Mary S. S. Carne entered into possession of the St. Donats Castle, with the gardens and fields belonging thereto, and was still in possession thereof. The present trustees of the indenture were Mary S. S. Carne and Matthew Peake. Various questions arose with respect to the rights of Mary S. S. Carne and John D. V. L. N. Carne, under the above stated indenture, and on April 5, 1898, an action was commenced by the trustees against John D. V. L. N. Carne, for the determination of the above questions.

H. Terrell, *Q.C.*, and *Cann* for the plaintiffs.
Vernon Smith, *Q.C.*, and *James G. Wood* for the defendant.

NORTH, J.—I do not see how to distinguish this case from *Re Eastman's Settled Estates* (1), before ROMER, J. I think that a gift of such an interest as this is a gift of an estate for life determinable by a conditional limitation. I do not think the question is whether any estate is given. [HIS LORDSHIP then referred to a passage in COKE UPON LITTLETON, 42a, respecting conditions annexed to estates, and also to BURTON ON REAL PROPERTY (7th Edn.), p. 236, where it is stated "a condition at common law may be annexed to an estate for life as well as to a fee simple," and continued:] As tenant for life Mrs. Carne has the power of selling the property of which she is tenant for life. With respect to the question whether that is what was intended by the settlor, when the power of sale and other powers were conferred on tenants for life by the Settled Land Act, 1882, it was considered that the benefits to be derived from the exercise by them of these powers exceeded the possible disadvantage of their defeating the intentions of settlors. I will refer the matter to chambers for the appointment of trustees of the settlement for the purposes of the Settled Land Acts.

There will be a declaration that Mrs. Carne is tenant for life within the meaning of the Settled Land Acts; and the court being of opinion that the plaintiffs are not trustees for the purposes of the Settled Land Acts, refer the matter to chambers to appoint such trustees.

Solicitors: *George Terrell; Field, Roscoe & Co.*, for *Wm. & Hy. Lewis*, Cardiff.

[*Reported by* J. TRUSTRAM, ESQ., *Barrister-at-Law.*]

HOLLIDAY *v.* NATIONAL TELEPHONE CO.

[COURT OF APPEAL (The Earl of Halsbury, L.C., A. L. Smith and Vaughan Williams, L.JJ.), July 17, 1899]

[Reported [1899] 2 Q.B. 392; 68 L.J.Q.B. 1016; 81 L.T. 252; 47 W.R. 658; 15 T.L.R. 483]

Highway—Negligence—Work done on highway—Employment of contractor—Negligence of contractor—Liability of employer.

The defendants were lawfully laying telephone wires under a highway, and for this purpose made trenches in which were laid tubes through which the wires were carried. The tubes were joined together with soldered joints, and the defendants employed to do this work a plumber who, in doing the work used a benzoline flare lamp. For use in the work there was a pot of molten solder on the footway, and a man employed by the plumber, as was usual and ordinary, dipped the lamp into the molten solder in order to heat it and obtain a flare. Owing to a defect in the lamp it exploded, and molten solder flew out and injured

the plaintiff who was passing along the footway. In an action for damages brought by the plaintiff against the defendants, A

Held: there was a duty cast upon the defendants to take care that the public were protected from injury caused by any act of negligence by the person employed to carry out the work on the highway, and, therefore, they were liable to the plaintiff for damages.

Notes. Distinguished: *Wilson* v. *Hodgson's Kingston Brewery Co.* (1915), 85 L.J.K.B. 270. Applied: *Pinn* v. *Rew* (1916), 32 T.L.R. 451. Considered: *Honeywill and Stein, Ltd.* v. *Larkin Brothers (London's Commercial Photographers), Ltd.*, [1933] All E.R. Rep. 77. Referred to: *Padbury* v. *Holliday and Greenwood* (1912), 28 T.L.R. 494; *Hurlstone* v. *London Electric Railway* (1913), 29 T.L.R. 514; *Turnbull* v. *Wieland* (1916), 33 T.L.R. 143; *Brooke* v. *Bool*, [1928] All E.R. Rep. 155; *Morgan* v. *Incorporated Central Council of the Girls' Friendly Society*, [1936] 1 All E.R. 404. B C

As to liability for the negligence of others, see 28 Halsbury's Laws (3rd Edn.) 22 et seq.; and for cases see 34 Digest 155 et seq.

Cases referred to:

(1) *Hughes* v. *Percival* (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 31 W.R. 725, H.L.; 42 Digest 982, *124*. D

(2) *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48; 63 L.J.P.C. 32; 70 L.T. 77; 58 J.P. 332; 6 R. 394, P.C.; 34 Digest 162, *1266*.

Also referred to in argument:

Hardaker v. *Idle District Council*, ante p. 311; [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 44 W.R. 323; 12 T.L.R. 207; 40 Sol. Jo. 273, C.A.; 34 Digest 161, *1255*. E

Penny v. *Wimbledon Urban Council*, ante p. 204; [1899] 2 Q.B. 72; 68 L.J.Q.B. 704; 80 L.T. 615; 47 W.R. 565, C.A.; 34 Digest 161, *1260*.

The Snark, [1899] P. 74; 68 L.J.P. 22; 80 L.T. 25; 15 T.L.R. 120; 9 Asp.M.L.C. 50; affirmed [1900] P. 105; 69 L.J.P. 41; 82 L.T. 42; 48 W.R. 279; 16 T.L.R. 160; 44 Sol. Jo. 209; 9 Asp.M.L.C. 50, C.A.; 34 Digest 162, *1267*. F

Hole v. *Sittingbourne and Sheerness Rail. Co.* (1861), 6 H. & N. 488; 30 L.J.Ex. 81; 3 L.T. 750; 9 W.R. 274; 158 E.R. 201; 34 Digest 162, *1263*.

Reedie v. *London and North Western Rail. Co.*, *Hobbit* v. *London and North Western Rail. Co.* (1849), 4 Exch. 244; 6 Ry. & Con. Cas. 184; 20 L.J.Ex. 65; 13 Jur. 659; 154 E.R. 1201; 34 Digest 159, *1243*. G

Appeal by the plaintiff from the decision of the Divisional Court (Wills and Lawrance, JJ.) allowing an appeal from a decision of the deputy judge of the City of London Court in an action by the plaintiff to recover damages from the defendant company for personal injuries.

The defendants were engaged in laying telephone wires under the footway of a street in London, and were acting lawfully in so doing. Tubes were laid in a trench under the footway, and the wires were carried through these tubes. The tubes were joined together by each one being fitted into the socket of the one next to it, the socketed joints being finished off with molten lead or solder. The defendant company employed a plumber to finish off these joints with lead or solder under a written agreement that the plumber would connect with wiped joints and seam to the satisfaction of the defendants' foreman in charge of the work, for the sum of 12s. for each connection. The work of making these connections was done under the supervision of the defendants' manager, and there was evidence that a servant of the defendant assisted in the work. The lead or solder was melted in an iron pot with a fire underneath it, which was on the footway, and was ladled out of the pot and run into the joints. In order to do the work it was necessary to have a flare from a benzoline lamp. This flare could not be obtained without the application of heat to the lamp. A man employed by the plumber was using a benzoline lamp H I

for the purpose of the work. The lamp had a safety valve, which was necessary to prevent danger of explosion. This safety valve was out of order, as the man ought to have known. In order to heat the lamp, the man dipped it into the pot of molten solder which was upon the pavement, and, in consequence of the defective safety valve, the lamp exploded, and the molten metal flew out and injured the plaintiff who was passing along the footway. It was proved that it was the ordinary and usual course to dip the lamp into the molten metal in order to obtain a flare.

The deputy judge of the City of London Court found that the plumber was a servant of the defendants, or that work was being done as a joint operation by the defendants and the plumber; that the workman was doing the work in the usual and ordinary way; and that the workman was negligent. Judgment was given for the plaintiff for £25 damages. The defendants appealed, and the Divisional Court (WILLS and LAWRANCE, JJ.) allowed the appeal and ordered judgment to be entered for the defendants. The plaintiff appealed with leave.

Bowen Rowlands, *Q.C.*, and *H. C. Davenport* (with them *Lincoln Reed*) for the plaintiff.

Mattinson, *Q.C.*, and *Lawless* for the defendant company.

THE EARL OF HALSBURY, L.C.—I am of opinion that the decision of the Divisional Court was erroneous, and that the decision of the learned county court judge was right. I think that it is clear that upon the evidence the decision of the learned county court judge can be supported upon two different grounds. I think that there was evidence that the work which was being done was being done jointly by the two parties and not solely by an independent contractor employed by the defendants, and that both parties would be responsible if the operations were negligently performed. Further, this interference with a public highway would not be lawful unless it was properly authorised. In this case it was properly authorised by the local authority. There was a duty cast upon the person thus interfering with the highway to take care that the public were protected from any act of negligence by the person employed to do the work.

In this case a person was employed to solder the joints of the tubes. For that purpose it was necessary to use molten lead in doing the work, and to have it upon the spot where the work was being done. It has also been found as a fact that it was usual, as the defendants must have well known, to put the blow-lamp into the cauldron of molten lead. If the lamp was in good order that operation would be perfectly harmless; but if the lamp was out of order there would necessarily be an explosion. Therefore there was an operation to be performed which might in the ordinary course of things cause an explosion if proper care was not taken. Can it, then, be contended that the defendants were under no obligation to the public to take care that members of the public were not injured by that operation? In my opinion such a contention is unarguable. I think, therefore, that the decision of the learned county court judge was right, and this appeal must be allowed.

A. L. SMITH, L.J.—I agree. I think that the decision of the learned county court judge was quite right. I agree with the Lord Chancellor that there was evidence that this was a joint operation by the plumber and the defendants which justified the findings of the county court judge. I think also that the other point is conclusive as to the liability of the defendants. This work was being done upon a public highway, and it was clearly dangerous work in which molten lead was being used and a benzoline blow-lamp. The defendants, therefore, were delegating the performance of dangerous work to the plumber. The plumber while doing the work —as has been found by the county court judge—did that which would ordinarily and usually be done when he put the blow-lamp into the pot of molten lead. The lamp was not in proper order, and an explosion took place by which the lead was scattered and the plaintiff was injured. The plaintiff sued the defendants for damages, and the defendants set up the defence that they had employed an independent contractor to do the work, and that therefore they were not liable.

I am of opinion that, according to the principle established in *Hughes* v. *Percival* (1) and *Black* v. *Christchurch Finance Co.* (2), where a person is executing work upon a public highway, he cannot escape liability by employing an independent contractor, becauses there is a duty cast upon him to see that the work upon the highway is so carried out as not to injure persons who are using the highway. I cannot agree with the view of WILLS and LAWRANCE, JJ., in the court below, that the using of molten lead upon the highway in this way comes within any possible view of what is called casual or collateral negligence. I agree, therefore, that the decision of the learned county court judge was right, and that the decision of the Divisional Court was wrong.

VAUGHAN WILLIAMS, L.J.—I agree.

Appeal allowed.

Solicitors: *Gibbs, White & Strong; E. L. Gaine.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

WHEELER *v.* HUMPHREYS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris and Lord James of Hereford), April 22, July 4, 1898]

[Reported [1898] A.C. 506; 67 L.J.Ch. 499; 78 L.T. 799; 47 W.R. 17]

Will—Hotchpot clause—Covenant to settle sum with son's marriage trustees six months after death of testator—Reversionary interest retained by testator—Residuary estate left equally between son and daughter—Testator's reversionary interest dealt with according to will.

On his son's marriage the testator covenanted with the trustees of the marriage settlement that his executors should within six months of his death pay £10,000 to be held in trust for the son for life, with remainder to the son's wife for life, and after death of the survivor then as to capital for the issue of the marriage and in default of issue the capital to be held in trust for the testator absolutely. By his will the testator provided that all sums which he had given or covenanted to give to a child on marriage should be taken in or towards satisfaction of that child's share under the will and be brought into hotchpot. The testator left his residuary estate equally between his son and daughter. After the death of the testator in 1886, his executors divided the residuary estate equally, treating the £10,000 as part of the son's share. In 1894 the son died without issue.

Held: the testator's reversionary interest in the £10,000 was not subject to the hotchpot clause, and the only fair way to effect an equal division between the son and the daughter was for the trustees specifically to appropriate and allot to the son's share the testator's contingent reversionary interest under the ultimate trust, not under the hotchpot clause, but under the terms of the will; accordingly the son's executors were entitled to the £10,000, subject to the life interest of the son's widow.

Notes. Considered: *Re Trollope, Game* v. *Trollope*, [1915] 1 Ch. 853. Referred to: *Re West, Denton* v. *West*, [1921] All E.R. Rep. 152; *Re Gordon, Public Trustee* v. *Bland*, [1942] 1 All E.R. 59; *Re Horn, Westminster Bank* v. *Horn*, [1946] Ch. 254; *Re North Settled Estates, Public Trustee* v. *Graham*, [1946] Ch. 13.

A As to hotchpot clauses and their effect, see 39 HALSBURY'S LAWS (3rd Edn.) 1111 et seq.; and for cases see 44 DIGEST 1238 et seq.

Appeal from an order of the Court of Appeal (SIR NATHANIEL LINDLEY, M.R., A. L. SMITH and RIGBY, L.JJ.), reported [1897] 1 Ch. 335, sub nom. *Re Cosier, Humphreys* v. *Gadsden*, reversing a decision of CHITTY, J., on the construction and B effect of a hotchpot clause in the will of Robert Arnold Cosier, who died in December, 1886.

The appellants were the testator's daughter and her children and the respondents were the executors of the testator's son who died without issue in June, 1894. The question for determination was whether, in the events which had happened, a sum of £10,000 which the testator had covenanted to settle on his son at his marriage C in 1885, was held by the settlement trustees on trust for the respondents, or as part of the testator's residuary estate, in which case the appellants were entitled to a share.

Farwell, Q.C., and *J. G. Wood* for the appellants.
Levett, Q.C., and *E. Ford* for the respondents.

D The House took time for consideration.

July 4, 1898. The following opinion was read.

LORD MACNAGHTEN.—The testator, at the time when he made his will, was a widower with only two children—a son and a daughter—both of whom were then married. By his will he directs his executors and trustees to convert his whole E estate into money, and to stand possessed of the clear residue in trust for his two children in equal shares. After settling the daughter's share and giving his trustees various powers, including a power specifically to appropriate and allot any part of his estate in or towards satisfaction of the respective shares thereinbefore given or settled, he declares his will as follows:

F "Provided also, and I declare that any and all sums of money, annuities or annual sums and property which I have already covenanted or agreed to give or which I may hereafter covenant or agree to give to or with any child of mine on his or her marriage shall, in default of any direction to the contrary in writing under my hand, be taken in or towards satisfaction of the respective share of such child . . . and shall be brought into hotchpot and accounted for accord- G ingly."

In the case of the daughter there was nothing to be brought into hotchpot. In the case of the son the testator had covenanted with the trustees of the son's marriage settlement that his executors would pay to them the sum of £10,000 to be invested and held upon trust for the son for life with remainder for the son's wife for life, H with remainder as to the capital for the children of the marriage. In case there should be no child (as in the event happened) the capital was to be held in trust for the settlor absolutely. The clear residue of the testator's estate without providing for this sum of £10,000 amounted, roughly speaking, to £52,000. Taking it at that sum, how ought the amount to have been dealt with?

The first question seems to be, what was the effect of the father's covenant? I What did it give to the son? It gave him a life interest in the investments representing the £10,000. Then it gave a life interest to the son's wife, and further it gave the capital to the issue of the marriage in the event of there being any issue to take. For the purposes of the will it seems to me that it would be only reasonable to hold that, whatever was coming to the son's wife and the children of the marriage under the covenant, was a marriage gift to the son. What was given was in substance given to the son to be enjoyed by him by means of a settlement on himself, his wife and children. But there the gift to the son ends. The interest which the father retained or reserved was not given to the son in any sense. It

would, therefore, have been wrong to require the son to bring the whole £10,000 into hotchpot in every event. And the testator has not done so.

Counsel for the appellants, did not contend that the £10,000 was to be brought into hotchpot as a gift to the son. They argued that the whole fund was to be brought into hotchpot as a gift with the son. That, if I may venture to say so, is the mistake which the learned judge of first instance makes. He observes:

> "The truth is that the testator has not referred in this hotchpot clause to the trusts of the £10,000, but what he has directed to be brought into account is the £10,000 which he gave with his son."

I cannot agree with that observation. The reference in the will is a reference to the trusts of the £10,000, so far as they enured for the benefit of the son, and to nothing else. Surely the testator must have been referring to the beneficial interest in the gift, not to the legal ownership of the fund which was designed to protect that interest. A gift is a gift, whether it be given directly, or given through the medium of a trust. What the donor keeps back is no gift.

I do not understand the expression, "given with any child of mine," as applied to a provision on behalf of a son. It obviously applies to a provision on behalf of a daughter. You give your daughter in marriage and you give a portion with your daughter. That is a common expression, and correct enough, because the portion is given to or for the benefit of the person to whom the daughter is given. In the marriage service the question is asked, "Who giveth this woman to be married to this man?" A corresponding question applied to the other contracting party, even nowadays, I presume, would be thought inappropriate. It appears to me that it would be equally inappropriate to refer to money settled on behalf of the intended husband as given with him. The contention on the part of the appellants involves a contradiction. It requires an object of the testator's bounty to give credit for something which never was his, and then it treats that very thing as belonging absolutely and for all purposes to the testator himself. This contention seems to have had its origin in a misapplication of the testator's words. Not that that misapplication can really make any difference. The contingent interest reserved by the settlor is no more given with the son (if anybody prefers that way of looking at it) than given to the son. It was not given at all. The settlor kept it.

The courts below agree in thinking that the sum of £10,000 which the testator covenanted to pay to the trustees of his son's marriage settlement must be brought into account under the hotchpot clause en bloc and without reserve. There, however, they part company. In the first court it was held that the hotchpot clause could have no further operation. The contingent interest under the ultimate trust in the settlement remained the father's property; as such it would have to be divided equally between the son and the daughter when it fell into possession. The result was unexpected but inevitable. The Court of Appeal are more fortunate in finding a way of escape. By inverting the hotchpot clause they arrive at a correct result. The whole fund, they say, must be brought into hotchpot by the son. It has, therefore to be taken towards satisfaction of his share; the direction that it is to be so taken implies a gift, and, therefore, whatever interest the father retained in the fund is given to the son by the hotchpot clause, as RIGBY, L.J., thinks, or as the other members of the Court hold, by the conjoint operation of that clause, and the gift in the earlier part of the will.

I must say I cannot follow this reasoning. It seems to me plain that the testator's reversionary interest in the fund cannot come under the operation of the hotchpot clause. That clause has nothing to do with it. Nothing was to be brought into hotchpot but what the testator had covenanted or agreed to give. The hotchpot clause is in the common form. The language used must have its ordinary effect. The simplest way of looking at the matter is to put oneself in the position of the executors when they came to divide the estate. They had £52,000 in hand and no liability to meet but the claim of the settlement trustees. The first thing to be done

was to pay the trustees. The trustees got their £10,000. Against that a like sum was set apart for the daughter's share. I pause there, for the division of the rest of the estate cannot give rise to any difficulty. The surplus, whatever it is, may be disregarded for the purpose of considering the present question. I ask what is the result of what the executors have done so far? Equality if the testator's interest under the ultimate trust has been appropriated to the son; inequality if that interest is to be regarded as still the father's property. If that mistake is made the daughter has certainly received too much.

As no one suggests, or ever has suggested, that the beneficial interests under the prior trusts are not to be brought into hotchpot, it is obvious that the daughter has received too much by the exact amount or value of the testator's reversionary interest. How is the mistake to be set right? Simply by doing now what ought to have been done before anything was set apart for the daughter. You must specifically appropriate and allot to the son's share the testator's contingent reversionary interest under the ultimate trust. But that is to be done not under the hotchpot clause, but under the plain directions in the earlier part of the will. It is the only way to effect an equal division between the son and the daughter. Whenever the interest of a legatee, together with the interest, if any, of the testator in a particular fund or a particular property exhausts the whole beneficial interest therein, and the legatee has to bring his interest into hotchpot, the appropriation of the fund or property in or towards satisfaction of the legatee's share or legacy under the will necessarily involves bringing the legatee's interest into hotchpot, and at the same time deals with the testator's interest, if any, in conformity with his directions in regard to his own property. The son is now dead without issue, and the whole of the £10,000 belongs to the son's estate absolutely subject only to the life estate of his widow.

The result of the view put forward on behalf of the appellants is certainly startling. Whereas the testator directed that his residuary estate should be divided in equal shares between his two children, the son gets £10,000 less than the daughter. The result might have been more startling still. The residuary estate, without providing for the £10,000, might have been only £20,000. That is an event which the testator seems to have contemplated as at least possible, because he directs that what he had covenanted to give to his son should be taken either towards satisfaction or in satisfaction of his son's share under the will. The son's wife might have died without issue in her husband's lifetime, and then, according to the view of the appellants' counsel, the testator's endeavour to produce equality would result in this—the son living and in a position to marry again would get £5,000, and the daughter would carry off £15,000. Suppose, further, that the bequest to the son had been a definite sum of £10,000 instead of being a share of residue, and suppose the ultimate residue had been given to someone else, an eldest son for instance, the son, who was advanced in the testator's lifetime, living and in a position to marry again, would have taken nothing but a life estate. I agree with SIR NATHANIEL LINDLEY, M.R., that such a result does suggest that there must be some error somewhere. But I desire to rest my judgment on the plain language of the will without putting any strained construction on any words in the hotchpot clause or giving it a peculiar or unusual effect. I think that the appeal must be dismissed with costs.

THE EARL OF HALSBURY, L.C., LORD MORRIS, and **LORD JAMES OF HEREFORD,** concurred.

Appeal dismissed with costs.

Solicitors: *Flower, Nussey & Fellows; Beyfus & Beyfus.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re BUCK. BRUTY *v.* MACKEY

[CHANCERY DIVISION (Kekewich, J.), August 4, 5, 1896]

[Reported [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 45 W.R. 106; 40 Sol. Jo. 729]

Charity—Friendly society—Institution moribund at death of testator—Applicability of cy-près doctrine.

A friendly society was formed in 1800 for the relief of sick and distressed members, their widows and children. In 1893 a legacy of £500 was bequeathed to the society by a testator, at whose death there was only one member of the society alive, and three annuitants, two of whom since died. The annuity of the remaining annuitant was amply covered by funds of the society in court.

Held: (i) the society, not being founded and maintained on actuarial principles and not being a business-like arrangement, was concerned with the relief of poverty and thus was a charitable institution; (ii) as the society, although moribund, was in existence at the date of the testator's death, the legacy had not lapsed, but was applicable cy-près.

Cunnack v. *Edwards* (1), [1896] 2 Ch. 679, distinguished.

Notes. Considered: *Braithwaite* v. *A.-G.*, [1909] 1 Ch. 510; *Gibson* v. *South American Stores, Ltd.*, [1949] 2 All E.R. 985. Referred to: *Re Scarisbrick's Will Trusts, Scarisbrick* v. *Public Trustee and A.-G.*, [1950] 1 All E.R. 143; *Oppenheim* v. *Tobacco Securities Trust Co.*, [1951] 1 All E.R. 31; *Oddfellows Society* v. *Manchester Corpn.*, [1958] 3 All E.R. 378; *Re Gillingham Bus Disaster Fund, Bowman* v. *Official Solicitor*, [1958] 1 All E.R. 37.

As to general charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq.; and for cases see 8 DIGEST (Repl.) 355 et seq.; as to the cy-près doctrine, see 4 HALSBURY'S LAWS (3rd Edn.) 317 et seq.; and for cases see 8 DIGEST (Repl.) 459.

Cases referred to:

(1) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344*.

(2) *Income Tax Special Purposes Comrs.* v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas., H.L.; 8 Digest (Repl.) 312, *1*.

(3) *Re Clark's Trust* (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 24 W.R. 233; 8 Digest (Repl.) 355, *343*.

Also referred to in argument:

Re Rymer, Rymer v. *Stanfield*, [1895] 1 Ch. 19; 64 L.J.Ch. 86; 71 L.T. 590; 43 W.R. 87; 39 Sol. Jo. 26; 12 R. 22, C.A.; 8 Digest (Repl.) 420, *1108*.

Re Slevin, Slevin v. *Hepburn*, [1891] 2 Ch. 236; 60 L.J.Ch. 439; 64 L.T. 311; 39 W.R. 578; 7 T.L.R. 394, C.A.; 8 Digest (Repl.) 463, *1633*.

Spiller v. *Maude* (1881), 32 Ch.D. 158, n.; 8 Digest (Repl.) 463, *1641*.

Originating Summons to determine whether a certain institution was in existence at the date of the testator's death and if so whether a legacy to it should lapse or be applied cy-près for charitable purposes.

Thomas Buck, who died on Jan. 8, 1893, by his will dated June 28, 1884, bequeathed "to the Commercial Travellers' Society, whose office is at 17, Philpot Lane, City," the sum of £500 free from legacy duty, directing that "the said charitable legacy" and the duty thereon should be paid out of his pure personal estate, and declaring that the receipt of the treasurer for the time being of the society should be an effectual discharge for the charitable legacy. His residuary estate was devised and bequeathed by the testator to the trustees of his will upon the trusts therein mentioned and in favour of his children. The Commercial

Travellers' Society was established as a friendly society in the City of London on Jan. 27, 1800, and its office was at 17, Philpot Lane, City. By the rules of the society, as certified by the Registrar of Friendly Societies in 1832, it was provided inter alia:

"(1.) The object of this society being to provide a fund for the relief of sick and distressed members, their widows and children in the manner hereinafter mentioned, it is agreed that this society shall be denominated the Commercial Travellers' Society, and shall consist of the principals of houses in trade both in town and country who employ travellers, and of persons actually employed as travellers. (2.) That the affairs of this society shall be entrusted to the management of a committee of not less than twenty. . . . (3.) That the said committee shall choose a president, one or more vice-presidents, a treasurer, and a secretary annually at every general meeting . . . (6.) That every person chosen a member whose age shall be under twenty-five years shall . . . either pay to the secretary for the use of the society the sum of twenty-one pounds . . . as a subscription for life, or the sum of two guineas annually, and if such member's age shall be twenty-five and under thirty years he shall pay in like manner . . . the sum of thirty-one pounds, ten shillings, as a life subscription, or the sum of three guineas annually . . . (11.) That the secretary . . . do pay the subscriptions of members and donations to the society into the hands of the treasurer . . . (13.) That the sum of twenty thousand pounds sterling, which shall become and remain the permanent fund of this society, shall be invested by the treasurer . . . pursuant to the Friendly Societies Act, 1829 [repealed], ss. 13, 31, in the names of the trustees on behalf of the society . . . (14.) That in case a member shall be afflicted with sickness, so as to render him incapable of employment, and in distresed circumstances, or shall become infirm, or meet with any other infirmity, which may in the opinion of the committee, render him an object deserving the assistance of the society, he shall be entitled, at the discretion of the committee, to a sum not exceeding one guinea per week during the time he shall so remain sick and distressed or such fit object as aforesaid . . . (15.) That in case a member shall die and snall leave a widow . . . and one or more child or children in distressed circumstances, the said widow , . . shall receive a sum not exceeding twenty pounds per annum for herself, at the discretion of the committee, and in like manner a further sum not exceeding five pounds per annum for each child . . . and the said widow at the time of making her claim for relief . . . shall exhibit to the committee . . . a just and true account of the property and effects of her late husband at the time of his decease . . . and if such member shall die, leaving a child or children in distressed circumstances, and no widow surviving him . . . each such child shall be entitled to a sum not exceeding ten pounds per annum, at the discretion of the committee . . . (17.) All moneys arising from contributions and fines shall be applied to the purposes in these rules mentioned . . ."

The funds of the society were added to by donations in addition to the regular subscriptions of the members.

On July 28, 1888, the three surviving trustees of the society paid into court the trust funds of the society, then amounting to £5,101, stating that, including themselves there were only five members of the society in existence and six annuitants, that no list of members later than 1838 was discoverable, that no new members had been admitted since 1850, and no general meeting held since 1871, and no subscription received since 1874, and that two of the trustees were the only members of the committee surviving. They further stated that in consequence of the impossibility of holding meetings of the members the society could not be dissolved under the Friendly Society Act, 1875 [repealed], and if it could be the persons entitled to the trust funds could not be ascertained. At the date of the testator's

death in 1893, John Brunt Mackay was the only surviving trustee and member of the committee and of the society, the last member but one having died in 1892. There were three annuitants living, of whom in 1896 one only was left, namely, Harriet Lucy Cage, who was entitled to the receipt of an annuity of £32 per annum. The funds of the society now in court amounted to £4,836 India Three per Cent. Stock and £320 in cash. A

The trustees and executors of the testator, before paying over the legacy of £500, took out this originating summons on May 18, 1896, against John Brunt Mackay and Harriet Cage, the residuary legatees of the testator, and the Attorney-General, by which they asked for the determination of the questions: (i) whether the Commercial Travellers' Society was so existing at the date of the testator's death as to have become entitled to the legacy of £500 or was not so existing as aforesaid; (ii) whether if the society was so existing the said legacy ought to be paid into court, or how otherwise the same ought to be dealt with; (iii) whether if in the opinion of the court the society was not so existing as aforesaid the said legacy ought to be treated as lapsed and fallen into the residuary estate of the testator, or ought to be applied cy-près for charitable purposes. B C

D. G. Begg for the plaintiffs. D
Sheldon for the defendants, John Brunt Mackay and Harriet Lucy Cage.
Renshaw, Q.C., and *A. M. Begg* for the residuary legatees.
Ingle Joyce for the Attorney-General.

KEKEWICH, J.—There are two questions falling for decision wholly independent each of the other. The first is, whether the Commercial Travellers' Society, whose office is at No. 17, Philpot Lane, City, to which society, through the treasurer for the purposes of the society, the testator gives £500, is a charity within the ordinary doctrine of the court as expounded by the House of Lords in *Income Tax Special Purposes Comrs.* v. *Pemsel* (2). That is the first question, and until we have decided that we cannot make any progress with the other. E F

If I were uncontrolled by decision (I am only speaking provisionally), the tendency of my opinion would be to hold this a charity. Am I controlled by decision? It seems to me not. *Cunnack* v. *Edwards* (1) and all the other cases which have been cited, all dwell on the absence of the ingredient of poverty in persons who are entitled to the benefit of the institution. Lord Herschell, in giving judgment in *Cunnack* v. *Edwards* (1), speaks of the society he there had to consider as "a perfectly business-like arrangement," and this society has been described argumentatively as a mutual insurance society. If this is a case of perfectly business-like arrangement —if it is a mutual insurance society, then it seems to me that, not only am I bound by authority, but it is a case that would clearly, reasonably, and fairly fall outside the definition of charity. It has been pointed out that this society has been maintained and has reached its present position, which is one, at least, of perfect solvency, not merely by subscriptions of members, whether life members or annual members, whose subscriptions would be a certain fixed sum, but by donations or voluntary subscriptions, donations either by living persons or sums which have been derived from donations by will. That, at any rate, is a matter not to be forgotten, and perhaps it is of some importance; but it is by no means to my mind conclusive that this is a charity, taking it into consideration in connection with other things. G H I

It is obvious, I think, on the face of these rules that this is not a society formed and maintained on actuarial principles. That is true of a very large number of societies either charitable or in the nature of mutual insurance societies. We are all acquainted with some most excellent institutions of that character which could not have been maintained and kept solvent but for large donations. It is those donations which enable such societies to start and be maintained in a solvent condition. I am not sure about the society in *Cunnack* v. *Edwards* (1), but certainly many of those which have been mentioned and certainly this, were not founded on

actuarial principles. It depended upon adventitious aid—donations by those who did not themselves desire to have any benefit from the society. That is really why it is not of so much importance that there were donations at all. They are for a different purpose. They are to raise the level of the benefits which ought in a perfectly business-like arrangement, if I may borrow the words of LORD HERSCHELL, to be arrived at by actuarial calculations. Then having got this fund, it is to be applied in payment of certain annuities, annuities of £20 to widows, and £5 to children. I am leaving out members altogether. Widows are to take £20 each with children, and the children are to take £10 each when they are motherless as well as fatherless. I do not see any provision that that is to be varied with the funds of the society. It is nothing like calculated, as far as I can see, that the funds would give those annuities from time to time. For that, no doubt, the society depended very much on their outside subscriptions. So that it is not a mutual insurance society. It is not, as it seems to me, a perfectly business-like arrangement, although so far it is partly business and partly charitable, I think. But what I find is this, that as regards both widows and children, the provision is strictly for those who are in what is called "distressed circumstances."

I have got before me the original rules of 1800, and in this respect since that time, I think I may say I am satisfied that there has been no substantial alteration. As regards members, which I passed over just now, r. 14 provides that in case a member shall be afflicted

> "with sickness so as to render him incapable of employment, [that is a mere friendly society] and in distressed circumstances, or shall become infirm or meet with any other infirmity which may, in the opinion of the committee, render him an object deserving the assistance of the society, he shall be entitled,"

and so on. "Distressed circumstances," although capable of many interpretations, grammatically no doubt, there means not only that a member is so sick that he cannot follow his ordinary employment, but that his position in life is such that he cannot live independently of that employment, that he is distressed in that sense. I do not think there can be any doubt that that is the meaning of the words. Then as regards infirmity, that means some permanent disease, accident or anything of that kind, such as may render him an object deserving of the assistance of the society. Although there is no guide on the face of it—that is to say, no further guide than the words themselves give—it is only reasonable to conclude that the committee would not be doing their duty in considering a man an object deserving the assistance of the society, if, however painful his physical state might be, he had ample means. I understand that that rule points distinctly to poverty. The same is true as regards the widow, who is to be in distressed circumstances, and also as regards the children who are also particularly mentioned as being left in distressed circumstances. So here I have that very element of poverty which HALL, V.-C., thought was absent in *Re Clark's Trust* (3), and it has been pointed out that in *Income Tax Special Purposes Comrs.* v. *Pemsell* (2) although the decisions have gone far away from poverty as being the strict limit of charity, at the same time poverty is in itself an object of charity; and when you have it expressed in this way linked to the provisions of such a society as this, it is impossible to say that it is a business-like arrangement or mutual insurance society. I conclude that it is a charity, and if I am not, as I think I am not, precluded by authority from holding that, I think I am bound to say that this is a charity.

If it is a charity, then comes the question, is there a lapse? I will assume that if this legacy of £500 is given to a charity, that has ceased to exist at the date of the death—which seems to be the critical point—then the law of lapse applies, at any rate to this extent, that the testator fails to specify the legatee, and therefore, because there is no legatee, which can be specified because there is a non-existent body, as there might be a non-existent person then the money must fall into residue. But it is agreed on all hands that not only at the death of the testator, but up to

the present time, there is at least one annuitant claiming against the fund. So that the charity is alive to that extent and must remain alive, as long at least as that annuitant survives. I cannot see how in the world it can be said that this society is dead, though it may still be what counsel for the residuary legatees said it was for a long time—moribund. The difference between moribund and dead is large. Test it in this way: supposing that that annuitant was not paid, she being entitled according to the rules of the society to be paid, could she not assert her rights? If she could assert her rights she could assert them against the fund, and against the administrator of the fund which is in court. It seems to me there is a duty to provide for her annuity which is still existing; and consequently the charitable institution is still existing. It does not follow, because it is still existing, that it has not failed practically. It seems to me, subject to what counsel for the defendants may be able to point out about the other claimants on the fund, that the society has failed except so far as it is necessary to provide for this particular annuitant. That is a matter of consideration as regards the fund in court, with which I am not now dealing. It must be dealt with at another time. As regards this legacy of £500, it is clearly not wanted for the particular annuity; and I ought at once to take care that it is applied, that is to say, put in process of application, to congenial objects; that is to say, objects akin to those to which the testator devoted his legacy, to which it cannot be strictly applied because there are no means of so applying it.

[His Lordship then made an order declaring that the society was a charitable society and was existing at the date of the testator's death, and that the legacy of £500 had not lapsed and directed the £500 to be brought into court to a separate account to the credit of the funds of the society after payment of costs with liberty to the Attorney-General to apply for a scheme.]

Solicitors: *Duffield & Bruty; Hare & Co.; West, King, Adams & Co.*

[*Reported by* C. F. Duncan, Esq., *Barrister-at-Law.*]

IN THE GOODS OF GILBERT

[Probate, Divorce and Admiralty Division (Sir Francis Jeune, P.), July 4, 1898]
[Reported 78 L.T. 762]

Will—Execution—Signature—Position—Will on three pages, with signature and attestation at foot of first page.

A testator, who had made her will on three pages of a four page document, signed her name at the foot of the first page, where the witnesses also signed. The second and third pages, read alone, constituted a sensible will.

Held: although in a physical sense the second and third pages followed the signature, nevertheless for the purposes of probate they might be construed as being anterior to the signature, and should be admitted to probate.

In the Goods of Wotton (1) (1874), L.R. 3 P. & D. 159, applied.

Notes. For the provisions as to the position of the testator's signature, see the Wills Act, 1837, s. 9, as amended by the Wills Act Amendment Act, 1852, s. 1.

Considered: *In the Goods of Smith* (1931), 47 T.L.R. 618; *Re Stalman, Stalman* v. *Jones*, [1931] All E.R. Rep. 193; *In the Estate of Long*, [1936] 1 All E.R. 435.

As to the place of signature, see 39 Halsbury's Laws (3rd Edn.) 877, and for cases see 44 Digest 256-257. For the Wills Act, 1837, s. 9, see 26 Halsbury's Statutes (2nd Edn.) 1332; and for the Wills Act Amendment Act, 1852, s. 1, see ibid. 1354.

A Case referred to:

(1) *In the Goods of Wotton* (1874), L.R. 3 P. & D. 159; 43 L.J.P. & M. 14; 30 L.T. 75; 38 J.P. 328; 22 W.R. 352; 44 Digest 256, *830*.

Motion on behalf of Edward Miller, who claimed to be executor of the last will and testament of Rebecca Susan Gilbert, of 47, Hawke Street, Portsea, that probate B should be decreed of certain parts of a testamentary document dated Mar. 8, 1898.

The document in question consisted of four pages. The first page was a printed form containing four clauses. One of these gave directions for payment of debts, funeral and testamentary expenses, another bequeathed and devised the business of the Cross Keys, Portsea, to a beneficiary, and a third appointed the applicant executor. A fourth clause contained a residuary bequest, but the name of the C beneficiary was left blank. This page was signed by the testatrix and by witnesses. The second page began "I leave my money in Post Savings Bank to the following persons named," and contained a number of pecuniary legacies. The third page was headed "My jewelry to be divided as follows" with the names of beneficiaries. It also contained a bequest of clothes and a bequest for a gravestone. These pages were not signed by the testatrix or witnesses, but the evidence showed that their D contents had been written before the signatures of the first page. The fourth page contained certain directions as to debts, but it was admitted that these directions were written on the document subsequently to the subscriptions of the signatures to the first page.

J. C. Priestley for the executor.

E **SIR FRANCIS JEUNE, P.**—I think I can assent to the argument of counsel for the executor. I am anxious to do so as I think by doing so I should be carrying out the wishes of the deceased. Whether I can do so depends on the words of the Wills Act Amendment Act, 1852, as interpreted in *In the Goods of Wotton* (1). Hannen, J., there pointed out how general the words of the Act are. He then F says in the course of his judgment (L.R. 3 P. & D. at p. 161),

> "And then follow words which express what is commonly called the spirit of the Act. 'No signature under this Act shall be operative to give effect to any disposition or direction which is underneath or which follows it; nor shall it give effect to any disposition or direction inserted after the signature shall be made.' Now, of course, if in this case the whole will were to be treated as G following the attestation clause, the application must fail. This is the point, therefore, upon which the whole case turns."

These considerations also arise in this case. Must I hold that the second and third pages of this will follow the signature? In a physical sense they do, but beyond that I do not see that they need be regarded as following it. The second H and third pages constitute a sensible will. It may be said that in the present case the initial words of the second and third pages do not constitute such an apt beginning for a will as in the case cited. That is true and there is some difference in that respect between the two cases. At the same time the second and third pages are so clearly intended to be a will that they seem to me impliedly to amount to saying "This is my will." In granting probate of the document as desired, I I do not think I shall be carrying the principle of *In the Goods of Wotton* (1) substantially further.

Solicitors: *Fraser & Christian*, for *W. H. Bolitho*, Portsea.

[*Reported by* H. M. Giveen, Esq., *Barrister-at-Law*.]

A

OLDROYD *v.* OLDROYD

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), May 2, 5, 6, 7, 8, 22, 1896]

[Reported [1896] P. 175; 65 L.J.P. 113; 75 L.T. 281; 12 T.L.R. 442] B

Restitution of Conjugal Rights—Refusal of decree—Conduct of petitioner leading to desertion by respondent—Conduct sufficient to disentitle petitioner to judicial separation.

Per CURIAM: Where the conduct of the petitioner in a suit for restitution of conjugal rights has led to desertion by the respondent and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion the court has power to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. C

Notes. Considered: *Beer* v. *Beer* (1906), 94 L.T. 704; *Edwards* v. *Edwards*, [1949] 2 All E.R. 145. Referred to: *Synge* v. *Synge*, [1900-3] All E.R. Rep. 452; D *Frowd* v. *Frowd*, [1904-7] All E.R. Rep. 104; *Greene* v. *Greene*, [1916] P. 188; *Herod* v. *Herod*, [1938] 3 All E.R. 722; *Dixon* v. *Dixon*, [1953] 1 All E.R. 910; *Timmins* v. *Timmins*, [1953] 2 All E.R. 187; *Dyson* v. *Dyson*, [1953] 2 All E.R. 1511.

As to restitution of conjugal rights, see 12 HALSBURY'S LAWS (3rd Edn.) 283; and for cases see 27 DIGEST 284 et seq. E

Cases referred to:

(1) *Russell* v. *Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; 44 W.R. 213; 11 T.L.R. 579; 30 Sol. Jo. 722, C.A.; on appeal, ante p. 1, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 356, *2948*. F

(2) *Mackenzie* v. *Mackenzie*, [1895] A.C. 384, H.L.; 27 Digest (Repl.) 366, *3027*.

(3) *Paterson* v. *Paterson* (1850), 3 H.L.Cas. 308; 10 E.R. 120; sub nom. *Paterson v. Russell (or Paterson)*, 15 L.T.O.S. 537; 7 Bell Sc. App. 337; 22 Sc. Jur. 628, H.L.; 27 Digest (Repl.) 295, *2409*.

(4) *Yeatman* v. *Yeatman* (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 16 W.R. 734; 27 Digest (Repl.) 365, *3019*. G

(5) *Haswell* v. *Haswell and Sanderson* (1859), 1 Sw. & Tr. 502; Sea. & Sm. 32; 29 L.J.P. & M. 21; 1 L.T. 69; 23 J.P. 825; 8 W.R. 76; 164 E.R. 832; 27 Digest (Repl.) 444, *3759*.

Wife's Petition for restitution of conjugal rights.

The petition was filed on July 31, 1895, and, after setting forth the marriage and H cohabitation of the parties, alleged that the husband "has refused and still refuses to allow your petitioner to live and cohabit with him," and prayed the court to order the husband

"to receive your petitioner into his home and to render her conjugal rights, and that your petitioner may have such further relief as may be just." I

The respondent, in his answer, filed on Sept. 23, 1895, admitted that he had refused to allow the petitioner to live and cohabit with him, but said that he had good ground for such refusal, as set forth in his answer, which then went on to allege that the petitioner was a woman of most violent temper and scandalous tongue, and that she had habitually slandered the respondent's daughters, whose health had suffered in consequence; that she had endeavoured to provoke the respondent to strike her or to commit some act which would enable her to take proceedings for a judicial separation; that she frequently expressed

her intention of separating herself from the respondent, and living separate and apart from him; that on Dec. 10, 1894, she voluntarily left his house against his will and without his sanction; that during the six weeks following she paid frequent visits to the house and removed a large quantity of goods, and that she behaved in a violent and abusive manner on those occasions, and once threw a quantity of milk over one of the daughters of the respondent; that in consequence of the petitioner's course of conduct the respondent's health became greatly impaired and he was compelled almost entirely to relinquish his business, and that it would be dangerous to his health if the petitioner were to live with him again; that on or about Mar. 26, 1895, the petitioner and respondent entered into a verbal agreement to live separate and apart, and the petitioner agreed that, as her personal income was sufficient to maintain a separate home, and as she had taken furniture from the respondent's house, she would accept £100 for the purpose of completing the furnishing, and in settlement; and that the sum of £100 was duly paid by the respondent; that the petitioner had never assigned any reason, as between herself and the respondent, why she left him on Dec. 10, 1894, and that until the formal demand made by her solicitors on July 16, 1895, after the arrangement for separation had been made, the question of her return was not raised, either by herself or her solicitors; that the petitioner was possessed of sufficient income to support herself in comfort, and that she had an annual income of £275. The concluding paragraph of the answer was as follows:

> "That by reason of the premises, the petitioner has forfeited any right to the relief she seeks . . . and, further, that she has been guilty of cruelty. . . ."

The respondent prayed that the petition should be dismissed, and that he should be granted a judicial separation on the ground of the petitioner's cruelty. The petitioner, in her reply, denied each and every allegation contained in the answer, and she further pleaded "that the said allegations, even if true, . . . do not constitute a legal answer to the petition. . . ."

Murphy, *Q.C.*, and *Bargrave Deane* for the wife.
Carson, *Q.C.*, and *Durley-Grazebrook* for the husband.

Cur. adv. vult.

May 22, 1896. **GORELL BARNES, J.,** read the following judgment—In this case the petitioner, the wife of Mr. Edwin Oldroyd, of Selborne House, Harrogate, in Yorkshire, engineer, sues for restitution of conjugal rights. The respondent, by his answer admits that he has refused to live and cohabit with the petitioner, but alleges that he has a good and sufficient and lawful ground for such refusal, as set forth in his said answer. The answer then sets forth a number of acts on the part of the wife which, it is contended on the husband's behalf, amount to such conduct as to justify him in refusing to return to cohabitation with the wife. It also alleges that the wife voluntarily, without his permission, and notwithstanding his express objection, left his home on Dec. 10, 1894, and never afterwards returned to cohabitation with him; that in consequence of her conduct his health failed, and it would be dangerous to his health if she were to again live with him; and that a verbal agreement was entered into between them on or about Mar. 26, 1896, whereby they agreed to live apart for the future in consideration of the payment by the husband to the wife of the sum of £100, which was duly paid to her in pursuance of the said agreement. The answer also alleges that the wife has been guilty of cruelty as set forth therein, which means that the acts to which I have referred are alleged to amount to legal cruelty, and the husband prays that he may be judicially separated from the wife by reason of her said cruelty.

It appears that the parties were married on April 9, 1890. The petitioner was a widow with several children, one of whom Marie Amelia Pycock, went with the petitioner to live with her and the respondent after the marriage. The respondent

was a widower having three children, two of whom lived in the house after the marriage, the third having married. The petitioner and respondent appear to have known each other for many years before their marriage, and at first lived happily together. The husband's case is that, not very long after the marriage, the wife's conduct became—and continued until they ceased to live together—such as to amount to cruelty towards him, or at any rate, to such conduct as, under the circumstances of the case, justified him, after she left him, in refusing to return to cohabitation with her, together with the defence that she voluntarily left him, and that the verbal agreement alleged in the answer was entered into. The case for the wife was that she had been guilty of no cruelty or conduct such as is alleged by the husband; that she did not voluntarily leave him; and that there was no agreement between them as alleged by the husband.

Dealing first with the question of cruelty, I think it sufficient to say that, although a great deal of evidence was given on the husband's behalf as to what had taken place between himself and the wife, no case of cruelty was established against her. There is no doubt that there had been for some time before December, 1894, a great deal of friction in the lives of these two persons, principally owing to causes to which I will refer later on, and that frequent quarrels had taken place in their household. But I think that the account which was given on the husband's side was coloured by a great deal of exaggeration, which is, perhaps, not unlikely to occur when a person is giving evidence relating to incidents which have taken place when a certain amount of excitement has prevailed, and especially when one party to a quarrel is giving his or her account thereof. I cannot accept this account as representing the real state of the case, and I am of opinion that there is no ground for imputing legal cruelty to the wife; and, although the husband alleged that his health had suffered, I think this was really due to his having unfortunately had an attack of influenza shortly after he and his wife had separated. I may say that possibly his illness may account for the tone of some of the letters written by him in 1895.

His counsel, however, contended that, even if the acts complained of by him did not amount to cruelty, yet that conduct on the part of the wife was established of such a character as to justify the husband in refusing to return to cohabitation, and that the court was entitled, following the decision of *Russell* v. *Russell* (1) to refuse to pronounce a decree for restitution of conjugal rights. He urged that the court has power, in accordance with that decision, to refuse a decree for restitution of conjugal rights whenever the result of such a decree would be to compel the court to treat one of the spouses as deserting the other without cause contrary to the real truth of the case, and although no definition of cause appears to have been given in the judgment of LOPES, L.J., in delivering the judgment of himself and LINDLEY, L.J., in that case, he referred to the opinion of LORD HERSCHELL, L.C., in the Scottish case of *Mackenzie* v. *Mackenzie* (2), where LORD HERSCHELL expressed himself as follows ([1895] A.C. at pp. 389, 390):

> "I am not prepared without further consideration, to assent to the proposition that a spouse who seeks a decree of adherence is in all cases entitled to obtain it unless a case can be established by the defender which will justify a decree of separation. It will be seen that in the view which I take it is not necessary to determine the point in the present case, but I think it right to state the grounds upon which I desire to reserve my judgment upon it. I admit that there is authority for the proposition contended for on behalf of the appellant, but it has never yet, so far as I am aware, been canvassed either in a Court of Appeal or in this House. It seems to me open to question whether the courts ought in all cases to disregard the conduct of the party who invokes their aid in an action for adherence, and to decree it in all cases where a matrimonial offence cannot be established by the defender. It is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the com-

munity. Take the case of a husband who has heaped insults upon his wife, but has just stopped short at that which the law regards as sævitia or cruelty. Can he, when his own misconduct has led his wife to separate herself from him, come into court, and, avowing his misdeeds, insist that it is bound to grant him a decree of adherence? I cannot better illustrate my meaning than by referring to the case of *Paterson* v. *Russell* (3), which was relied on by the appellant. It was determined in this House, reversing the decree of the Court of Session, that the wife was not entitled to a separation; could the husband have insisted upon a decree of adherence? Might not the court refuse its aid to one who had so acted, and regard his conduct as a bar to his claim to relief? It is not a notion strange to our law that the court should refuse its aid to one who does not come into it with clean hands, and when the question arises for decision I think it may well be considered whether the court would be bound to entertain an action and grant relief at the suit of one whose misconduct, though falling short of a matrimonial offence, has been the primary cause of the difficulty, and has led to the refusal to adhere."

The proposition which counsel for the husband supported was that the court ought not to pronounce a decree for restitution of conjugal rights where the respondent has separated himself or herself, as the case may be, from the petitioner with cause, and that cause may be conduct on the part of the petitioner which, though falling short of a matrimonial offence for which a judicial separation could be obtained by the respondent, yet renders it practically impossible, in the opinion of the court, for the petitioner and respondent to live together. Section 16 of the Matrimonial Causes Act, 1857 [see now Matrimonial Causes Act, 1950, s. 14: 29 HALSBURY'S STATUTES (2nd Edn.) 388], allows a judicial separation to be obtained on the ground inter alia of desertion by the respondent without cause for two years and upwards. Section 27 [see s. 1 of Act of 1950] allows a wife to obtain a divorce from her husband on the ground (inter alia) of his adultery coupled with desertion without reasonable excuse for two years and upwards. Section 31 [see s. 4 (2) (iii) of Act of 1950] provides that the court may refuse to pronounce a decree of divorce where the petitioner has been guilty (inter alia) of having deserted or wilfully separated himself or herself from the other party before the adultery complained of and without reasonable excuse. Section 5 of the Matrimonial Causes Act, 1884 [see s. 14 (i) and s. 15 of Act of 1950] provides that, if the respondent shall fail to comply with a decree of the court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may be forthwith instituted, and sentence of judicial separation pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights.

In *Russell* v. *Russell* (1) the majority of the Court of Appeal held that the Act of 1884 has materially altered the old law as to restitution of conjugal rights, and has given the court a power to refuse a decree which it had not before; that the wife's conduct in that case, though not amounting to legal cruelty, would disable her from contending that her husband's desertion was without cause, and she would fail in a suit for judicial separation; and that, as the Act of 1884 made disobedience to a decree for restitution of conjugal rights equivalent to desertion without cause, therefore, by necessary implication the court must have power to refuse a decree for restitution wherever the result of such decree would be to compel the court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case, and they dismissed the wife's petition for restitution and the husband's counterclaim for judicial separation. I understand that this case is under appeal to the House of Lords upon the question of the husband's counterclaim. [For report of *Russell* v. *Russell* in the House of Lords see ante p. 1]. The judgment does not define "cause" or "reasonable cause" or "reasonable excuse," which I think all mean the same thing: see LORD PENZANCE in *Yeatman* v. *Yeatman* (4), L.R. 1 P. & D. at pp. 491, 494; but, after referring to some

cases in which it was held that in a suit for restitution nothing short of a ground for separation afforded a defence to the respondent, the judgment states that if the wife had been petitioning for a judicial separation on the ground of desertion her conduct towards her husband would disable her from contending that the desertion was without cause, and then holds that, as she would fail in a suit for judicial separation, the effect of the Act of 1884 was to empower the court to refuse her a decree in a restitution suit.

In stating that the petitioner would have failed in a suit for judicial separation, the lords justices, although *Yeatman* v. *Yeatman* (4) is not mentioned in the report, seem to have substantially held the same view as that expressed by LORD PENZANCE in that case before the Act of 1884 with regard to suits of judicial separation on the ground of desertion; but they carry the matter further than he did by the effect which they hold that the Act of 1884 has produced upon suits for restitution. He held that conduct falling short of a matrimonial offence sufficient to found a decree for judicial separation was still sufficient "cause" to bar the right of a petitioner to maintain a suit for judicial separation on the ground of desertion. LORD PENZANCE, in the course of his judgment in that case said (L.R. 1 P. & D. at pp. 191, 492):

> "Now it must be borne in mind that, according to the matrimonial law of this country, which the Divorce Acts have not affected to touch on this head, nothing will justify a man in refusing to receive his wife, except the commission of some distinct matrimonial offence, such as adultery or cruelty, upon which the court could found a decree of judicial separation. And that in all other cases, no matter what her conduct, she can always claim a decree enforcing cohabitation. Save, then, in cases where some such a matrimonial offence has been committed, the law does not justify and support the husband in deserting and living apart from his wife. And it may be considered hardly consistent with this to hold that any desertion can be 'reasonable' which cannot be justified by proof of such offence, or, in other words, that the law should at the same time hold the desertion of the husband to have been reasonable, and yet, if asked by the wife, decree that her husband must take her back again. The inconsistency, however, is perhaps more apparent than real. For the legislature may have thought it right, in creating the new matrimonial offence of 'desertion,' to subject the remedy for it to the condition that the conduct of the party complaining should not have led to the result complained of; and if it should have done so, to deny all remedy for the desertion without affirming that the parties were legally justified in living apart. However this may be, the inconsistency, if it exists, is the work of the legislature, as interpreted by the full Court of Divorce. For in the case of *Haswell* v. *Haswell and Sanderson* (5) it was decided that conduct falling short of a matrimonial offence sufficient to found a decree for judicial separation was still sufficient 'cause' to bar all remedy to a wife whom her husband had deserted. By this decision I am bound to shape my course."

Later he said (ibid. at p. 494):

> "the 'cause' should be grave and weighty which, in the judgment of the court, should deprive a deserted wife of her remedy for that desertion, and her right to set it up as a bar to a divorce for adultery at her husband's suit."

The Court of Appeal, however, does not hold that the court is to exercise a general discretion in granting or refusing a decree of restitution. To go so far would involve a large alteration of the old law, and would confer a discretionary power on the court of far-reaching effect and most difficult to exercise. Indeed, it was not contended before me that the decision in *Russell* v. *Russell* (1) went to this extent. The effect of that case appears to be that, in cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to

disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the court is now empowered to refuse to pronounce a decree compelling the respondent to return to cohabitation with the petitioner. The truth is that in such cases it has become practically impossible for the spouses to live properly together. I may add, there may be some little inconsistency in holding that a decree for restitution may not be pronounced and yet that the other party cannot obtain a decree for judicial separation; but that seems to be the result of *Russell* v. *Russell* (1).

I have now to apply these observations to the present case. I am of opinion that, when the whole of the evidence in this case is considered there is nothing in the conduct of the wife which would approximate the case to such cases as are referred to by LORD HERSCHELL, and in *Russell* v. *Russell* (1). In my judgment, the wife has not been guilty of conduct which justifies the husband in refusing to return to cohabitation, or which can be said to render it practically impossible for the wife and the husband to live together. [HIS LORDSHIP reviewed the evidence and concluded:] I must pronounce that the wife is entitled to her decree for the restitution of conjugal rights, and that the cross-claim by the husband fails.

Solicitors: *Patersons, Snow, Bloxam & Kinder*, for *Lupton & Fawcett*, Leeds; *Vincent & Vincent, for John Bowling & Son*, Leeds.

[*Reported by* H. DURLEY GRAZEBROOK, ESQ., *Barrister-at-Law.*]

ARMYTAGE *v.* ARMYTAGE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), March 9, May 12, 17, June 21, 1898]

[Reported [1898] P. 178; 67 L.J.P. 90; 78 L.T. 689; 14 T.L.R. 480]

Judicial Separation—Jurisdiction—Parties resident within the jurisdiction, but domiciled abroad—Acts of respondent complained of committed abroad—Custody of children.

The court has jurisdiction to entertain a suit for judicial separation if the parties are resident within the jurisdiction at the time of the beginning of the suit, even though the domicil of the parties is foreign or the conduct of the respondent on which the petition is based occurred in foreign countries.

If the court grants a wife a judicial separation under such circumstances, it has also power to give her the custody of the children of the marriage.

Notes. Applied: *Chetti v. Chetti*, [1908-10] All E.R. Rep. 49. Approved and Followed: *Anghinelli* v. *Anghinelli*, [1918-19] All E.R. Rep. 255. Considered: *Graham* v. *Graham*, [1922] All E.R. Rep. 149; *H.* v. *M.*, [1928] P. 206; *Milligan* v. *Milligan*, [1941] 2 All E.R. 62. Applied: *Matalon* v. *Matalon*, [1952] 1 All E.R. 1025; *Keserue* v. *Keserue*, [1962] 3 All E.R. 796. Referred to: *Von Eckhardstein* v. *Von Eckhardstein* (1907), 23 T.L.R. 539; *Rayment* v. *Rayment and Stuart*, [1910] P. 271; *Riera* v. *Riera* (1914), 112 L.T. 223; *Lord Advocate* v. *Jaffrey*, [1920] All E.R. Rep. 242; *A.-G. for Alberta* v. *Cook*, [1926] All E.R. Rep. 525; *Raeburn* v. *Raeburn* (1928), 138 L.T. 672; *Sim* v. *Sim*, [1944] 2 All E.R. 344; *Hutter* v. *Hutter (Otherwise Perry)* [1944] 2 All E.R. 368; *Forsyth* v. *Forsyth*, [1947] 1 All E.R. 406; *Ramsay-Fairfax (otherwise Scott-Gibson)* v. *Ramsay-Fairfax*, [1956] P. 115.

As to judicial separation and orders for custody, etc., of children, see 12 HALSBURY'S LAWS (3rd Edn.) 285, 392, and for the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 388.

Cases referred to:

(1) *Niboyet* v. *Niboyet* (1878), 3 P.D. 52; 47 L.J.P. 49; 39 L.T. 172; 26 W.R. 683; reversed, 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021.*

(2) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527, P.C.; 11 Digest (Repl.) 468, *1011.*

(3) *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, *1010.*

(4) *Connelly* v. *Connelly* (1851), 7 Moo. P.C.C. 438; 13 E.R. 949, P.C.; 11 Digest (Repl.) 477, *1062.*

(5) *Firebrace* v. *Firebrace* (1878), 4 P.D. 63; 47 L.J.P.C. 41; 39 L.T. 94; 26 W.R. 617; 11 Digest (Repl.) 342, *127.*

(6) *Newton* v. *Newton* (1885), 11 P.D. 11; 55 L.J.P. 13; 34 W.R. 123; 27 Digest (Repl.) 684, *6533.*

(7) *Thornton* v. *Thornton* (1886), 11 P.D. 176; 55 L.J.P. 40; 54 L.T. 774; 34 W.R. 509, C.A.; 11 Digest (Repl.) 543, *1522.*

(8) *Christian* v. *Christian* (1897), 67 L.J.P. 18; 78 L.T. 86; 11 Digest (Repl.) 548, *1556.*

(9) *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488; 9 Bli.N.S. 89; 6 E.R. 1239, H.L.; 11 Digest (Repl.) 356, *250.*

(10) *Manning* v. *Manning* (1871), L.R. 2 P. & D. 223; 40 L.J.P. & M. 18; 24 L.T. 196; 19 W.R. 479; 11 Digest (Repl.) 475, *1051.*

(11) *Lewis* v. *Lee* (1824), 3 B. & C. 291.

Also referred to in argument:

Russell v. *Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 13 T.L.R. 516; 41 Sol. Jo. 660, H.L.; 27 Digest (Repl.) 307, *2551.*

Carden v. *Carden* (1837), 1 Curt. 558.

D'Aguilar v. *D'Aguilar* (1794), 1 Hag. Ecc. 773; 1 Hag. Con. 134, n.; 162 E.R. 748; 27 Digest (Repl.) 487, *4256.*

Brodie v. *Brodie* (1861), 2 Sw. & Tr. 259; 30 L.J.P.M. & A. 185; 4 L.T. 307; 9 W.R. 815; 164 E.R. 995; 11 Digest (Repl.) 472, *1026.*

R. v. *Jackson*, [1891] 1 Q.B. 671; 60 L.J.Q.B. 346; 64 L.T. 679; 39 W.R. 407; sub nom. *Re Jackson*, 55 J.P. 246; sub nom. *Ex parte Jackson*, 7 T.L.R. 382, C.A.; 27 Digest (Repl.) 86, *644.*

Nugent v. *Vetzera* (1866), L.R. 2 Eq. 704; 35 L.J.Ch. 777; 15 L.T. 33; 30 J.P. 820; 12 Jur.N.S. 781; 14 W.R. 960; 11 Digest (Repl.) 500, *1188.*

Colliss v. *Hector* (1875), L.R. 19 Eq. 334; 44 L.J.Ch. 267; 39 J.P. 295; 23 W.R. 485; 11 Digest (Repl.) 491, *1134.*

Evans v. *Evans* (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest (Repl.) 294, *2398.*

Petition by the wife, Fannie Augusta Armytage, for a judicial separation on the ground of the cruelty of her husband, Harry Armytage. The petition also asked for the custody of the two children of the marriage. The acts of cruelty relied on were alleged to have been committed in Australia and in various places in Italy. The husband denied the cruelty. He also filed an act on petition denying the jurisdiction of the court on the ground that he was a domiciled Australian, and that no act of cruelty within the jurisdiction of the English courts was alleged in the petition.

Inderwick, Q.C., and *E. Lewis Thomas*, for the husband, contended that (i) domicil was necessary to give the court jurisdiction; (ii) even if residence was in some cases sufficient to found the jurisdiction of the court, it was not sufficient unless some act of cruelty was committed within this country; (iii) the court had no power to interfere with the custody of the children of a domiciled foreigner.

Bargrave Deane, Q.C., and *W. T. Barnard* for the wife.

Cur. adv. vult.

June 21, 1898. **GORELL BARNES, J.,** read the following judgment.—This is a suit for judicial separation by Mrs. Armytage against her husband on the ground of his alleged cruelty towards her. By his answer the husband has denied the alleged cruelty, and by an act on petition he has further pleaded that the court has no jurisdiction to entertain the suit. I have, therefore, to determine a question of fact, whether there has been cruelty by the husband to the wife, and a question of law whether the court has jurisdiction in the circumstances to entertain the suit. The second point raises a question of considerable importance in private international law.

The parties were married at Toorak, near Melbourne, Australia, on April 11, 1888, and there are two children of the marriage, whose custody the wife seeks to obtain. The husband is by birth an Australian, and his domicil is in the colony of Victoria. He was educated at Cambridge, and has been called to the English Bar. The wife is an Englishwoman born in England, of parents residing at Blackheath, near London. The parties became acquainted on board ship on passage from this country to Melbourne, and their marriage was celebrated shortly afterwards. They cohabited in Australia and in England, and afterwards in Italy, and the occurrences which give rise to this suit took place at Florence in April and May, 1897. The wife alleges that in April and May, 1897, her husband committed certain acts of violence towards her which caused her to leave him and come to England with her children to seek her father's protection. These acts are denied by the husband, and he alleges that his wife has merely come to this country to endeavour to give this court jurisdiction in this matter. [HIS LORDSHIP reviewed the evidence.] I have come to the conclusion that the wife has established a case of cruelty on the part of the husband towards her at Florence in April and May, 1897. I further find that she left him in Florence and came to England bona fide in order to shelter herself under the care of her parents, and is now resident in this country. No acts of cruelty in this country were alleged or proved, but the wife stated that she remained in fear of her husband.

I have now to deal with the question of jurisdiction. The further facts necessary to refer to are these. The wife came to this country with her children on or about May 24, 1897, and she and the children have since resided under her parents' roof and at Bexhill. The husband's solicitor on May 31, 1897, wrote on his behalf to the wife and the father requesting the wife to return with her children to her husband, but she declined to comply with this request. At the end of June, 1897, the husband came to, and has since resided in, England, but I understand he has not taken up a permanent residence here, and has only come to and is remaining in England for the purpose of enforcing, and so long as may be necessary to determine, such rights as he may have against the wife with regard to the children. In the month of November, 1897, he settled the sum of £100 on each of his children, and made them wards of court in Chancery. He thereupon applied to NORTH, J., for an order for the custody of the children, which was met with a cross-application on the part of the wife. In the meantime these proceedings were commenced, and the husband was served with the citation and petition in this country. NORTH, J., ordered the application before him to stand over until after the determination of this suit.

The question to be decided, therefore, is whether or not this court can entertain a suit for judicial separation by the wife against the husband in the circumstances above stated. It may now be taken as settled that this court has no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not domiciled in this country at the commencement of the proceedings. Although in *Niboyet* v. *Niboyet* (1) it was held by the majority of the Court of Appeal that residence not amounting to domicil may give the court jurisdiction, that case, which, if followed, would have the effect of giving the court a jurisdiction which it does not concede to foreign tribunals, is opposed to the general current of the cases in this court, and has been practically overruled by the decision of the Privy Council in *Le Mesurier*

v. *Le Mesurier* (2). LORD WATSON, in delivering their Lordships' judgment after a review of the authorities, stated ([1895] A.C. at p. 540) that

> "their Lordships have . . . come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage."

The court does not now pronounce a decree of dissolution where the parties are not domiciled in this country except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who up to the time when she was deserted or began so to be justified was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicil of her own in the country of the matrimonial home, it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country.

The jurisdiction to dissolve marriages was conferred upon this court by the Matrimonial Causes Act, 1857 [see now the Matrimonial Causes Act, 1950, s. 1], and although that Act does not expressly make domicil a test of jurisdiction, that test is applied by the court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law, an adherence to which is necessary, as LORD PENZANCE said in *Wilson* v. *Wilson* (3) (L.R. 2 P. & D. at p. 442), to "preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another." These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status ought to depend on the law of his domicil, though there may be limitations and exceptions to this principle; see DICEY'S CONFLICT OF LAWS, 1896, c. 18, 474 et seq.; cf. SAVIGNY'S s. 362 (GUTHRIE'S translation), 2nd Edn., p. 108. The jurisdiction in suits other than suits for dissolution of marriage is conferred on the court by s. 6 of the Act of 1857. By other sections judicial separation is substituted for the old divorce a mensa et thoro, and a new ground for separation, viz., desertion without cause for two years and upwards, is added [see Act of 1950, ss. 8, 12, 14, 15]. Section 22 provides as follows:

> "In all suits and proceedings other than proceedings to dissolve any marriage, the said court shall proceed, and act, and give relief on principles and rules which, in the opinion of the said court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts have heretofore acted and given relief, but subject to the provisions herein contained, and to the rules and orders under this Act." [see now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, s. 103 (1)].

There are no special provisions of the Act, or rules, or orders, which directly affect the present question. The present suit is for judicial separation on the ground of cruelty. Before the Act it would have been a suit for divorce a mensa et thoro on the same ground, and the inquiry is as to the principles and rules on which the ecclesiastical courts would have acted in the circumstances. The wife maintains that the test of domicil is not applicable as in a suit for dissolution of marriage, and that the ecclesiastical courts would have given her relief where she and her husband are both residing in England in the circumstances proved, whereas the husband maintains that no relief would have been given because the parties are not domiciled in England, and no act of cruelty has been proved within the jurisdiction.

In support of her contention, the wife's counsel cited the judgments of JAMES and COTTON, L.JJ., in *Niboyet* v. *Niboyet* (1) and certain passages from the above-mentioned judgment of LORD WATSON in *Le Mesurier* v. *Le Mesurier* (2). *Niboyet* v. *Niboyet* (1) was a case in which a marriage was solemnised at Gibraltar between a Frenchman and an Englishwoman, and the husband resided for several years in

England, but, being a consul for France, he retained his domicil of origin. The wife presented a petition for a divorce, alleging adultery committed in England and desertion. The husband appeared under protest, and prayed to be dismissed. It was held (reversing the decision of SIR ROBERT PHILLIMORE) by JAMES and COTTON, L.JJ., BRETT, L.J., dissenting, that the court had jurisdiction to grant a divorce. I have already pointed out that this decision is virtually overruled, but LORD WATSON, in *Le Mesurier v. Le Mesurier* (2), said ([1895] A.C. at p. 531):

> "The main reason assigned for their decision by the learned judges of the majority was that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishops' Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights or for a divorce a mensa et thoro, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for alimony, but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe s. 27 of the Act of 1857 as giving the English court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishops' Court."

The reasons given by JAMES, L.J., for holding the wife entitled to sue for a divorce a mensa et thoro in the Bishops' Court fully appear at pp. 4-6 of the report (4 P.D.); but his observations appear to me to be limited to the case of the parties being resident though not domiciled in a matrimonial home within the jurisdiction, and a matrimonial offence being committed during such residence either within or outside the jurisdiction. COTTON, L.J., proceeded on very much the same grounds, except that he does not seem to include the case of offences committed outside the jurisdiction. BRETT, L.J., who differed from the other lords justices, was of opinion that the domicil of the husband in England at the institution of the suit is the fact which gives jurisdiction to the English Divorce Court to decree divorce, and that the same rule applies to suits for judicial separation and to suits for restitution of conjugal rights.

This case cannot, therefore, be considered a distinct authority in the wife's favour, but her counsel, in addition to the last-quoted passage from LORD WATSON's judgment, placed reliance on the following passage from the same judgment of the report ([1895] A.C. at pp. 526, 527):

> "No authority can have a material bearing upon that point [viz., whether the courts of a colony have a jurisdiction to dissolve a marriage contracted in England by British subjects who, though resident within the forum, still retain their English domicil] which does not relate to the dissolution of marriage; because there are unquestionably other remedies for matrimonial misconduct short of dissolution which, according to the rules of the jus gentium, may be administered by the courts of the country in which spouses domiciled elsewhere are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these courts may compel him to aliment her; and in cases where the residence is of a more permanent character and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the courts of the residence are warranted in giving the remedy of judicial separation without reference to the domicil of the parties. But the circumstances which justify the courts of the residence in administering remedies for the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose

of putting an end to the marriage and remanding the spouses to the condition of single persons."

It is to be observed that the cases referred to in this passage, in which the remedy of judicial separation may be given, are the same as those contemplated by JAMES, L.J., and do not necessarily include the present case, where the parties, though within the jurisdiction at the commencement of the suit, had no joint matrimonial home of any kind in this country. Counsel for the wife did not cite the works of any jurists who may have been referred to by LORD WATSON. The published works of several eminent writers which I have consulted show that doubt has been expressed upon the question which LORD WATSON does not consider doubtful. Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce a mensa et thoro of married persons who are residing but not domiciled in the country of the forum.

The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others and has been allowed in some States on grounds different from those on which it could be obtained in others. There has been want of unanimity as to the forum which ought to take cognisance of the question of divorce and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds have in order to obtain divorces temporarily resided or assumed domicil in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed in reported cases and by different jurists upon the question of dissolution of marriage.

But in practice suits for judicial separation or divorce a mensa et thoro and restitution of conjugal rights do not appear to have given rise to similar difficulties, and, therefore, cases and discussions as to jurisdiction in these suits are not often met with. Such suits generally occur before the tribunals of the country in which the parties are in fact domiciled, and a case like that before me was not so likely to occur in former days as at the present time, when large numbers of people are to be found residing for more or less lengthy periods away from the place of their domicil. SIR ROBERT PHILLIMORE, in his work on INTERNATIONAL LAW (1861), vol. 4, pp. 338, et seq., does not enter upon the question of the validity of a decree of divorce a mensa et thoro by the court of a State in which the parties are living but not domiciled, though he makes mention of *Connelly* v. *Connelly* (4), where, in answer to a suit in the Arches Court of Canterbury for restitution of conjugal rights, a wife relied for her answer partly on a decree of separation between the parties at Rome, and, after her plea had been rejected by the Court of Arches, the Privy Council allowed her to amend her plea by stating that she and her husband were domiciled at Rome at the time when the alleged sentence was passed, and that by the law of their American domicil (the lex loci contractus) that sentence would be held valid, but gave no opinion as to what the effect of such further pleading might be.

BURGE, in his COMMENTARIES ON COLONIAL AND FOREIGN LAWS (Edn. 1838), chap. 8, s. 2, pp. 668 et seq., confines his inquiry to the conflict between the law of the one country which treats marriage as indissoluble and that of the other which authorises its dissolution by judicial sentence. He states that the obligatory effect of a sentence of separation a mensa et thoro by a foreign tribunal will be the subject of inquiry by him in a subsequent part of his work when the nature and effect of foreign judgments and sentences are considered, but I cannot find that he reverts to the subject. He observes, however (p. 669), that generally the law of the actual

domicil of the parties is admitted to be competent to decree their separation a mensa et thoro. BISHOP, in his COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (Boston Edn., 1881), s. 158, discusses the jurisdiction of the ecclesiastical courts in England, and shows how the bishop's jurisdiction did not extend beyond his diocese, and concludes with this passage:

> "Besides the English courts had no authority to dissolve valid marriages, and it may be doubted whether a suit for separation from bed and board involves a question of status within the principle we are considering. If it does, still no one would seek such a divorce under circumstances to give the decree no personal effect upon the defendant."

DR. BAR considers fully the jurisdiction in divorce in his THEORY AND PRACTICE OF PRIVATE INTERNATIONAL LAW, translated by GILLESPIE, Edn. 1892. At p. 381 he says:

> "The result in practice will probably be found to coincide pretty much with the doctrine of the text, because wives claiming aliment or demanding protection will resort to the forum of the place of residence, while these courts will not determine any question of rights so as permanently to affect the marriage relations, unless they have jurisdiction ratione domicilii."

And, again, at p. 384, in the notes:

> "The court of the domicil, or even of the place of residence in cases of necessity are competent to lay down provisional rules, e.g., to regulate a provisional separation, to protect the wife from cruelty or to make temporary provision for her aliment, to restore for a time at the husband's instance the domicil conjugal. French practice recognises this."

PROFESSOR WESTLAKE (PRIVATE INTERNATIONAL LAW, Edn. 1890) states that "the jurisdiction of the English court to decree judicial separation depends on the same circumstances as its jurisdiction to grant a divorce" (s. 47), but he adds:

> "If the matter be considered on the ground of social rather than legal principle, a doubt may be suggested whether it is necessary to identify the jurisdiction for judicial separation with that for divorce. The former decree leaves the parties man and wife, but gives to the injured party a protection against some of the consequences of that status, and it may, therefore, be reasonable to allow its benefit to be enjoyed within the territory by those who are resident in it, even though the court of their country or domicil should alone be held competent to dissolve the tie of marriage between them."

He further appears to consider that the English court has jurisdiction to decree restitution of conjugal rights where both parties are in England at the time of the action (s. 48). DR. FRASER, in his TREATISE ON HUSBAND AND WIFE ACCORDING TO THE LAW OF SCOTLAND (2nd Edn., 1878), p. 1294, under the title of Actions of Separation and Aliment, points out that different considerations come into play when the object is not permanently to affect the status of parties, but to obtain immediate protection from cruel treatment, or the means of daily subsistence, and the hardship which would arise if the rule were established that jurisdiction in actions of separation only exists in the forum of the husband's domicil.

I do not find that the point in question is expressly dealt with in FOOTE'S PRIVATE INTERNATIONAL JURISPRUDENCE, Edn. 1890; DICEY'S CONFLICT OF LAWS, Edn. 1896; EVERSLEY ON DOMESTIC RELATIONS, 1885; STORY'S CONFLICT OF LAWS, Edn. 1872; or KENT'S COMMENTARIES, 1873. But in WHARTON'S CONFLICT OF LAWS, Edn. 1881, s. 210, p. 294, there is the following passage:

> "Cruelty or other misconduct gives jurisdiction for police purposes to the court of the place where such misconduct takes place and where the offender may be cited though he be not then domiciled; but without such domicil the

court, while it will interpose for the protection of the injured party and for a provisional separation, can grant no permanent dissolution of the marriage tie."

And in a note on the same page it is stated that there is much doubt in France whether the courts have jurisdiction to decree a séparation de corps between foreigners not domiciled but resident in France, and that this jurisdiction is maintained in Switzerland.

I conclude from the writers to whom I have referred that most of them are disposed to consider that the courts of the country in which the parties are living, though not domiciled, ought to have the right in a matrimonial suit to afford protection to an injured party from the cruelty of the other party. LORD HANNEN may possibly have had such a case in his mind when, in giving judgment in *Firebrace* v. *Firebrace* (5), he said (4 P.D. at p. 67):

"The domicil of the wife is that of her husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicil."

But he added:

"It is not, however, inconsistent with this principle that a wife should be allowed in some cases to obtain relief against her husband in the tribunal of the country where she is resident, though not domiciled."

This was a suit for restitution of conjugal rights where the respondent, the husband, who was domiciled in Australia, had left England before the institution of the suit, and it was held that the court had no jurisdiction over him after he left this country, and that the suit could not be maintained. Had he remained in England it would seem from *Newton* v. *Newton* (6), and *Thornton* v. *Thornton* (7) that the suit could have been maintained. In the recent case of *Christian* v. *Christian* (8), the President said that a suit for judicial separation may be founded upon matrimonial residence only as distinguished by our law from domicil.

Having considered sufficiently for the purposes of the case the opinions of the jurists above mentioned, it is necessary that I should revert to s. 22 of the Act of 1857, which requires the court in such a suit as the present to act conformably to the principles and rules on which the ecclesiastical courts had therefore acted and given relief. There are several works which deal more particularly with the jurisdiction and mode of proceedings in the ecclesiastical courts—e.g., BURN'S ECCLESIASTICAL LAW, Edn. 1842; ROGER'S ECCLESIASTICAL LAW, Edn. 1849; SHELFORD'S LAW OF MARRIAGE AND DIVORCE, Edn. 1841; and older works, such as GODOLPHIN'S ABRIDGMENT; but I cannot trace in them any statement upon the precise point in question, and the principles to govern it must be deduced from the general principles and practice of the courts. These are stated in general terms so far as concerns the matter under consideration by JAMES, L.J., in his judgment above referred to (*Niboyet* v. *Niboyet* (1), 4 P.D. at p. 3), where the jurisdiction of the Court Christian is considered, and it is pointed out that the Church and its jurisdiction had nothing to do with the original nationality or acquired domicil of the parties, that residence as distinct from casual presence on a visit or in itinere was an important element, but that residence had no connection with or little analogy to the question of a person's domicil.

In my opinion, if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an ecclesiastical court, that court would have interfered, if the parties were within the jurisdiction at the commencement of the suit, to protect the injured party against the other party in respect of the adultery or cruelty of the latter, and I can find no authority for the suggestion made by the husband's counsel that such interference could be limited to cases where the offence complained of was committed within the jurisdiction. In *Warrender* v. *Warrender* (9) LORD BROUGHAM said (2 Cl. & Fin. at p. 562): "The law either in this country or Scotland makes no distinction in respect of the place of the commission of the

offence." Although the ecclesiastical courts could not extinguish the mutual obligations of husband and wife, they acting pro animae salute, suspended these obligations in order to protect and relieve the injured party. It could make no difference where the parties were residing within the jurisdiction that the necessity for protection and relief arose in consequence of adultery committed by the wrongdoer while temporarily outside the jurisdiction, or of cruelty committed while the parties were temporarily outside the jurisdiction and the apprehension of further acts of cruelty remained. If the parties were within the jurisdiction, and the necessities of the case demanded that one of them should be protected against a matrimonial wrong done by the other of which the courts would take cognisance, I cannot doubt that the courts would have interfered. *Manning v. Manning* (10), which was relied upon by the husband's counsel, is no authority against that view, because in that case the respondent was not within the jurisdiction of the court, and the petitioner was held not to be a bona fide resident in England. If the husband's contention is correct no decree of judicial separation could be made even in cases like *Niboyet* v. *Niboyet* (1), where the parties, though not domiciled, were resident for years in this country.

Then does the present case fall within the principles and rules upon which the courts have acted? I think it does. The wife, an Englishwoman, whose domicil of origin was English, and who has resided at times in England with her husband, is forced by the cruelty committed in Italy of her husband, a domiciled Australian, to seek the protection of her parents in England. Though legally domiciled in Australia, as a matter of fact she has been forced to separate herself from her husband and establish herself in a home of her own in this country. She and her husband are both within the jurisdiction. She has been required to return with her children to her husband, and is afraid to do so owing to her apprehension of the repetition of the acts of cruelty which have been committed against her while they were living together abroad. It is against the repetition of apprehended acts of cruelty that the court grants its protection, and unless the court interferes there is nothing to prevent the husband from forcing himself upon his wife and placing her in a position in which she may be subjected to further acts of cruelty. The status of married persons within the country is recognised. Performance of the duties arising from the marriage tie should be required and protection afforded against an abuse of the position resulting from that tie where necessary. Police protection is an inadequate remedy.

It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought only to be effected by the courts of the domicil. But the relief is to be given on principles and rules which, in the opinion of the court, shall be as nearly as may be conformable to the principles and rules on which the ecclesiastical courts gave relief. According to those principles and rules cruelty and adultery were only grounds for a sentence of divorce a mensa et thoro which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other. The relation of marriage still subsisted, and the wife remained a feme covert. A woman divorced by the court a mensa et thoro and living separate and apart from her husband could not be used as a feme sole: see *Lewis* v. *Lee* (11). The effect of the sentence was to leave the legal status of the parties unchanged. Although a sentence of judicial separation is to have the effect of a divorce a mensa et thoro under the old law (s. 16 of the Act of 1857), and also the further effect of placing the wife in the position of a feme sole with respect to property which she may acquire or which may come to or devolve upon her from the date of the sentence and while the separation continues, and also for the purposes of contract and wrongs and injuries and suing and being sued during that period: ss. 25 and 26 of the said Act of 1887 [see now Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, and Matrimonial Causes Act, 1950, s. 21], yet, as the relief to be given now is to be

given according to the principles and rules in force in the ecclesiastical courts, I am of opinion that the effect of the said ss. 25 and 26, if they affect a wife's status within the meaning of the term as applied to the principles under consideration, which is doubtful, is not to deprive the court of the power to grant relief in cases where it would have been granted by the ecclesiastical courts.

It may be further objected that as domicil is considered a test of jurisdiction in cases of dissolution of marriage in order that the decree may be recognised in countries other than that of the domicil for the same reason a similar test should be applied in cases of judicial separation. But the reasons which apply in the one case are not applicable to the other; and, even if the principle should be established that the courts of the country of the domicil of the parties are the only courts which can pronounce a decree of judicial separation which ought to be recognised in other countries, in my opinion no valid reason can be urged against the courts of a country in which a husband and wife are actually living pronouncing a decree which will protect the one against the other as long as they remain within the jurisdiction. In the present case the wife's domicil is legally in Australia, but, as a matter of fact, she has justifiably separated herself from her husband and made her home in England, and it is in England that she now requires protection. He has come here and subjected himself to the jurisdiction of the courts of this country. Could anything be more unreasonable than for this court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country and leave her to proceed in the courts in Australia to protect herself against her husband in England? It may, I think, be safely laid down that the ecclesiastical courts would formerly, and this court will now, interfere to protect the wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention.

I, therefore, hold that this court has jurisdiction to entertain this suit, and I pronounce a decree of judicial separation in favour of the wife with costs. Having held that the court has jurisdiction to entertain the suit, I think it follows that the court has jurisdiction under the powers expressly conferred upon it by s. 35 of the Matrimonial Causes Act, 1857, and s. 4 of the Matrimonial Causes Act, 1859 [see now Matrimonial Causes Act, 1950, s. 26], to make provision for the custody of the children of the marriage. Having heard the case it is probably more convenient that I should dispose of this matter rather than leave it for further contest in the Chancery proceedings. I will hear any application relating to the children in chambers.

Solicitors : *Jackson & Prince; William Negus.*

[*Reported by* H. M. Giveen, Esq., *Barrister-at-Law.*]

THE VORTIGERN

[Court of Appeal (Lord Russell, C.J., A. L. Smith and Henn Collins, L.JJ.), February 22, 23, March 11, 1899]

[Reported [1899] P. 140; 68 L.J.P. 49; 80 L.T. 382; 47 W.R. 437; 15 T.L.R. 259; 43 Sol. Jo. 330; 8 Asp.M.L.C. 523; 4 Com. Cas. 152]

Shipping—Seaworthiness—Implied warranty—Voyage divided into stages—Warranty that ship seaworthy at beginning of each stage.

The implied warranty, which at common law prima facie is to be read into a contract of carriage by sea, that the ship shall be seaworthy for the voyage at the time of sailing, means that she will then be in a fit state as to repairs, equipment, and crew, and in all other respects in a proper condition in ordinary circumstances to proceed to the port of destination. Coal is part of the equipment of a steamship. There is no warranty that the ship shall continue seaworthy during the voyage, but where it is impossible (e.g., for providing cargo space) at the port of departure to take on sufficient coal for the whole voyage, and, for the purpose of coaling, the voyage is divided into stages, there is an implied warranty at the beginning of each stage that the vessel has on board enough coal for that stage.

The plaintiffs' vessel shipped, in the Philippine Islands, a cargo, including a quantity of copra belonging to the defendants, under a charterparty by which the cargo was to be carried to Liverpool for a lump sum freight. So that cargo space could be provided sufficient coal for the whole voyage was not shipped at the loading port, and the voyage, in order that the vessel might be able to take on coal, was divided into three stages—from Cebu (in the Philippines) to Colombo, from Colombo to Suez, and from Suez to Liverpool. Owing to the negligence of the engineer, the vessel left Colombo for Suez, the second stage of her voyage, with an insufficient supply of coal for that stage. In consequence the ship became short of coal and some of the defendants' copra was consumed as fuel. In an action by the shipowners for freight,

Held: the defendants were entitled to set off the value of the copra so consumed against their liability for freight.

Notes. Applied: *Greenock Steamship Co.* v. *Maritime Insurance Co.*, [1900-3] All E.R. Rep. 834; *E. Timm & Son, Ltd.* v. *Northumbrian Shipping Co., Ltd.*, [1938] 1 All E.R. 774. Considered: *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.*, [1938] 2 All E.R. 648. Considered: *The Makedonia*, [1962] 2 All E.R. 614. Referred to: *MacIver* v. *Tate Steamers* (1903), 8 Com. Cas. 124; *Darling* v. *Raeburn*, [1907] 1 K.B. 846; *Noemijulia Steamship Co.* v. *Minister of Food*, [1950] 2 All E.R. 699.

As to the warranty of seaworthiness, see 35 Halsbury's Laws (3rd Edn.) 401-410; and for cases see 41 Digest 471-480.

Cases referred to:

(1) *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1870), L.R. 3 P.C. 234; 7 Moo. P.C.C.N.S. 1; 39 L.J.P.C. 53; 22 L.T. 559; 18 W.R. 769; 3 Mar. L.C. 414; 17 E.R. 1, P.C.; 41 Digest 475, *3071*.

(2) *Dixon* v. *Sadler* (1839), 5 M. & W. 405; 9 L.J.Ex. 48; 151 E.R. 172; affirmed sub nom. *Sadler* v. *Dixon* (1841), 8 M. & W. 895, Ex. Ch.; 29 Digest 191, *1513*.

(3) *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(4) *Thin* v. *Richards & Co.*, [1892] 2 Q.B. 141; 62 L.J.Q.B. 39; 66 L.T. 584; 40 W.R. 617; 8 T.L.R. 571; 36 Sol. Jo. 501; 7 Asp.M.L.C. 165, C.A.; 51 Digest 475, *3072*.

(5) *Burges* v. *Wickham* (1863), 3 B. & S. 669; 33 L.J.Q.B. 17; 8 L.T. 47; 10 Jur.N.S. 92; 11 W.R. 992; 1 Mar. L.C. 303; 122 E.R. 251; 29 Digest 188, *1465.*

Also referred to in argument:

Biccard v. *Shepherd* (1861), 14 Moo. P.C.C. 471; 15 E.R. 383; sub nom. *Commercial Marine Co.* v. *Namaqua Mining Co.*, 5 L.T. 504; 10 W.R. 136; 1 Mar. L.C. 165, P.C.; 29 Digest 191, *1510.*

Walford de Baedemaeker & Co. v. *Galindez Bros.* (1897), 13 T.L.R. 293; 2 Com. Cas. 137; 41 Digest 477, *3096.*

Hedley v. *Pinkney & Sons Steamship Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 42 W.R. 497; 10 T.L.R. 347; 7 Asp.M.L.C. 483; 6 R. 106, H.L.; 41 Digest 297, *1591.*

Bouillon v. *Lupton* (1863), 15 C.B.N.S. 113; 2 New Rep. 393; 33 L.J.C.P. 37; 8 L.T. 575; 10 Jur.N.S. 422; 11 W.R. 966; 1 Mar. L.C. 347; 143 E.R. 726; 29 Digest 192, *1515.*

Bermon v. *Woodbridge* (1781), 2 Doug. K.B. 781; 99 E.R. 497; 29 Digest 45, *73.*

Glynn v. *Margetson & Co.*, [1893] A.C. 351; 62 L.J.Q.B. 466; 69 L.T. 1; 9 T.L.R. 437; 7 Asp.M.L.C. 366; 1 R. 193, H.L.; 41 Digest 311, *1715.*

Appeal by the plaintiffs from a decision of GORELL BARNES, J., in an action for freight.

Scrutton and *D. Stephens* for the plaintiffs.

Walton, Q.C., and *Mansfield* (*Horridge* with them) for the defendants.

Cur. adv. vult.

Mar. 11, 1899. **A. L. SMITH, L.J.,** read the following judgment.—This is an action by the owners of the steamship *Vortigern* to recover from the defendants the sum of £610 18s. 4d., being for freight under a charterparty dated Aug. 6, 1897, and the defendants defend themselves upon the ground that the cargo, which belonged to them and consisted of copra (a species of coconut), had during the voyage been burnt up by the captain as fuel for the ship, and that this burning up of the cargo had taken place in consequence of the breach of the implied warranty of seaworthiness which attached to the contract of affreightment at the commencement of the voyage—that is, that coal necessary for the due prosecution of the voyage had not been taken on board when the ship commenced the chartered voyage, and the cargo had, therefore, to be used as fuel in the place of coal.

The defence depends upon a point of law, and a question of fact. The value of the cargo burnt equalled the freight claimed excepting as to £20 which was paid into court by the defendants. The charterparty was in ordinary form, and was for a voyage by the plaintiffs' steamship from Cebu, in the Philippine Islands, to Liverpool, calling at Marseilles, if ordered. By this charterparty the steamship had liberty to call at any port or ports in any order, and by the charterparty dangers of navigation or machinery, negligence, default, or error in judgment of the owners, pilot, master, and crew, or other servants of the shipowner were excepted. The point of law is: What implied warranty of seaworthiness attaches to a contract of affreightment upon a voyage such as the present when from the necessity of the case the ship cannot start upon the chartered voyage with an equipment of coal on board sufficient for the whole voyage if the ship is to be a cargo-carrying vessel, which it clearly was the intention of all parties that it should be.

It cannot be denied that the implied warranty which prima facie attaches to a charterparty such as the present is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that it shall then be in a fit state as to repairs, equipment, and crew, and in all other respects sufficient to take the ship in ordinary circumstances to its port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage. That coals are part of the equipment of a steamship I do not doubt, and if the voyage in this case had been an ordinary voyage, as to which there was no necessity, as regards taking in

coal, for dividing it into stages, it cannot be denied that the steamship was unseaworthy when she started from Cebu on her voyage to Liverpool, for the simple reason that she had not then on board an equipment of coal sufficient to take her in ordinary circumstances to her port of destination. To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships (for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination)—it has become the practice by reason of the necessity of the case for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus as far as practicable complying with the warranty of seaworthiness which attached when the ship commenced its voyage.

This practice was resorted to in the present case, for I find by the engineer's log that the voyage was divided into stages, and it appears from the average adjustment that the cargo-owners subsequently acquiesced therein, the first stage being from Cebu to Colombo, in Ceylon, the second from Colombo to Suez, and the third from Suez to Liverpool. At Colombo the ship, accordingly, called and took in coal for the second stage, but the learned judge has found, and there certainly was evidence to support his finding, that the ship did not at Colombo take in a sufficiency of coal for the second stage to Suez, and thus, by reason of the coal falling short while passing up the Red Sea, the defendants' copra was resorted to in order to carry the ship on to Suez, where she again coaled, and so was enabled to perform her chartered voyage to Liverpool. As to the question of fact it was argued on behalf of the plaintiffs that the learned judge was in error in finding that the ship was not fully equipped with coal when it started upon the second stage from Colombo to Suez, and this argument was principally based upon the engineer's log, but that document when looked at has been so much altered that little if any reliance can be placed thereon. In my opinion, GORELL BARNES, J., has dealt with this question of fact in the proper manner by investigating the amount of coal consumed by the ship at different parts of the voyage, and I agree not only in the result he has arrived at but with the reasons he has given which are fully set out in his judgment.

I come to the point of law, which is this: What was the implied warranty, if any (it matters not whether it is called a warranty or an absolute condition), when the ship started upon the second stage from Colombo to Suez? Was there then an implied warranty that she had a sufficiency of coal on board for this second stage—that is, that she was seaworthy for that stage? This is the real point in the case. The shipowners assert that there is no such warranty, and that the sole obligation they were then under to the cargo-owners was that their master and crew should not negligently omit to take in coal at Colombo or during the stages subsequent to the first stage, and that, although the ship might during the second stage in this case have put into Perim and obtained coal, and although it might be negligence for the master and crew not to have done so, as negligence of master and crew is excepted by the charterparty, the shipowners are not liable to the cargo-owners for having burnt up their cargo for fuel as they did. Now reduce this contention of the shipowners into a concrete case to see what in practice it amounts to. Take, for instance, the case of a cargo-carrying steamship, commencing a voyage of some 5,000 miles in length, and the shipowners, for coaling purposes by reason of the necessity of the case, having to divide the voyage into five stages of 1,000 each. The shipowners must admit that they warrant to the cargo-owners that their ship has a sufficiency of coal on board for the whole voyage, when it commenced that voyage, but they assert that by reason of their dividing the voyage into stages, although for their own purposes, this warranty is thus cut down to the first stage of 1,000 miles, and that as regards the residue of the stages (4,000 miles in all) there is no warranty that the ship has a single ton of coal on board, and that the only liability they are under to the cargo-owners during the residue of the voyage is for

the negligence, if any, of their master and crew for not taking coal on board when they might have done, and, as negligence of master and crew is excepted by the charterparty, the shipowners are under no liability whatever to the cargo-owners during the transit of the 4,000 miles. A

I am asked to hold that this is the true meaning of the charterparty in the present case. I certainly cannot do so. On the other hand, the contention of the cargo-owners is that, whether the shipowners divide the chartered voyage into stages or not for coaling purposes, that has nothing to do with them, but if from the necessity of the case the shipowners do so, the cargo-owners in no way abandon the undoubted warranty they have at the commencement of the voyage. The only way in which this warranty can be complied with is for the shipowners to extend the existing warranty to the commencement of each stage, and I can see no reason why such a warranty should not be implied, and I have no difficulty in making the implication, for it is the only way the clear intention of the parties can be carried out and the undoubted and admitted warranty complied with. It appears to me to be no answer to say that it is a warranty subsequent to the commencement of the voyage. In my judgment, when a question of seaworthiness arises either between a steamship owner and his underwriter upon a voyage policy or between a steamship owner and a cargo-owner upon a contract of affreightment, and the underwriter or cargo-owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage—and if he fails in this he fails in defeating the issue of unseaworthiness which prima facie has been established against him. In each case it is a matter for proof where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established. B C D E

The question of dividing up voyages into stages, as regards the warranty of seaworthiness, is by no means destitute of authority. There are numerous cases decided upon policies of marine insurance when the voyage is divided into stages, and there is also a case in this court relating to the warranty of seaworthiness upon a contract of affreightment when the voyage was divided into stages. As regards the first class of cases it suffices to cite from a judgment of LORD PENZANCE, when delivering the judgment of the Judicial Committee of the Privy Council, consisting of himself, SIR WILLIAM ERLE, and GIFFARD, L.J., in *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1), where the numerous prior authorities relating to voyages consisting of different stages are referred to. LORD PENZANCE says (L.R. 3 P.C. at p. 241): F G

> "The case of *Dixon* v. *Sadler* (2) and the other cases which have been cited leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward, of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions, but it has been equally well decided that a vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped and in all respects seaworthy for each of these stages of the voyage, respectively, at the time she enters upon each stage; otherwise the warranty of seaworthiness has not been complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition of equipment of the vessel to encounter the perils of each stage of the voyage necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage H I

A of the voyage requires, and no doubt that is so. But the equipment must if the warranty of seaworthiness is to be complied with [namely, the warranty at the time of the commencement of the voyage] be furnished before the vessel enters upon that subsequent stage of the voyage which is supposed to require it."

Read into this judgment the word "shipowner" in the place of "the assured," B and the judgment is in point in the present case. There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage. What LORD BLACKBURN said in *Steel* v. *State Line Steamship Co.* (3) (3 App. Cas. at p. 86), in the House of Lords, as C to the warranty of seaworthiness which attaches to "contracts for sea carriage" shows that it is the same warranty as that which attaches when a shipowner insures his ship with an underwriter. The judgment of the Privy Council contemplates, it will be seen, stages of necessity, and I can see no difference in principle between physical stages of necessity and other stages of necessity as to the implication of a warranty attaching thereto.

D But there is also the case in this court in 1892 of *Thin* v. *Richards & Co.* (4), which I am unable to distinguish in principle from the present. It was an action by cargo-owners against shipowners for non-delivery of cargo, and the point which arose was whether there had been a breach of the warranty of seaworthiness when the ship commenced its voyage. The ship was chartered for a voyage from Oran, in Algiers, to Garston Dock, Liverpool. There was also an exception as to the negligence of E the master and crew. According to the usual practice, the ship, having left Oran with a light cargo of esparto grass, proceeded to Huelva, in Spain, and there filled up with iron ore, and was subsequently lost on her chartered voyage. It was proved that when the ship left Oran she had not a sufficiency of coal on board to take her to Liverpool, nor did she fill up at Huelva with a sufficiency of coal to take her to Liverpool. The not taking on board sufficient coal at Huelva arose from the F negligence of the engineer. This court (LORD ESHER, M.R., FRY and LOPES, L.JJ.) held that, whether the voyage was to be taken to be a voyage from Oran to Liverpool or a voyage divided into stages, the ship was unseaworthy, for, if the commencement of the voyage be taken as from Oran, she had not then a sufficiency of coal on board for the voyage from Oran to Liverpool, or, if the commencement of the voyage be the stage from Huelva to Liverpool, she then had not sufficient coal on board for G that stage, and, consequently, whichever the voyage was, the warranty had been broken. The doubt expressed by LORD ESHER whether it was a voyage divided into stages seems to have been, not that a voyage can never be divided into stages if the necessity of the case required it, but whether in such a comparatively short voyage as from Oran to Liverpool the necessity of dividing the voyage into stages had been established by proof.

H In my judgment, GORELL BARNES, J., was correct when he held upon the facts of this case that there was a necessity for dividing the voyage for coaling purposes into stages into which it was divided; that, therefore, the warranty of seaworthiness existed at the commencement of the second stage at Colombo; and that the ship had not then sufficient coal on board for this second stage, and that the defendants were right in their contention. This decides the case in favour of the defendants, and I it is unnecessary to embark upon the point raised as to general average. The judgment of GORELL BARNES, J., must be affirmed, and this appeal dismissed with costs.

HENN COLLINS, L.J.—I think the difficulties which have been suggested in this case are very much diminished when it is realised that the warranty of seaworthiness has always been relative. Though absolute when it attached, its precise extent and limitations were relative, and varied according to the standard which the parties must have been supposed to contemplate as applicable to the adventure. A good instance of this principle is to be found in *Burges* v. *Wickham* (5), where the

standard of seaworthiness required was determined by reference to the class of the vessel, which to the knowledge of both parties was intended to be insured. That was a case of a vessel built for river navigation sent on an ocean voyage, and the warranty was held to be satisfied by proof that it had been made as fit as was reasonably possible for a vessel of such a description. The cases cited by my brother A. L. SMITH are other instances of the same principle. The custom of a particular trade (e.g., the Greenland whale fishery) or the convenience of the parties to a particular adventure may make it reasonable that the vessel should be equipped up to a different standard at different stages of the voyage, and the warranty of seaworthiness has to be adjusted accordingly. It is a necessary corollary of this principle of varying standards at different stages that at each stage the vessel shall conform to the standard required for that stage. I regard this not so much as a concession to the shipowner as an adjustment of the standard of seaworthiness to the requirements which the conditions of the adventure, according to the understanding and convenience of both parties, demand.

To come to the case before us, it is obvious that the convenience of both parties required that the adventure should be carried out by a steamer, and that it was not reasonably possible for the steamer in question to carry coals enough, in addition to her cargo, to take the vessel to her ultimate destination at a reasonable rate of consumption for a vessel of her class. It is obvious, therefore, that the common purpose could not be reasonably carried out unless the vessel's stock of coal should be from time to time replenished. The warranty of seaworthiness, therefore, must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage, and the voyage, for this purpose, must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly.

It follows that the warranty must cover a condition that the vessel shall at the commencement of each stage be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative; that is to say, varying according to the standard reasonably applicable to the contemplated conditions. Following the process of evolution through which modern commerce has passed, the warranty must be made to conform to modern exigencies—that is, to the rules of convenience which regulate the practice of merchants in respect to particular voyages. To say, as counsel for the plaintiffs contended, that the warranty is limited to the first stage, and is satisfied if the vessel is fit to perform it, is, as it seems to me, to ignore the principles out of which the doctrine of stages was evolved, and to accept it partially only and not in its entirety. The doctrine of stages involves a recurring obligation to bring the vessel up to the required standard at each stage. It cannot be accepted with an illogical limitation. It must be accepted altogether or not at all. Accepting, as I do, GORELL BARNES, J.'s, findings of fact for the reasons given by him and my brother A. L. SMITH, it follows that, whether Colombo to Suez or to Port Said is regarded as the second stage in the contemplated voyage, the warranty of seaworthiness as to coal supply was not made good, to which, of course, negligence (though excepted) is no answer, and, therefore, that the shipowners are liable to make good the value of the copra consumed by reason of the breach of warranty. The question in this case is as to coal only, but the subject-matter as to which the voyage, for the purpose of applying the warranty of seaworthiness, may be deemed to be divided, and what the stages are to be, must be determined in each case by reference to what may be taken as the exigencies of the adventure as contemplated by the parties having regard to the ordinary course of business.

A. L. SMITH, L.J., said that **LORD RUSSELL, C.J.**, asked him to state that he agreed with the judgments which had been delivered.

Solicitors: *Holman, Birdwood & Co.; Rowcliffes, Rawle & Co.*, for *Hill, Dickinson & Co.*, Liverpool.

[*Reported by* SUTTON TIMMIS, ESQ., *Barrister-at-Law.*]

A

Re MARRIAGE, NEAVE & CO., LTD. NORTH OF ENGLAND TRUSTEE, DEBENTURE AND ASSETS CORPORATION, LTD. *v.* MARRIAGE, NEAVE & CO., LTD.

B COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), July 28, 30, 1896]

[Reported [1896] 2 Ch. 663; 65 L.J.Ch. 839; 75 L.T. 169; 60 J.P. 805; 45 W.R. 42; 12 T.L.R. 603; 40 Sol. Jo. 701]

Company—Rates—Debenture-holders' action—Appointment of receiver and manager—Liability for unpaid rates—Distress—Priority of right to distrain over debenture-holders' equitable charge.

C In the absence of a direction in an appointment by the court of a receiver and manager in a debenture-holders' action that the property of the company should be delivered up to the receiver and manager the company retains possession of its property, the function of the receiver and manager being merely to manage the company's property and to receive its income. Accordingly, if in such circumstances rates due in respect of the company's property remain unpaid the rating authority are entitled to distrain on the property of the company despite the appointment. Moreover, this right to distrain is not to be postponed to the equitable charge on the company's property created by debentures in favour of debenture-holders.

Notes. Applied: *Re Crosbie, Johnson and Hughes* v. *Crosbie* (1909), 74 J.P. 25. E Considered: *Whinney* v. *Moss Steamship Co.*, [1910] 2 K.B. 813; *National Provincial Bank* v. *United Electric Theatres* (1915), 85 L.J.Ch. 106. Followed: *Gyton* v. *Palmour*, [1944] 2 All E.R. 540.

As to a floating charge to secure debentures and as to the duties and liabilities of a receiver and manager, see 6 HALSBURY'S LAWS (3rd Edn.) 472-476, 517; and for cases see 10 DIGEST (Repl.) 770 et seq., 825 et seq.

F Cases referred to:

(1) *Paterson* v. *Gas Light and Coke Co.* (1896), 65 L.J.Ch. 443; 74 L.T. 280; 60 J.P. 360; reversed [1896] 2 Ch. 476; 65 L.J.Ch. 709; 74 L.T. 640; 60 J.P. 532; 45 W.R. 39; 12 T.L.R. 459; 40 Sol. Jo. 652, C.A.; 25 Digest (Repl.) 530, *74.*

G (2) *Richards* v. *Kidderminster Overseers*, *Richards* v. *Kidderminster Corpn.*, [1896] 2 Ch. 212; 65 L.J.Ch. 502; 74 L.T. 483; 44 W.R. 505; 12 T.L.R. 340; 10 Digest (Repl.) 830, *5432.*

Also referred to in argument:

Re Smith, Ex parte, Mason, [1893] 1 Q.B. 323; 67 L.T. 596; 57 J.P. 72; 41 W.R. 159; 9 T.L.R. 15; 37 Sol. Jo. 30; 9 Morr. 304; 5 R. 47; 25 Digest (Repl.) *73.*

H *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L.J.Ch. 292; 64 L.T. 487; 39 W.R. 369; 7 T.L.R. 282; 2 Meg. 418, C.A.; 7 Digest (Repl.) 32, *163.*

Re Opera, Ltd., [1891] 3 Ch. 260; 60 L.J.Ch. 839; 65 L.T. 371; 39 W.R. 705; 7 T.L.R. 655, C.A.; 10 Digest (Repl.) 783, *5091.*

Stevens v. *Evans* (1761), 2 Burr. 1152; 1 Wm. Bl. 284; 97 E.R. 761; 18 Digest (Repl.) 388, *1390.*

I **Appeal** from an order made by KEKEWICH, J., on a summons in a debenture-holders' action taken out by the rating authority by which they asked that they might be at liberty to distrain on the goods and chattels of the company for unpaid rates.

The company, Marriage, Neave and Co., Ltd., had issued debentures which created a floating charge upon all the property of the company, both present and future, not comprised in or subject to the trusts of, or effectually charged by, the trust deed. The property of the company consisted of a mill, warehouse, and heredita-

ments, situate in the parish of St. Mary, Battersea, and the company was rated in that parish in respect of that property. On Oct. 26, 1895, rates were made for the half-year ending March, 1896, by the churchwardens and overseers of the parish, in respect of the company's property, amounting to £307 10s. On Feb. 6, 1896, an action was commenced by the first mortgage debenture-holders of the company to enforce their security; and on Feb. 17, 1896, joint receivers and managers were appointed, but the company was not ordered to deliver up possession of its property. The receivers and managers entered on the property for the purpose of performing their duties, but did not reside there. Payment of the sum of £307 10s. was demanded of the company in the usual way, but, the same not having been paid, a summons was, on Feb. 20, 1896, issued against the company to show cause why the amount had not been paid. On the hearing of the summons before police magistrates, on Mar. 2, 1896, a warrant of distress against the company was applied for, which was granted accordingly, but was ordered by the court not to be executed until after Mar. 9, 1896, as it was stated that an application would be made on that date for an order to wind-up the company. As the receivers and managers declined to pay the rates, a summons in the debenture-holders' action was issued on Mar. 10, 1896, asking that they might be at liberty to distrain on the goods and chattels of the company in respect of the rates, notwithstanding the appointment of the receivers and managers.

KEKEWICH, J., dismissed the summons, and the rating authority appealed.

Warrington, *Q.C.*, and *C. Lyttelton Chubb* for the rating authority (the overseers and churchwardens).

Levett, *Q.C.*, and *Kirby* for the debenture-holders.

LINDLEY, L.J.—The first part of this case turns upon the question whether there has been such a change of occupation as brings into operation s. 16 of the Poor Rate Assessment and Collection Act, 1869 [see now Rating and Valuation Act, 1925, s. 4 (4)].

With reference to that, it appears that on Feb. 17, 1896, Paterson and Stevens were appointed by the court receivers and managers in an action instituted by debenture-holders against Marriage, Neave & Co., Ltd. When I look at the order appointing those gentlemen receivers and managers, I do not find—and the omission is very important to my mind—any direction whatever for delivery up of possession of the company's property to them. There is nothing in the order at all about it. And when I come to look at the affidavits, I do not find that the receivers and managers have taken possession of the company's property in any sense that I can see. What they have done is this. They have gone on to the property for the purpose of receiving and managing the income and business of this company. They have not done anything to change the ostensible possession of the property in any way whatever, and upon the facts it appears to me that the possession and occupation have not been changed at all. Counsel for the debenture-holders argued that, inasmuch as corporations could only occupy by their agents, it was quite enough for receivers of a corporation to be appointed to cause it to go out of possession. I do not take that view of the law. A corporation can possess and can occupy in the same way as individuals; and the mere fact that receivers have been appointed by an order like this, which does not order the delivery up of possession, does not cause the company to give up possession. It does not dispossess the company. I do not think, therefore, that there is such a change of occupation made out as is requisite to bring into operation s. 16 of the Poor Rate Assessment and Collection Act, 1869. That section runs thus:

> "If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged . . . the overseers shall enter in the rate-book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences . . ."

A The overseers have not done that; nor, in my judgment, it is necessary for them to do it. If you look to see what the real truth is, it appears that the company was and is still in point of law in occupation of the property. The receivers are there as managers of the business. They have no right that I know of to discharge servants contrary to a contract made by the company. It is a mistake to suppose that, because receivers may hire servants, which of course they may do, and dismiss B servants, which of course they may do while they break no contract, therefore they oust the company from possession. They are receivers and managers instead of the company, under an order of the court; but the legal possession of the property of the company remains where it was.

That difficulty having been got over, we must look a little further. It is said that, C under the statutory provisions, this rate can only be distrained for upon the goods of the person assessed and who has made default. That is the offender. I agree that the offender here was the company. The company is assessed; the company has made default; and the only goods which can be taken under the distress warrant are the goods of the company. Therefore, what we have to ascertain is, are there any goods of the company on these premises which are liable to distress? It is said D that there are not. It is said, first of all, that the goods on the premises belong in point of law to the trustees for the debenture-holders. That turns upon the true construction of the trust deed. When you look at the trust deed you find that the goods of the company are expressly excepted—it was suggested on behalf of the debenture-holders, by way of precaution only, and by reference to the Bills of Sale Acts so as to make the exception amount to nothing at all—but the goods are E excepted in language which is perfectly unmistakable. The goods, therefore, did not pass, and were never the goods of the trustees for the debenture-holders. So far as that argument goes, therefore, the goods remain in point of law the goods of the company.

The next point is that the debentures are expressed in language so large as to include the goods of the company although the trust deed did not. But, when you F look at the debentures and consider what effect they have, it is plain that the only effect is to give the debenture-holders an equitable charge upon the company's goods. That is all they have. They have no right even to take possession of the goods. They have no right to appoint a receiver. All that they could do would be to institute an action to get a receiver appointed by the court. The goods, therefore, are not the property of the debenture-holders in any sense whatever. They are the goods G of the company subject only to the equitable charge created by the debentures.

Let us go back and see what the rights of the overseers are. The rights of the overseers under the Poor Relief Act, 1601, and under the distress warrant which they have obtained, are to distrain for these rates upon the goods of the offender. The goods in question are, we find, the goods of the offender, subject to an equitable charge. What is to be done? Counsel for the debenture-holders started a point H which was new to all of us, and like every new point it required consideration. It was that, if there was an equitable charge, you could not distrain upon the goods at all. I agree that the power of distraining under the Poor Relief Act, 1601, for poor rates is not like the power of a landlord to distrain. We all know the difference. A landlord can take any goods, no matter whose, which are brought on the premises, while the overseers' power of distraining is much more restricted. But it certainly I astonished all of us to hear it said that the existence of an equitable charge prevented the overseers from recovering rates. It would be a very easy way of escaping from the payment of rates if that were so. When you come to consider the matter you see that it is nothing of the kind. The duty of the overseers is first of all to seize the goods of the company. That they could plainly do. Secondly, to sell the goods of the company. That they could plainly do. Therefore, we get rid of the equitable charge up to that point.

Then the question arises: What is to be done with the money? Is it the business of the bailiff out of the money to pay the owners of the equitable charge in priority

to the rates or not. The statute and the distress warrant show that he is not to do that. The substance of the thing is in accordance with the practice, and with what everybody understood, though it seems to have been forgotten, that out of the proceeds of the goods distrained upon the rates should have a priority over equitable charges and everything else. I do not say Queen's taxes, but we are not discussing them. The duty of the bailiff is to pay the rate out of the offender's goods, and to hand the surplus to the owner of the goods. That is his duty, and that does in effect give the rates priority over all other charges with regard to the proceeds of the goods when seized and sold under that distress. There is no action for these rates, and there is sense in that being the legislation on the subject, for when you come to give overseers rights of action questions about priorities at once arise, and you find them provided for. They are provided for under the Bankruptcy Acts, and under the Bills of Sale Acts.

It seems to me, therefore, that the several points taken break down one after the other, and that the appeal must be allowed—that is to say, there must be liberty given to the overseers to distrain upon the goods of the company. Nobody wants them to distrain. The proper form will be to express the opinion that the overseers and churchwardens are entitled to distrain on the goods and chattels of the company in the possession of the receivers and managers at the Albert Mills, and then they will proceed as they think expedient. The debenture-holders must be ordered to pay the costs of this appeal, and also the costs in the court below.

LOPES, L.J.—I am of the same opinion. The first point in this case arises under s. 16 of the Poor Rate Assessment and Collection Act, 1869. It is said that, the receivers having been appointed, there was a change of occupation. Directly the order is looked at appointing the receivers, it seems to me perfectly clear that that contention cannot be maintained, because we find nothing in that order which directs that possession of the property of the company is to be given up to the receivers. What the receivers have to do is to go on the property and manage the property. The occupation, in my judgment, remained in the company in precisely the same way as it was before. The company continued to occupy. That being so, there was no such change in occupation as is contemplated by s. 16. Something was said about the corporation being occupiers by their servants, and that that was not a case contemplated by this section. The answer is, that corporations are occupiers every day. We have railway companies in every part of England, and they are dealt with as occupiers, and are placed on the rate-book as occupiers.

Then it was said that this occupation of the company was at an end, because the receivers had power to discharge servants, and annul contracts, and do various things that were mentioned. Receivers have no power at all to annul any contract. I mean by that a contract which has to be continued for any definite period. It was the company, and the company only, that could discharge the servants who were in their service under such contracts. It comes to this, that the company continued in occupation for the purpose of s. 16, and the receivers did not occupy the property in such a way as to make them responsible for the poor rate.

Then the question arises which was dealt with by my learned brother LINDLEY, with regard to what goods can be seized. When the Poor Relief Act, 1601, is looked at, it appears that the goods to be seized, and the only goods to be seized, are the goods of the offender. The offender in this case would be the company. Then it is said that the goods in question which it is sought to seize, were not the goods of the company—that they passed under a certain deed of trust. When the trust deed is looked at it appears that these goods were excepted, and did not pass under the trust deed at all. Therefore, the goods cannot be said to belong to the debenture-holders. The position with regard to the goods is really that they belong to the company subject to an equitable charge in favour of the debenture-holders. There arises the other question with regard to the point as to the equitable charge. It was said that these goods have been made subject to the equitable charge of the

A debenture-holders, and that, therefore, no distress could be issued against them, or would be enforceable against them. That certainly took me by surprise. I have seen many cases dealing with the enforcement of the payment of rates such as these, and I never heard of the point being raised before. However, it was necessary to look into it, and when I have looked into it I find that there is a preferential charge in favour of rates—that rates are to be paid in preference to anything like an B equitable charge such as this is. What leads me to that conclusion, among other things, is that there is perfect power to distrain, and no action can be brought. I think that this appeal ought to be allowed.

RIGBY, L.J.—I am of the same opinion. In my judgment, *Paterson* v. *Gas Light and Coke Co.* (1) has nothing to do with, and in no way affects, the present C appeal.

I do not think that I have anything to add to what has been said to show that there is no change of occupation under s. 16 of the Act of 1869. It is only where there is a change of occupation that that section has any operation. To say that because receivers and managers were appointed, ipso facto the persons carrying on D business are turned out, is to say that which is not reasonable and not plausible. These receivers, for anything I can see, might have done all their duties without ever seeing this property. They were to carry on the business. They could have appointed a manager of that business under them to take his instructions from them. They never had need to go near the property at all. It is said that the servants of the company became the servants of the receivers. The servants, it is E true, became liable to obey their orders, because a competent power had reposed in them the management of the business, but that they are the servants of the receivers, or that the receivers become liable to pay them their salaries, is quite another matter. They may do so; they may re-engage the servants in some way or other. But that they become liable by virtue of their appointment to pay out of their own pockets the salaries, or to fulfil at their own expense any other contracts F of the company, is a doctrine that I do not think can be established—at any rate in the way in which it has been advanced before us. The receivers are the managers, that is all. It may very well happen that, as such managers, and for the purpose of management, the court may direct that they should be put into possession of the property of the company, and, if they are so put into possession, it may be that they become the occupiers within the meaning of s. 16. That, however, is not the point G that we have to deal with. No such order has been made, and no such idea seems to have occurred to anyone. The occupation of the company has not been interfered with, and, therefore, s. 16 does not apply.

That being so, we are sent back to the Poor Relief Act, 1601, to know what can be done. There quite clearly the powers of distress were prescribed by statute; and, independently of other statutory provisions, the only way is by distress on the goods H of the offenders. Marriage, Neave & Co., Ltd., were the persons assessed for the payment of this half-year's rate, and they are the offenders because they did not pay. A question arises as to certain goods which were admittedly on the property; but it is said that those goods were not the goods of Marriage, Neave & Co. So I need not deal with that question. Nor have I anything more to say about the construction of the trust deed, which, to my mind, did not carry the goods and chattels; but I there is a charge given by the debentures. Does that prevent the goods from being the goods of Marriage, Neave & Co.? I apprehend not. Putting aside the Bills of Sale Acts, and carrying one's mind to a time not very remote when there was no Bills of Sale Act—before 1854 in fact—can it be said that because a person wrote on a piece of paper: "I charge my household furniture with the payment of £5"—or indeed 5s., for the argument only requires that—"in favour of so and so"—that he is thereby securing himself practically from the payment of rates? The argument put forward comes to this, that the household furniture becomes the property of the person in whose favour the charge is made, and that it cannot be

seized by way of distress. I think, however, that the true construction is that they must take the goods of the offenders as they find them, and must distrain and sell and pay the rates first. When they have paid the rates, I do not know but that they may not be called upon in a proper way to account for the surplus to the equitable mortgagees—the persons entitled to the charge. They may or may not; but their first duty is to pay the surplus to the owners; and, if they are not called upon, to no one else. They have first to pay the rates; and that practically gives a preferential charge in favour of the rates.

In *Richards* v. *Kidderminster Overseers* (2), decided by NORTH, J., it was held that s. 16 applied—that there had been a change of occupation. We have nothing to do with that case at all. It turned upon a point absolutely different from the present. It was a case in which the terms of a deed had to be considered. It may be that the deed there was similar to that which exists in this case; but the deed in this case has nothing to do with the point now arising. Upon the terms of a deed before NORTH, J., or at any rate upon one particular part of that deed, the company were to remain in possession until a certain event, and upon that event possession was given up. NORTH, J., held—and I see no reason why his decision should not be right—that there was a change of occupation with the necessary result. True it is that in that case there are some words of NORTH, J., which seem to say that the case of a distress under the present statutes falls within the same principle as the case of an execution. I do not know whether or not the matter was argued before him. Apparently not, so far as the case goes. It was not in the least necessary to hold anything of the kind, for, as has been pointed out, there was an actual conveyance of the goods—or an assignment of the goods—to other persons; and that was relied upon. At any rate, if that were treated as a considered judgment with reference to the position of the overseers and their right to distrain under these Acts, we are constrained to say that, in our opinion, it cannot be supported. The result is that the appeal is allowed.

Appeal allowed.

Solicitors: *W. W. Young & Son; Grundy, Kershaw, Saxon, Samson & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re WRAGG, LTD.

[COURT OF APPEAL (Lindley, A. L. Smith and Rigby, L.JJ.), February 26, March 2, 4, 5, 19, 1897]

[Reported [1897] 1 Ch. 796; 66 L.J.Ch. 419; 76 L.T. 397; 45 W.R. 557; 13 T.L.R. 302; 41 Sol. Jo. 385; 4 Mans. 179]

Company—Shares—Payment of price by shareholder—Payment in kind—Transfer of property to company—Unimpeachable transaction—Winding-up—Right of liquidator to inquire into value of property transferred.

The liability of a shareholder to pay the company the price of his shares is a statutory liability and is declared by the Companies Acts to be a specialty debt, but that debt can be discharged in more ways than one, e.g., by payment or accord and satisfaction, and, subject to the limited capacity of companies, any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor. Provided that a company acts honestly and not

colourably and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, an agreement by the company to pay for property or services in fully paid-up shares is valid and binding on the company and its creditors. Unless the transaction is impeached—e.g., on the ground of fraud—the value of the property or services paid for in shares cannot be inquired into; the value of what is acquired by the company is measured by the price at which the company agrees to buy what it thinks it worth its while to acquire.

W., M., and others, who carried on business as coach proprietors and livery-stable keepers, became desirous of turning their business into a limited company, and a contract was entered into between them as vendors, and the company (in which all the vendors became shareholders), for the sale of the business, plant, etc., for £46,300, of which £20,000 was to be fully paid-up shares of the company. This agreement was duly filed before the issue of any shares. The figure at which coaches, horses, etc., were set down in the books of the company at its formation was about £11,000 less than the sum allocated to this item in the agreement. The company later being ordered to be wound-up compulsorily, the official receiver sought to recover that amount from the vendors on the ground that to this extent the consideration was a sham.

Held: the official receiver, not being able to impeach the agreement, was not entitled to go into the adequacy of the consideration to show that the company had agreed to give an excessive value for what it had purchased.

Notes. Considered: *Hong Kong and China Gas Co.* v. *Glen*, [1914-15] All E.R. Rep. 1002. Referred to: *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108; *Gardner* v. *Iredale*, [1912] 1 Ch. 700; *I.R. Comrs.* v. *Blott*, *I.R. Comrs.* v. *Greenwood*, [1921] A.C. 171; *Faber* v. *I.R. Comrs.*, [1936] 1 All E.R. 617; *Craddock* v. *Zevo Finance Co.* (1946), 174 L.T. 385.

As to the allotment of shares, see 6 Halsbury's Laws (3rd Edn.) 235 et seq.; and for cases see 9 Digest (Repl.) 309 et seq.

Cases referred to:

(1) *Salomon* v. *Salomon & Co.*, *Salomon & Co.* v. *Salomon*, ante p. 33; [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 45 W.R. 193; 13 T.L.R. 46; 41 Sol. Jo. 63; 4 Mans. 89, H.L.; 9 Digest (Repl.) 30, *11*.

(2) *Re British and Foreign Cork Co.*, *Leifchild's Case* (1865), L.R. 1 Eq. 231; 13 L.T. 267; 11 Jur.N.S. 941; 14 W.R. 22; 9 Digest (Repl.) 307, *1929*.

(3) *Re China Steamship and Labuan Coal Co.*, *Drummond's Case* (1869), 4 Ch. App. 772; 21 L.T. 317; 18 W.R. 2, L.J.; 9 Digest (Repl.) 90, *396*.

(4) *Re Heyford Co.*, *Pell's Case* (1869), 5 Ch. App. 11; 39 L.J.Ch. 120; 21 L.T. 412; 18 W.R. 31, L.J.; 9 Digest (Repl.) 90, *397*.

(5) *Re Heyford Ironworks Co.*, *Forbes' and Judd's Case* (1870), 5 Ch. App. 270; 39 L.J.Ch. 422; 22 L.T. 187; 18 W.R. 302, L.C. & L.J.; 9 Digest (Repl.) 92, *407*.

(6) *Re Baglan Hall Colliery Co.* (1870), 5 Ch. App. 346; 9 L.J.Ch. 591; 23 L.T. 60; 18 W.R. 499, L.J.; 9 Digest (Repl.) 312, *1956*.

(7) *Re Empire Assurance Corpn.*, *Leeke's Case* (1871), 6 Ch. App. 469; 40 L.J.Ch. 254; 19 W.R. 664, L.JJ.; 9 Digest (Repl.) 474, *3101*.

(8) *Re Bosworthen and Penzance Mining Co.*, *Jones' Case* (1870), 6 Ch. App. 48; 40 L.J.Ch. 133, L.JJ.; 9 Digest (Repl.) 90, *398*.

(9) *Re Matlock Old Bath Hydropathic Co.*, *Maynard's Case* (1873), 9 Ch. App. 60; 43 L.J.Ch. 146; 29 L.T. 630; 22 W.R. 119, L.C. & L.JJ.; 9 Digest (Repl.) 91, *404*.

(10) *Re Pen'Allt Silver Lead Mining Co.*, *Fothergill's Case* (1873), 8 Ch. App. 270; 42 L.J.Ch. 481; 28 L.T. 124; 21 W.R. 301, L.C. & L.JJ.; 9 Digest (Repl.) 91, *402*.

(11) *Re Wedgwood Coal and Iron Co.*, *Anderson's Case* (1877), 7 Ch.D. 75; 47 L.J.Ch. 273; 37 T.L. 560; 26 W.R. 442, C.A.; 9 Digest (Repl.) 101, *462*.

(12) *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9; 62 L.J.Ch. 742; 69 L.T. 363; 41 W.R. 642; 9 T.L.R. 501; 37 Sol. Jo. 559; 2 R 516, C.A.; 9 Digest (Repl.) 321, *2017*.

(13) *Re Richmond Hill Hotel Co., Pellatt's Case* (1867), 2 Ch. App. 527; 36 L.J.Ch. 613; 16 L.T. 442; 15 W.R. 726, L.JJ.; 9 Digest (Repl.) 250, *1592*.

(14) *Ooregum Gold Mining Co. of India* v. *Roper*, *Wallroth* v. *Roper*, [1892] A.C. 125; 61 L.J.Ch. 337; 66 L.T. 427; 41 W.R. 90; 8 T.L.R. 436; 36 Sol. Jo. 344, H.L.; 9 Digest (Repl.) 304, *1913*.

(15) *Re Addlestone Linoleum Co.* (1887), 37 Ch.D. 191; 57 L.J.Ch. 249; sub nom. *Re Addlestone Linoleum Co., Ltd., Ex parte Benson*, 58 L.T. 428; 36 W.R. 227; 4 T.L.R. 140, C.A.; 9 Digest (Repl.) 307, *1933*.

(16) *Re Almada and Tirito Co.* (1888), 38 Ch.D. 415; 57 L.J.Ch. 706; sub nom. *Re Almado and Tirito Co., Allen's Case*, 59 L.T. 159; 36 W.R. 593; 4 T.L.R. 534; 1 Meg. 28, C.A.; 9 Digest (Repl.) 324, *2035*.

(17) *Lee* v. *Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321; 5 T.L.R. 260; 1 Meg. 140, C.A.; 9 Digest (Repl.) 179, *1161*.

(18) *Re Theatrical Trust, Ltd., Chapman's Case*, [1895] 1 Ch. 771; 64 L.J.Ch. 488; 43 W.R. 553; 11 T.L.R. 310; 39 Sol. Jo. 364; sub nom. *Re Theatrical Trust, Ltd., Chapman's Case, Brandon's Case, Greville's Case*, 72 L.T. 461; 2 Mans. 304; 13 R. 462; 9 Digest (Repl.) 321, *2018*.

Also referred to in argument:

Re Poole Firebrick and Blue Clay Co., Hartley's Case (1875), 10 Ch. App. 157; 44 L.J.Ch. 240; 32 L.T. 106; 23 W.R. 203, L.C. & L.J.; 9 Digest (Repl.) 318, *1988*.

Oakes v. *Turquand and Harding*, *Peek* v. *Turquand and Harding*, *Re Overend, Gurney & Co.* (1867), L.R. 2 H.L. 325; 36 L.J.Ch. 949; 16 L.T. 808; 15 W.R. 1201, H.L.; 9 Digest (Repl.) 28, *1*.

Hire-Purchase Furnishing Co. v. *Richens* (1887), 20 Q.B.D. 387; 58 L.T. 460; 36 W.R. 365; 4 T.L.R. 184, C.A.; 10 Digest (Repl.) 970, *6689*.

Appeal by the official receiver the liquidator in the winding-up of a company, E. J. Wragg, Ltd., from a decision of VAUGHAN WILLIAMS, J., sitting as an additional judge of the Chancery Division, on a summons taken out by the official receiver for a declaration that two persons, one Wragg and one Martin, were indebted to the company in the circumstances set out hereinafter in the judgment of the lords justices.

The Solicitor-General (*Sir Robert Finlay, Q.C.*), and *Buckley, Q.C.*, for the official receiver.

Reed, Q.C., and *Ward Coldridge* for Wragg.

Eve, Q.C., and *A. H. Carrington* for Martin.

Cur. adv. vult.

Mar. 19, 1897. The following judgments were read.

LINDLEY, L.J.—This is an appeal from a decision of VAUGHAN WILLIAMS, J., refusing to hold two gentlemen, named Martin and Wragg, liable to pay up certain shares in the company held by them, which are registered in their names as fully paid up. The question is whether these shares are fully paid up or not.

Martin and Wragg were omnibus and coach proprietors, and livery-stable keepers. They were the owners of certain freehold and leasehold property, and of a considerable number of horses, carriages, and a quantity of harness and other things. Their business and the goodwill of it were worth something. They formed a limited company to buy their business and property for £46,300 payable in cash debentures and fully paid-up shares, as will be more fully stated presently. The company was registered on Jan. 9, 1896. Its capital was £20,000 divided into 2,000 shares of £10 each. The objects for which the company was established were stated in the memorandum of association to be to acquire and take over as a going concern the

aforementioned business and property, and with a view thereto to enter into and carry into effect (with such modifications as might be agreed upon) the agreement mentioned in art. 3 of the articles of association. The articles of association commenced with a statement to the same effect. Article 3 was to the effect that the directors should forthwith in the name of the company enter into and adopt the agreement referred to which had been already prepared, a copy of which was identified by being indorsed by two of the subscribers to the articles, but with power to make modifications therein. Articles 71-93 relate to the appointment and powers and duties of directors. There were to be not less than two nor more than five. They were to be appointed by the subscribers to the memorandum of association. The directors had power by art. 81 to appoint one or more of their body to be managing director or directors at a remuneration. But nothing turns on these articles. Suffice it to say that to enter into and carry into effect the agreement referred to was not only within their powers, but was one of the first things they had to do.

On Jan. 10, 1894, an agreement was entered into between Wragg and Martin, of the one part, and the company, of the other part, and by that agreement, which was duly registered pursuant to s. 25 of the Companies Act, 1867 [see now Companies Act, 1948, s. 52 (1) (b): 3 HALSBURY'S STATUTES (2nd Edn.) 452], upon Jan. 24, 1894, it was agreed that Wragg and Martin should sell, and the company should purchase of them: (i) the goodwill of their business; (ii) their freeholds; (iii) their leaseholds; (iv) their coaches, omnibuses, and horses; (v) their harness, saddlery, and all other stock; (vi) all contracts relating to the business; and (vii) all other properties the vendors might be entitled to. It was agreed (cl. 2) that the company should pay the vendors for the above-mentioned property and rights the sum of £46,300 in the following way: by £7,000 in cash; as to £9,300, £3,000 in first debentures of the company, and £6,300 in second debentures of the company: as to £10,000 by the transfer to the company of two mortgages, making together £10,000 secured upon the property conveyed; and as to £20,000, the balance of the said £46,300, £19,930 in 1,993 fully paid-up shares of £10 each. By cl. 3 of the agreement the component parts of this £46,300 were allocated to the different matters sold by the vendors to the company thus: to the value of the goodwill, £6,000; to the value of the freeholds, £12,000 (this included the mortgages for £10,000); to the value of the leaseholds, £500; to the value of stock, coaches, horses, plant, etc., £27,300; to contract rights, £250; to all other property, £250—making a total of £46,300. There was a supplemental agreement of the same date relating to the debentures, but nothing turns on this document. The property in the schedule was transferred to the company, and the company paid the vendors £7,000 in cash, and issued to them the debentures and fully paid-up shares as agreed. Martin and Wragg are respectively the registered holders of 891 and 941 of these shares. The company is now in liquidation, and the liquidator contends that these shares were improperly issued as fully paid up, and cannot be properly so treated. No attempt has been made to impeach or set aside the agreement. Nor, having regard to the decision of the House of Lords in *Salomon v. Salomon & Co., Ltd.* (1), is it possible to hold that agreement invalid on the materials before us. The company, although a small one, promoted by the vendors and managed by them, must be treated as competent to buy the property which it was formed to acquire, and to take it at the price named by the vendors. The only question is whether the shares issued as fully paid up in part payment of the price can be treated as fully paid up.

Before examining the law upon this point, I will state the grounds on which the official receiver contends that they cannot. It appears from the books of the company that the stock-in-trade, which by cl. 3 of the agreement is taken to be worth £27,300, was entered as of the value of £15,375 only, and it is contended that the paid-up shares given to the vendors must be attributed in part at least to this difference of £11,000 odd. In other words, it is contended that the company ought to be treated as having issued shares to the nominal amount of £20,000 (the

rest of the £27,300 being cash or debentures) in payment of goods of much less value—viz., of the value of £15,000 odd only—as both vendors and buyers well knew. A

I am quite unable to take this view of the contract. I will assume that the stock-in-trade was worth only £15,000, i.e., that it would not have fetched more in the market. There was no agreement to buy the stock-in-trade at that price, and to pay for it in shares of a larger nominal amount. The third clause in the agreement was merely inserted for stamp purposes. It was absolutely useless and meaningless for any other purpose. No evidence is required to prove it. No lawyer accustomed to the preparation of deeds can fail to see why it was inserted or its legal effect. Stamp duty had to be paid on so much of the £46,300 as was liable to duty, and duty was payable in respect of so much of this sum as was attributable to the good-will, and of the freeholds and leaseholds, and of nothing else. These were valued at the respective sums mentioned in cl. 3; £27,300 remained, and the stock-in-trade remained, and the £27,300 was attributed to that. I do not say that this was right, but whether right or wrong cl. 3 does not in any way alter the real agreement between the vendors and the company. The real agreement was that the vendors should sell, and that the company should buy, the various properties mentioned in the schedule to the agreement for one sum of £46,300, which apparently was £11,647 more than could have been obtained from any other purchaser. But the parties did not appropriate any part of the purchase money to any definite part of the property purchased, nor is the court at liberty to do so. It would be wholly wrong to treat the agreement as one to pay £27,300 for stock-in-trade, valued as between the vendors and the company at £15,375 odd, and to attribute the whole of the share capital to the purchase of that particular item. To do this is to fasten on the parties a contract which they never made, and one, moreover, which would entirely defeat their intentions if the official receiver is right in his contention. B C D E

Such being the true agreement between the parties, I will endeavour to ascertain the law applicable to the case. In *Re British and Foreign Cork Co., Leifchild's Case* (2), a limited company bought a patent and paid for it in paid-up shares; the holder was held not to be a contributory. The agreement was not sought to be set aside and no question as to the actual value of the patent was raised. No one apparently thought that question material. This case was decided in 1865 by KINDERSLEY, V.-C., and is valuable as showing that as early as that year it was taken for granted that shares in a limited company issued as paid up in consideration of property transferred to the company must be treated as paid up unless the whole transaction was set aside on the ground of fraud. In 1869 *Re China Steamship and Labuan Coal Co., Drummond's Case* (3) came before GIFFARD, L.J., sitting as the Court of Appeal, and it was then distinctly decided that even a subscriber of the memorandum of association could satisfy his liability in respect of the shares for which he subscribed by paying for them in money or money's worth, or, as GIFFARD, L.J., put it, "in meal or in malt." This general proposition has never been doubted, but there was a difficulty in applying it to a subscriber of the memorandum of association. The difficulty was to identify the shares which he was to receive as vendor with those which he had bound himself to take and pay for by subscribing the memorandum of association. The difficulty always arises in similar cases. F G H

It has never been doubted, so far as I know, that the obligation of every shareholder in a limited company to pay to the company the nominal amount of his shares could be satisfied by a transaction which amounted to accord and satisfaction or set off as distinguished from payment in cash. In 1867 the legislature rendered all such transactions invalid unless they were made pursuant to a duly registered contract, but if there is such a contract the law is now what it always was. As regards the value of the property which a company can take from a shareholder in satisfaction of his liability to pay the amount of his shares there has been some difference of opinion. But it was ultimately decided by the Court of Appeal I

that, unless the agreement pursuant to which shares were to be paid for in property or services could be impeached for fraud, the value of the property or services could not be inquired into. In other words, the value at which the company is content to accept the property must be treated as its value as between itself and the shareholder whose liability is charged by its means.

The following are the decisions which established this doctrine. The point was first raised in 1869 in *Re Heyford Co., Pell's Case* (4). Pell had agreed to sell his business to a limited company for a certain number of fully paid-up shares which were allotted to him, and were registered in his name. On the winding-up of the company LORD ROMILLY held him to be a contributory in respect of these shares, but to be entitled to an inquiry as to the value of the property given for them, and to be allowed such value but no more towards payment of them. This decision, however, was reversed on appeal by GIFFARD, L.J., on the ground that the agreement for the sale of the business for paid-up shares not being impeached, the shares ought to be treated as paid for in money's worth. In *Re Heyford Ironworks Co., Forbes' and Judd's Case* (5), LORD HATHERLEY clearly intimated his concurrence with the view that, unless the agreement was impeached, the value of the property given for the shares could not be gone into. In *Re Baglan Hall Colliery Co.* (6) GIFFARD, L.J., again acted on the same principle, and there being, as he said, "some confusion in the views entertained of cases of this nature," he went fully into the grounds of his decision, referring to the various sections of the Companies Act, 1862, which were material. He fully recognised the obligation of a shareholder to pay for his shares, but he again held that this obligation could be satisfied otherwise than by payment in money. In that case the company had agreed to buy a colliery and to pay for it in shares, and the handing over of the colliery as the consideration for the shares was held to be payment in full. No question was raised as to the value of the colliery.

In *Re Empire Assurance Corpn., Leeke's Case* (7), STUART, V.-C., criticised *Pell's Case* (4) and evidently disapproved the decision of GIFFARD, L.J., but, although *Leeke's* Case (7) was affirmed on appeal, the Vice-Chancellor's strictures on *Pell's Case* (4) were not approved. In *Jones' Case* (9) the Court of Appeal again adhered to the principle laid down in *Pell's Case* (4), *Forbes' and Judd's Case* (5), and *Re Baglan Hall Colliery Co.* (6). JAMES, L.J., seems to have had some doubt whether he should have come to the conclusion he did if it had not been for the decisions, but I understand his doubt was as to the identification of the shares subscribed for with those given for the property taken by the company. MELLISH, L.J., had no misgivings, and expressly approved the decision of GIFFARD, L.J., in *Pell's Case* (4). In *Re Matlock Old Bath Hydropathic Co., Maynard's Case* (9) fully paid-up shares were allotted to a subscriber of the memorandum of association in payment of property sold by him to the company. He was held to have satisfied his liability, the company "being free to accept payment in any honest way." It was proved to the satisfaction of the court that the shares for which he subscribed were to be paid for in property to be bought by the company at a sum equal to the amount of the shares subscribed for. It was not suggested that the agreement was ultra vires or depended for its validity on the value of the property.

All these cases arose before the Companies Act, 1867, came into operation, although some of them were decided at a later date. In *Re Pen' Allt Silver Lead Mining Co., Fothergill's Case* (10), which arose after that Act was in force, the above decisions were again considered, and were held inapplicable to cases to which that Act applied unless a proper agreement were duly registered. In *Fothergill's Case* (10) there was a registered agreement, but it was held not to apply to the shares for which he had subscribed the memorandum of association, and he was held to be a contributory in respect of them. But I can find nothing to throw doubt on the application of the law as settled in *Pell's Case* (4), and the others referred to hereinbefore to similar cases arising since 1867 in which the shares in question have been issued pursuant to a duly registered agreement as required by the Act.

In *Re Wedgwood Coal and Iron Co., Anderson's Case* (11), a colliery was sold to a limited company for paid-up shares. A proper agreement was registered. The price of the colliery to the company was £150,000, to be paid in shares. The vendors had shortly before agreed to buy it for £66,000 and to pay £42,000 in shares. They, therefore, made a huge profit. It was nevertheless held by the Court of Appeal that, so long as the agreement for sale to the company was unimpeached, all the 150,000 shares must be treated as fully paid up. This case is the last to which it is necessary to refer, bearing directly on the question I am examining.

I understand the law to be as follows. The liability of a shareholder to pay the company the amount of his shares is a statutory liability and is declared to be a specialty debt: Companies Act, 1862, s. 16 [now Companies Act, 1948, s. 20 (2)], and a short form of action is given for its recovery (s. 70). But specialty debts, like other debts, can be discharged in more ways than one—e.g., by payment, set-off, accord and satisfaction, and release—and, subject to the qualifications introduced by the doctrine of ultra vires, or, in other words, the limited capacity of statutory corporations, any mode of discharging a specialty debt is as available to a shareholder as to any other specialty debtor. It is, however, obviously beyond the power of a limited company to release a shareholder from his obligation without payment in money or money's worth. It cannot give fully paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *Re Eddystone Marine Insurance Co.* (12); nor can a company deprive itself of its right to future payment in cash by agreeing to accept future payments in some other way. It cannot substitute an action for the breach of a special agreement for its statutory action for nonpayment of calls: see *Re Richmond Hill Hotel Co., Pellatt's Case* (13). From this it follows that shares in limited companies cannot be issued at a discount [but see now Companies Act, 1948, s. 57, by which such issue is permitted subject to certain conditions]. By our law the payment by a debtor to his creditor of a less sum than is due does not discharge the debt; and this technical doctrine has also been invoked in aid of the law which prevents the shares of a limited company from being issued at a discount. But this technical doctrine, though often sufficient to decide a particular case, will not suffice as a basis for the wider rule or principle that a company cannot effectively release a shareholder from his statutory obligation to pay in money or money's worth the amount of his shares. That shares cannot be issued at a discount was decided in *Ooregum Gold Mining Co. of India* v. *Roper* (14), the judgments in which are strongly relied upon by the official receiver in this case.

It has, however, never yet been decided that a limited company cannot buy property or pay for services at any price it thinks proper, and pay for them in fully paid-up shares. Provided a limited company does so honestly, and not colourably, and provided that it has not been so imposed upon as to be entitled to be relieved from its bargain, it appears to be settled by *Pell's Case* (4), and the others to which I have referred, and of which *Anderson's Case* (11) is the most striking, that agreements by limited companies to pay for property or services in paid-up shares are valid and binding on the company and their creditors. The legislature in 1867 appears to me to have distinctly recognised such to be the law, but to have required, in order to make such agreements binding, that they shall be registered before the shares are issued. There is certainly no decision yet which is opposed to the above statement of the law. The observations in *Re Addlestone Linoleum Co.* (15); *Re Almada and Tirito Co.* (16); *Lee* v. *Ueuchatel Asphalte Co.* (17); and *Ooregum Gold Mining Co.* v. *Roper* (14), fall far short of deciding that the value of the property or services paid for in shares can be inquired into or is material in any case in which the sale is not impeached.

These and other cases decided upon the Act of 1867 show: (i) that since that Act, as before, shares must be paid for in money or money's worth; (ii) that since that Act, as before they may be paid for in money's worth; (iii) that since the Act payment in money's worth can only be effectually made pursuant to a properly registered

A contract; (iv) that, even if there is such a contract, shares cannot be issued at a discount; (v) that if a company owes a person £100, the company cannot by paying him £200 in shares of that nominal amount discharge him, even by a registered contract, from his obligations as a shareholder to pay up the other £100 in respect of those shares. That would be issuing shares at a discount [but see note in square brackets supra]. The difference between such a transaction and paying for property B or services in shares at a price put upon them by a vendor and agreed to by the company may not always be very apparent in practice. But the two transactions are essentially different, and while the one is ultra vires the other is intra vires. It is not law that persons cannot sell property to a limited company for fully paid-up shares and make a profit by such transaction. We must not allow ourselves to be misled by talking of value. The value paid to the company is measured by the C price at which the company agrees to buy what it thinks it worth its while to acquire. While the transaction is impeached this is the only value to be considered. This appears to me to be in complete accordance with the passages quoted from the judgments of COTTON, L.J., in *Re Almada and Tirito Co.* (16) (38 Ch.D. at p. 423) and LORDS WATSON and MACNAGHTEN in the *Ooregum Gold Mining Co.'s Case* (14) [1892] A.C. at pp. 136, 137, 147, 148). LORD HERSCHELL'S judgment, as I D understand it, is distinctly favourable to the respondents.

In my judgment, the law is settled, and cannot be declared wrongly settled by this court at any rate. If it is to be altered, the decisions which have settled it must be declared wrong by the House of Lords, or the law must be altered by Act of Parliament. VAUGHAN WILLIAMS, J., has had to consider this matter on more than one occasion—viz., in *Re Theatrical Trust, Ltd., Chapman's Case* (8), and again E in the present case—and on both occasions the principle on which he based his decision is, in my judgment, correct. The summons which has raised the question of Martin and Wragg's liability is of an unusual kind, being a misfeasance summons and an alternative application to enforce payment up of the shares. It was dismissed with costs, and no question was raised on appeal except the important F question of principle which I have considered. The appeal must be dismissed with costs.

A. L. SMITH, L.J., stated the facts, and continued: So much for the facts, and upon these alone, apart from the cases, I agree with VAUGHAN WILLIAMS, J., that the official receiver has failed in his case. When I come to the authorities the same G result follows. It is now well settled law, that for a shareholder in a company limited by shares to have fully paid-up shares, and, therefore, not to be liable for calls in a winding-up of the company, he must show that he has fully paid up to the face value of the shares either in cash or in value received by the company in some form, or partly in cash and partly in value received by the company in some form, and if the payment other than in cash be relied on, this can only be so if H there be a

> "contract duly made in writing, and filed with the Registrar of Joint Stock Companies, at or before the issue of such shares"

pursuant to s. 25 of the Companies Act, 1867. The House of Lords has definitely settled this point in *Ooregum Gold Mining Co.* v. *Roper* (14). Partial payment is not sufficient, but shares may be lawfully issued as fully paid up for considerations I which the company have agreed to accept as representing in money's worth the nominal value of the shares: per LORD WATSON, ([1892] A.C. at p. 136) in the *Ooregum Case* (14).

It is not suggested that the contract of Jan. 10, 1894, is not an honest bargain, or that its consideration is colourable or illusory. Is a liquidator entitled to go into the adequacy of the consideration, and to show if he can that the consideration for the contract was made inadequate unless it appears so upon the transaction itself, or, if not, if he desires to do so, must he not impeach the contract itself? If there be no consideration at all for the shares, and it be shown, as in *Re Eddystone Marine*

Insurance Co. (12), that the words inserted in the registered contract "in consideration of services" were placed there as a mere blind, that will suffice. Again, if in a registered contract a money value be placed upon the consideration which the company had agreed to accept as representing in money's worth the nominal value of the share less than the face value of the share, that share would, I should think, not be fully paid up. For instance, as was put in argument, a contract to supply to a limited company 100 tons of coal, valued at 10s. per ton, as a consideration for 100 £1 shares in the company—i.e., a valued £50 worth of coal for 100 £1 shares—these shares would not be, I think, fully paid up. There would be no necessity in such a case for impeaching the agreement for that the shares were not fully paid up in money or money's worth would be apparent upon its face. COTTON, L.J., in *Re Almada and Tirito Co.* (16) (38 Ch.D. at p. 421), points to such a case as this, though he did not decide it. If, however, the consideration which the company has agreed to accept as representing in money's worth the nominal value of the shares be a consideration not clearly colourable nor illusory, then, in my judgment, the adequacy of the consideration cannot be impeached by a liquidator unless the contract can also be impeached. And I take it to be the law that it is not open to a liquidator, unless he is able to impeach the agreement, to go into the adequacy of the consideration to show that the company have agreed to give an excessive value for what they have purchased.

I will content myself with citing three of the earlier cases which will be found in 5 Ch. App., and I will begin with *Pell's Case* (4). Pell in this case had agreed to sell to a company the goodwill and stock-in-trade of his business in consideration of 1,500 £20 shares of the company fully paid up. The company was wound-up, and no payment for these shares could be found in the books of the company. LORD ROMILLY, M.R., directed an inquiry as to the value handed over by Pell to the company under his agreement with them, and declared that Pell was entitled to be allowed only the amount of that value. This decision was reversed upon appeal, GIFFARD, L.J., holding that, as the agreement was not impeached, the court had ground for going behind the agreement. In the next year (1870) in *Forbes' and Judd's Case* (5), HATHERLEY, L.C., deals with *Pell's Case* (4), and expressly states that, if the consideration is to be impeached, the contract must also be impeached; he says (5 Ch. App. at p. 273):

> "The only difference between GIFFARD, L.J., and the Master of the Rolls in that case was this. The Master of the Rolls thought that Pell, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business; and GIFFARD, L.J., thought that the contract not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over."

The Lord Chancellor clearly approves, and in no way disapproves, of the decision of GIFFARD, L.J., in *Pell's Case* (4).

In *Re Baglan Hall Colliery Co.* (6) GIFFARD, L.J., again lays down what he had stated in *Pell's Case* (4). It is true that in *Leeke's Case* (7), STUART, V.-C., did not like the decisions in *Pell's Case* (4) and *Forbes' and Judd's Case* (5), by LORD HATHERLEY and GIFFARD, L.J. But many cases have been decided since then all in accord with *Pell's Case* (4), which LINDLEY, L.J., has referred to, and I do not repeat them, and not a single case has been cited to the contrary. It appears to me that in the House of Lords in the *Ooregum Case* (14) the principle of *Pell's Case* (4) and *Forbes' and Judd's Case* (5) was distinctly approved. LORD WATSON says ([1892] A.C. at pp. 136, 137):

> "It has been decided that, under the Act of 1862, shares may be lawfully issued as fully paid up, for considerations which the company has agreed to

accept as representing in money's worth the nominal value of the shares. I do not think any other decision could have been given in the case of a genuine transaction of that nature where the consideration was the substantial equivalent of full payment of the shares in cash. The possible objection to such an arrangement is, that the company may over-estimate the value of the consideration, and, therefore, receive less than nominal value for its shares. The court would doubtless refuse effect to a colourable transaction, entered into for the purpose or with the obvious result of enabling the company to issue its shares at a discount; but it has been ruled that, so long as the company honestly regards the consideration given as fairly representing the nominal value of the shares in cash, its estimate ought not to be critically examined. That state of the law is certainly calculated to induce companies who are in want of money, and whose shares are unsaleable except at a discount, to pay extravagant prices for goods or work to persons who are willing to take payment in shares. The rule is capable of being abused, and I have little doubt that it has been liberally construed in practice."

LORD HERSCHELL is very distinct upon this point—he says (ibid. at p. 140):

"But the contrary has been determined. And not only may a share be allotted as fully paid up in respect of property, goods, or services received by the company, but the courts will not inquire into the adequacy of the consideration, and certainly have not required it to be proved that the consideration given was equivalent in cash value to the nominal amount of the shares."

LORD MACNAGHTEN says (ibid. at p. 148):

"It seems to me that all that has been determined so far is, that the court will decline to rip up a transaction not impeached as dishonest, and not proved to be such, merely because the company may have paid an extravagant price for their property."

In my judgment, whether the facts of this case are looked to, or whether the law applicable thereto is looked at, the liquidator is in the wrong, and that my brother VAUGHAN WILLIAMS's judgment was quite right in dismissing his application.

RIGBY, L.J., stated the facts and continued: As it is not suggested that there is ground for setting aside the contract, I do not see, subject to the point which I reserve as to the appropriation of the purchase money, how, consistently—at any rate with *Anderson's Case* (11)—the shares could possibly be treated as not fully paid up. In the present, as in *Anderson's Case* (11), the shares allotted were allotted to vendors, or persons representing vendors, and in *Anderson's Case* (11) the £150,000 worth of shares allotted consisted, to an extent of far more than 50 per cent. of profit reserved to the members of the syndicate selling. That case is undoubtedly binding upon us. It was cited and relied upon in the *Ooregum Case* (14), and was not, I think, in any way disapproved of. Certainly there is nothing in the opinions of the noble and learned Lords to shake the authority of the case. By saying that *Anderson's Case* (11) is an authority binding on us, I do not mean to intimate an opinion that there are not other authorities to the same effect. I think that the series of authorities cited by LINDLEY, L.J., beginning with *Pell's Case* (4), have made it impossible in such a case as above indicated to inquire effectually into the value of the property taken in exchange for shares where the contract itself is not impeached. If these authorities are to be overruled, that must be done by the House of Lords.

But it is said that a clause in the main agreement of Jan. 10, 1894, viz., cl. 3, makes the present case an exception to the general rule. Before examining that clause I will consider what the actual agreement between the parties was, independently of that clause. Clearly, it was a purchase of the whole freehold property dealt with at an entire price. Neither the vendors nor the purchasers would have

sold or bought any one of the items independently of the others. It is not in accordance with the facts that there were a number of independent purchases of separate items, and no one could say that, independently of the clause, it would have been possible to make any appropriation of portions of the purchase money. As the vendors would have the full control over the consideration given, and could divide it in accordance with their rights inter se, there could be no object connected with any difference in those rights in making any appropriation. In addition to this it is manifest that the figures in the clause are not founded on any exact estimate of the rights of the different partners, the figures being throughout round numbers which could hardly by possibility conform to pre-existing rights. It is obvious that it could not in any way make the slightest difference to the company, except for the stamp duty payable, that part of the consideration should be given for one part of the assets rather than for another. My conclusion is, that the clause was intended to be operative only as regards stamp duty. The apportionment may have been a wrong apportionment, but that cannot alter the nature of the contract, or entitle the company to deal exceptionally with it. I am not prepared to say that in no case can the consideration in kind given for paid-up shares be inquired into, even although there may be nothing on the face of the contract to show the insufficiency of the consideration, but I abstain from attempting to define what the cases are. I think it sufficient to say that, in my judgment, the opinions of the noble and learned Lords in the *Ooregum Case* (14) sufficiently indicate that such cases may arise. They must be dealt with when they do arise.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; Colyer & Colyer; A. E. Greville.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

KENNEDY *v.* DE TRAFFORD AND ANOTHER

[House of Lords (Lord Herschell, Lord Macnaghten, Lord Morris and Lord Shand), March 18, 19, 1897]

[Reported [1897] A.C. 180; 66 L.J.Ch. 413; 76 L.T. 427; 45 W.R. 671]

Mortgage—Sale—Duties of mortgagee.

Mortgage—Sale—Sale of mortgaged property to one of several mortgagors—Mortgage of property by tenants in common—Purchaser a co-tenant—Fiduciary relationship.

Two tenants in common mortgaged a property and one of them collected the rents and managed the property. The power of sale having become exercisable, the mortgagee gave notice that, unless the mortgage were paid off, he would sell at a price equal to principal, interest and costs. He received no objection to a sale on those terms and later sold the property under his power of sale for the stated price to the co-tenant who had collected the rents.

Held: (i) in the circumstances the mortgagee had taken proper precautions in complying with the provisions of his power of sale and had acted in good faith, and the sale could not be set aside; (ii) the sale could not be impeached on the ground of any fiduciary relationship created by co-ownership or by reason of the collection of rents having been left in the hands of the co-tenant who had purchased the property.

Decision of the Court of Appeal, [1896] 1 Ch. 762, affirmed.

Notes. Considered: *Nutt* v. *Easton*, [1899] 1 Ch. 873. Referred to: *Field* v. *Debenture Corpn.* (1896), 12 T.L.R. 469; *Re Biss*, *Biss* v. *Biss*, [1900-3] All E.R. Rep. 406; *Griffith* v. *Owen*, [1904-7] All E.R. Rep. 718; *Birkin* v. *Smith*, [1909] 2 K.B. 112; *Reliance Permanent Building Society* v. *Harwood-Stamper*, [1944] 2 All E.R. 75.

As to the mode of exercise of the power of sale and purchase by one co-owner of the equity of redemption, see 27 HALSBURY'S LAWS (3rd Edn.) 302, 307; and for cases see 35 DIGEST 503-504. As to the incidents of tenancy in common, see 32 HALSBURY'S LAWS (3rd Edn.) 340-343; and for cases see 38 DIGEST (Repl.) 827-828.

Cases referred to:

(1) *Van Horne* v. *Fonda* (1821), 5 Johns. Ch. (N.Y.) 388.

(2) *M'Mahon* v. *Burchell* (1846), 2 Ph. 127; 1 Coop. temp. Cott. 457; 8 L.T.O.S. 289; 41 E.R. 889, L.C.; 38 Digest (Repl.) 828, *407*.

Also referred to in argument:

Ex parte Lacey (1802), 6 Ves. 625; 31 E.R. 1228, L.C.; 43 Digest 780, *2202*.

Carter v. *Palmer* (1841), 8 Cl. & Fin. 657; 8 E.R. 256, H.L.; 35 Digest 378, *1216*.

Eyre v. *M'Donnell* (1864), 15 I.Ch.R. 534.

Orme v. *Wright* (1839), 3 Jur. 19, 972, L.C.; 35 Digest 503, *2341*.

Martinson v. *Clowes* (1882), 21 Ch.D. 857; 51 L.J.Ch. 594; 46 L.T. 882; 30 W.R. 795; on appeal (1885), 52 L.T. 706, C.A.; 35 Digest 499, *2303*.

Keech v. *Sandford* (1726), Sel. Cas. Ch. 61; 2 Eq. Cas. Abr. 741; Cas. temp. King, 61; 25 E.R. 223; White & Tud. L.C. (6th Edn.) 53, L.C.; 43 Digest 633, *720*.

Palmer v. *Young* (1684), 1 Vern. 276; 1 Eq. Cas. Abr. 380; 23 E.R. 468; 43 Digest 632, *709*.

Hamilton v. *Denny* (1809), 1 Ball & B. 199; 35 Digest 636, *3679i*.

Rushworth's Case (1676), Freem. Ch. 13; 22 E.R. 1026; 35 Digest 310, *571*.

Howard v. *Ducane* (1823), Turn. & R. 81; 1 L.J.O.S.Ch. 85; 37 E.R. 1025, L.C.; 40 Digest (Repl.) 770, *2544*.

Henderson v. *Eason* (1851), 17 Q.B. 701; 21 L.J.Q.B. 82; 18 L.T.O.S. 143; 16 Jur. 518; 117 E.R. 1451, Ex. Ch.; 38 Digest (Repl.) 828, *405*.

Appeal from a decision of the Court of Appeal (LINDLEY, KAY, and A. L. SMITH, L.JJ.), [1896] 1 Ch. 762, reversing a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The action was brought by one Kennedy, as trustee in bankruptcy of one Carswell, against one De Trafford, the surviving executrix of Sir Humphrey De Trafford, deceased, and one Dodson, to set aside a sale to Dodson under a power of sale contained in a mortgage deed of certain property in Manchester, which had belonged to Carswell and Dodson as tenants in common, and had been mortgaged by them to Sir Humphrey De Trafford.

The facts of the case appear in the speech of LORD HERSCHELL.

The Vice-Chancellor of the County Palatine of Lancaster held that there was evidence that Dodson stood in a fiduciary relation towards the appellant, and that the sale was not a due exercise of the power, and ordered it to be set aside, but his judgment was reversed by the Court of Appeal and the trustee in bankruptcy appealed.

Farwell, *Q.C.*, and *Maberley* for the appellant.

Warrington, *Q.C.*, and *Clarkson* for the respondent De Trafford.

Astbury, *Q.C.*, and *Dodson* for the respondent Dodson.

LORD HERSCHELL.—I confess that I think this as hopeless an appeal as has ever been presented to your Lordships. The action is brought against the mortgagees of some property in Manchester, to set aside a sale made by them under the

power of sale contained in their mortgage deed. The property mortgaged was held by two persons, the respondent Dodson and a Mr. Carswell, as tenants in common. They were co-owners, each possessing an undivided moiety. The mortgage was for a sum of £60,000 to Sir Humphrey De Trafford who is represented, he being dead, by the respondent De Trafford. It appears that the mortgagees became uneasy about their security, it matters not why, and gave notice calling in the money, and pressing for payment. Payment was not made. Various proposals from time to time were made, none of which came to any effect. At the time to which I am referring, Carswell had transferred his interest by a voluntary settlement to Brown, and he afterwards became bankrupt, and, on the occasion of his bankruptcy, Dr. Kennedy, the appellant, was appointed trustee.

The rents, no doubt, were collected from time to time by Dodson, one of the respondents in this action, and one of the co-owners. I will come in a moment to the circumstances under which they were collected, but I will deal first with the questions raised with regard to the circumstances of the sale. Having, as I have said, called in their money, and payment not having been made, as they desired to reduce the mortgage debt, the mortgagees, then represented by their solicitor, Mr. Taylor, stated that they must be paid the rents of the property as received, instead of their being held by the co-owners for their own benefit, subject to the payment of the interest. Accordingly from a date in the year 1887, the rents were paid over from time to time, by Mr. Dodson who received them, to the mortgagees. But they were not satisfied to let that state of things continue indefinitely; they kept pressing for payment and insisting upon payment. Ultimately they gave notice that they would take proceedings to foreclose. It was suggested that there should be a conveyance of the equity of redemption to save the trouble of foreclosing. Then they gave to Dr. Kennedy, the trustee in the bankruptcy, who represented one moiety, this notice:

> "Our clients' instructions are to realise this security if they can obtain principal, interest, and costs. Is Mr. Carswell's trustee (that is, Kennedy) prepared to pay them off? If not, we shall forthwith endeavour to effect a sale by private treaty. We are writing a similar letter to Mr. Dodson."

There was a similar letter written to Mr. Dodson.

The mortgagees, having given that distinct notice that unless the parties came forward and paid off the mortgage they were prepared to sell at a price which would realise principal, interest, and costs, it seems that at a somewhat later period Mr. Dodson entered into negotiations to become himself the purchaser of the property, and ultimately an arrangement was come to in December, 1888, according to which the mortgagees were willing to sell to Dodson for the amount of principal, interest, and costs, and they were willing to leave £54,000 of the money on mortgage after the sale was completed. Mr. Dodson wished for some delay in order to be able to be in a position to carry out that arrangement, and it was agreed that the matter should be completed in the following April. In the month of February, 1889, a communication was made to Dr. Kennedy, or to his solicitor (it matters not which), that the mortgagees were negotiating a sale on the basis of payment of an amount equal to principal, interest, and costs; so that that was known to Dr. Kennedy in February, 1889. In May the transaction was completed by a conveyance. In the autumn of 1891 Dr. Kennedy took his first step in the way of making inquiries as to what the mortgagees had done, with a view to this action which was afterwards brought.

The appellant seeks to set aside the sale, on the ground that the mortgagees have been guilty of a breach of duty in relation to this sale. First of all, it is said that they have sold at an undervalue, and that that sale at an undervalue has arisen from their not discharging the duties incumbent upon them as mortgagees. It is not disputed that they sold in good faith. They did not intend to do anything else but properly exercise the power of sale vested in them under their mortgage. But it is

A alleged that they did not put up the premises for sale by auction, that they only inserted two advertisements inviting a sale by tender, and that they ultimately sold for the amount of principal, interest, and costs to Mr. Dodson. I am myself disposed to think that, if a mortgagee, in exercising his power of sale, exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he had been guilty of B any breach of duty towards the mortgagor. LINDLEY, L.J., in the court below, says that

> "it is not right or proper or legal for him, either fraudulently or wilfully or recklessly, to sacrifice the property of the mortgagor."

C Well, I think that is all covered really by his exercising the power committed to him in good faith. It is very difficult to define all that would be included in the words "good faith," or to give an exhaustive definition of them, but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully and recklessly deals with the property in such a manner that the interests of the mortgagor are sacrificed, I should say that D he had not been exercising his power of sale in good faith.

It is not necessary in this case to give an exhaustive definition of the duties of a mortgagee to a mortgagor, because it appears to me that, if you were to accept the definition of them for which the appellant contends, namely, that the mortgagee is bound to take reasonable precautions in the exercise of his power of sale, as well as to act in good faith, I think in this case he did take reasonable precautions. E Of course, all the circumstances of the case must be looked at. To sell in the manner in which the sale here took place might, let us assume for the moment, be under some circumstances improper; what we have to deal with are the existing circumstances. Here there are the two co-owners, who are not acting in all respects harmoniously together. The mortgagee communicates what he is about to do to each of these co-owners. He tells each of them that he is preparing to sell, and that F he is willing to take principal, interest, and costs. To that he has received from the present appellant no remonstrance, no answer. Why is he to suppose for a moment that he would receive no answer or remonstrance if Dr. Kennedy thought that selling on such terms would be an improper sale, as being at an undervalue, because it must be certain that more than that sum could be easily obtained? It is obvious that, where such a communication is made, and no answer is received, and G no objection put forward, the mortgagee may very reasonably suppose that no objection can be taken, and that nobody considers that he will be selling at an undervalue if he sells for principal, interest, and costs. Having regard to the notice given under those circumstances to Dr. Kennedy, and to the fact that he had heard in February, 1889, that the property was being sold for principal, interest, and costs, and then took no objection to it, it seems to me preposterous for him to come H forward at this time of day and allege that he has a right on that ground to insist that the sale is invalid on the ground that the mortgagee has not taken proper precautions in making the sale.

But then it is said that the sale was made to a person who was incapable of buying because he was in a fiduciary relation, and that that fiduciary relation was known to the mortgagees who sold. I do not think it established here at all that there was I a fiduciary relation between the defendant Dodson and Kennedy. What are the facts? The mortgagors are co-owners, and no doubt one co-owner, Mr. Dodson, has been left, by Carswell in the first instance, I daresay, to collect the rents. Afterwards an arrangement was come to between him and Mr. Brown, who then represented Carswell's interest, that Dodson should collect the rents and pay the money into a bank, and that each of them should draw on that account for the expenses and for the division of the money which thus belonged to them. But it is a fallacy altogether to say that Dodson only got his right to collect the rents by virtue of that arrangement. Dodson was an owner of this property—the owner of

an undivided moiety, it is true, but each owner of an undivided moiety is none the less truly an owner, and Dodson in collecting those rents and profits collected them in the right which he possessed as a co-owner of the property. He did not need agency or the appointment of agent to justify him in collecting those rents. If nothing had ever passed between the two co-owners which constituted an authority from the one to act for the other, his right to collect those rents would not have been one jot or one tittle less that it was. No doubt an arrangement was come to that those rents when collected were to be paid into a bank upon which both the co-owners were to draw, but that was an arrangement that might have been put an end to at any time. It was merely an arrangement which was come to by voluntary agreement between the two co-owners. Each co-owner would have an obligation to account to the other in respect of any rents he collected, or moneys he received under it.

So much for the relation between Dodson and Brown prior to the bankruptcy, or prior to the date of the setting aside of the voluntary agreement; but after that date Dr. Kennedy became a co-owner, and there was no arrangement between Dr. Kennedy and Mr. Dodson at all. What happened was this—that the mortgagees had said to Dodson: "Now you must pay over the rents to us in reduction of our mortgage debt and payment of interest. You must no longer keep them or pay them to your co-owner." They were in a position to insist upon that. Accordingly, they insisting upon that, Dodson did deal in that way with the rents which he collected. That was the state of things during the time that Kennedy was the co-owner. I do not understand it to be suggested that during Kennedy's time Dodson was agent for Kennedy. He not only never received any authority from Kennedy to collect these rents, but he never did collect them for Kennedy otherwise than as paying them over to the mortgagees to whom he was bound to pay them over. At all events it is enough to say that there is not a shadow of ground for suggesting that during that time he was the agent of Kennedy.

But then it is said that during that period he was the agent of the mortgagees, because, they having insisted that he was to collect these rents and pay them over to them, he became their agent in that respect. It seems to me to be clear that he was not their agent to collect these rents. He collected these rents in his own right, the right he had as owner—he was collecting his own rents. No doubt they had insisted that those rents should be paid to them; but how the fact that the mortgagees had said when you have got your rents pay them to us, made Dodson their agent to collect them, I am at a loss to see. Therefore, I take it to be abundantly clear that he was not the agent of the mortgagees in collecting the rents any more than he was the agent of Dr. Kennedy, or than he had been the agent of Brown.

But then it is said, if you look at the evidence of Dodson you will find that he said he was an agent. I confess that I do not think it is of any importance to look at any particular words of that sort used in evidence, especially when the words originated from the counsel and did not originate with the witness. No word is more commonly and constantly abused than the word "agent." A person is spoken of as an "agent," and no doubt in the popular sense of the word he may be said to be an "agent," although, when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency, that use of the word is only misleading. Therefore, whatever expressions Dodson may have used calling himself an agent, and however true or applicable they may have been in a popular sense, in point of law and in their legal sense they are meaningless. Dodson was not the agent of Kennedy, and he was not the agent of the mortgagees. If that be so, there is an end of the fiduciary relationship which is supposed to prevent his being a purchaser.

It is said in the present case—and I think that it is the only other point that is urged—that it was concealed by the vendors, the mortgagees, from Kennedy that Dodson was the person who was purchasing, although they informed Kennedy that

the purchase was being made, and they informed him of the terms on which it was being made. It seems to me to be utterly unimportant. If there was no fiduciary relation there was no obligation to reveal the name. There was no right in the other party to know it; there was no duty upon them to communicate it. Therefore, it seems to me that all the grounds upon which the right to set aside this sale have been rested utterly and entirely fail.

Another point has been raised—whether it arises upon the pleadings or not seems very doubtful—namely, that, whether the sale is to be set aside or not, Kennedy is entitled to claim, as against Dodson, that, under the circumstances under which Dodson bought, he should be declared trustee of the one moiety for Kennedy. That depends, in the first place, upon the question of the fiduciary relationship between them, arising out of what has been said to be the management of the property and the collection of the rents. I have already—I think sufficiently—dealt with that part of the case. It is quite clear that, in all the transactions for some time prior to this sale, Dodson was not in any sort of way acting for his co-owner—the two were acting each for himself. The communications from the mortgagees were made to both of them, and, so far from Dodson acting as Dr. Kennedy's agent, there was a certain amount of hostility between them—at any rate, there was a want of harmonious action.

But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such a relationship between them that the one co-owner could not take this property and hold it for himself, but that the co-owner is entitled, on equitable grounds, to have it declared that the benefit of one part of that purchase should be his. No authority has been cited in support of such a proposition. Cases have been referred to, of a very different description, where the owner of an estate under a settlement—a tenant for life, for example—has been held incapable of obtaining an enlargement of that estate for himself alone. It has been said that, whatever benefit he gets must enure to the benefit of all taking under the settlement. That is a totally different case from this case. The only authority—if it can be so called—which has been cited is the case before Chancellor KENT, but he commences his observations by saying that he is not going to lay down a general rule which would be applicable to such a case as this. He deals with that case—the circumstances of which were peculiar and of immense complication—and he certainly does not lay down any rule or doctrine of law which supports the argument which has been addressed to your Lordships: *Van Horne* v. *Fonda* (1). It is not necessary to enter into the details of that case; it is enough to say that, even if it is to be taken as enunciating a rule of law which would be as applicable in this country as in America, it does not enunciate any rule of law which would be sufficient for the appellant in the present case. I think that I have now covered the whole of the ground, and it only remains for me to move your Lordships that this judgment be affirmed, and the appeal dismissed with costs.

LORD MACNAGHTEN.—I am of the same opinion. Counsel for the appellant has argued this case with his usual ability and his usual fairness; but I must say that in the whole course of my experience I have never met with so bold and so hopeless an appeal. Certainly I never expected to find a proposition which was thought by a great judge to be so unreasonable and so absurd that of itself it made a complete answer to a case which had some show and appearance of justice, put forward as the foundation and the starting point of a serious argument in this House. I find that in *M'Mahon* v. *Burchell* (2), before LORD COTTENHAM, one tenant in common sued another tenant in common who had been in occupation of the property and claimed rent from him. The Lord Chancellor says (2 Ph. at p. 134):

> "I must, therefore, take it that the defendant means to raise this proposition: that the fact of the plaintiff having occupied the house, not in entirety but as a tenant in common, makes him liable to his co-tenant. A case has been

referred to in which the Vice-Chancellor of England is represented to have so decided, but I cannot think that the Vice-Chancellor can have laid down any such doctrine; for the effect would be that one tenant in common by keeping out of the actual occupation of the premises might convert the other into his bailiff."

And then he goes on to say that there is no foundation for any such doctrine as that. That is exactly the ground on which this case was opened before your Lordships. It was said that Dr. Kennedy took no part in the management of the property, that he left the dealing with the property entirely to Dodson, and that, therefore, Dodson was his bailiff. That was the exact position which Mr. Farwell said in the opening of his case Dodson occupied. There is no foundation for such a proposition that I can find in any of the books or in any of the authorities that have been cited. Nor is there anything in the other ground on which it was attempted to rest this case—the doctrine of principal and agent. In the whole of the evidence I cannot find a single word, or a single scrap of evidence, to show that Dodson ever accepted the position of agent in regard to Dr. Kennedy as his principal. On both these grounds it appears to me that the case entirely fails.

But I must say that I rather think that Dr. Kennedy did himself injustice and did injustice to his clients in saying that he left everything to Dodson, because I find a bill of costs of Dr. Kennedy's solicitors which shows that they exerted themselves as they were bound to do—they exerted themselves very thoroughly for several months, making inquiries here, and making inquiries there, and doing everything that could be expected from persons in their position. That bill begins on May 29, 1888, and goes down to August. They get all the documents, they write to all sorts of people, and they receive several answers, and they have several attendances on them; they write letters to parties requiring particulars of the property and so on. That bill goes down to Aug. 3, and then on Aug. 10, there comes this letter from Taylor and Co. to these gentlemen saying:

"As we have had no communication from you in this matter since your client's moiety was put up to auction, we presume he has abandoned the idea of purchasing, and we shall now deal with the property as we think best in the interests of our clients without any further notice to your client."

That letter does not seem to have been answered, and it appears to me that when they received no answer to that letter the mortgagees were justified in supposing that Dr. Kennedy had done his best to see if he could make any profitable use of this property, whether he could find a purchaser for it, and being satisfied that he could not do so, had abandoned the property, and thereupon they sold the property, as I think they were entitled to do, to Dodson. I think that they did everything that could reasonably be expected of them, but I entirely agree with what has fallen from my noble and learned friend on the Woolsack, if a mortgagee selling under a power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached. I entirely agree that this appeal must be dismissed with costs.

LORD MORRIS.—I concur. There is nothing that I can add with advantage.

LORD SHAND.—This case has formed the subject of very full opinions in the Court of Appeal. After what your Lordships have said, I have nothing to add except that I entirely concur in what was said by the judges in the court below, and in what has fallen from your Lordships.

Appeal dismissed.

Solicitors: *Chester, Mayhew, Broome & Griffithes*, for *Crofton, Craven & Worthington*, Manchester; *L. W. Byrne*, for *Taylor, Kirkman & Colley*, Manchester; *Pritchard, Englefield & Co.*, for *Boote & Edgar*, Manchester.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

MANNERS *v.* PEARSON & SON

[Court of Appeal (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), May 2, 3, 23, 1898]

B [Reported [1898] 1 Ch. 581; 67 L.J.Ch. 304; 78 L.T. 432; 46 W.R. 498; 14 T.L.R. 312; 42 Sol. Jo. 413]

Action—Account—Action for balance found due, not for several items included therein.

Money—Foreign currency—Rate of exchange—Date of conversion—Action for account—Date when balance found due.

C An action for an account in equity is an action for the balance found due on taking the account, and not for the several items to be included in it. Accordingly, where an action was brought in this country by a creditor to have an account taken of money payable to him periodically by the defendant in foreign currency under a contract made abroad, and the court directed an account to be taken,

D **Held** (Vaughan Williams, L.J., dissenting), the creditor was not entitled to have the sums so payable converted into English money at the rate of exchange prevailing at the date when each periodical payment became due; the relevant date was that on which the balance due on the account was found.

Notes. Distinguished: *Lebeaupin* v. *Richard Crispin & Co.*, [1920] All E.R. E Rep. 353. Considered: *Di Ferdinando* v. *Simon, Smits & Co., Ltd.*, [1920] All E.R. Rep. 347; *Société des Hotels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459. Explained: *Celia (Owners)* v. *Volturno (Owners)*, [1921] All E.R. Rep. 110. Distinguished: *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] All E.R. Rep. 219; *Re British American Continental Bank, Goldzieher and Penso's Claim*, [1922] 2 Ch. 575. Considered: *Re United Railways* F *of the Havana and Regla Warehouses, Ltd.*, [1960] 2 All E.R. 332. Referred to: *Re Chesterman's Trusts, Mott* v. *Browning*, [1923] All E.R. Rep. 705; *Madeleine Vionnet et Cie.* v. *Wills*, [1939] 4 All E.R. 136.

As to the conversion into sterling of money payable in foreign currency, see 27 Halsbury's Laws (3rd Edn.) 6, 7; and for cases see 35 Digest 172-176.

G Cases referred to:

(1) *Cash* v. *Kennion* (1805), 11 Ves. 314; 32 E.R. 1109, L.C.; 35 Digest 173, *35*.

(2) *Cockerell* v. *Barber* (1810), 16 Ves. 461; 33 E.R. 1059, L.C.; 35 Digest 172, *33*.

(3) *Scott* v. *Bevan* (1831), 2 B. & Ad. 78; 9 L.J.O.S.K.B. 152; 109 E.R. 1073; 35 Digest 174, *44*.

(4) *Bertram* v. *Duhamel* (1838), 2 Moo. P.C.C. 212; 12 E.R. 984, P.C.; 35 Digest H 176, *56*.

(5) *Suse* v. *Pompe* (1860), 8 C.B.N.S. 538; 30 L.J.C.P. 75; 3 L.T. 17; 7 Jur.N.S. 166; 9 W.R. 15; 141 E.R. 1276; 35 Digest 173, *37*.

Also referred to in argument:

Delegal v. *Naylor* (1831), 7 Bing. 460; 5 Moo. & P. 443; 9 L.J.O.S.C.P. 167; 131 E.R. 178; 35 Digest 174, *43*.

I

Appeal from a decision by Kekewich, J., in an action brought for an account of what was due from the defendants to the plaintiff as the legal personal representative of one Morison under a contract entered into between him and the defendants.

The contract was dated Oct. 6, 1891. It was in the English language, and was made between Morison, described as a British subject, of the city of Mexico, of the one part, and the defendants, described as of 10, Victoria Street, Westminster, and called the contractors, of the other part, and by it the defendants agreed to pay Morison (i) £595 17s. 6d. in English money on the execution of the agreement; (ii)

one cent. in Mexican currency for every cubic metre of certain excavation works mentioned in the agreement. This one cent. was payable from time to time as and when the same should be received by the defendants from the junta or committee of management of the drainage works of the city and valley of Mexico. The contract provided as follows :

> "3. The contractors shall within one month from the date of this agreement, and monthly thereafter, make and furnish to the said A. D. Morison a statement in writing of the total number of cubic metres of excavation which shall have been done by the contractors and paid for by the junta to them as aforesaid up to the date of such account, and of the amount then payable to the said A. D. Morison at the rate of one cent. per cubic metre, and the contractors shall be entitled to take credit for and deduct therefrom all sums paid by them to the said A. D. Morison on account thereof, as per statement attached, and they shall immediately thereafter pay the balance appearing by such account to be due to him. 4. Subsequent payments shall be made by the contractors to the said A. D. Morison as and when the contractors shall from time to time receive from the junta payment for excavation done by them . . ."

The £595 17s. 6d. was duly paid, and so long as Morison lived the defendants paid him all that became due to him under the contract. He died in June, 1894, and no one became his legal personal representative until May, 1896, when the plaintiff took out letters of administration to his estate.

In June, 1896, the plaintiff brought this action for an account. It came on for trial on Nov. 4, 1897, and the court then declared that the plaintiff was entitled to have an account taken of what was due and payable to him as Morison's legal personal representative under and by virtue of the agreement, and in taking such an account the defendants were to be credited with a sum of £327, as to which no question arose. The defendants had made no other payments since Morison's death, but had always kept proper accounts of the sums payable to Morison's estate in Mexican dollars. The plaintiff accepted these accounts as correct. On Nov. 15, 1897, the defendants delivered an account showing that on Aug. 31, 1896, a balance of 19,366 dollars was due from them to the plaintiff. On the accounts two questions arose. First, the plaintiff contended that the dollars ought to be turned into English money whenever any dollars ought to have been paid by the defendants, while the defendants contended that the ultimate balance only ought to be turned into English money. Secondly, the plaintiff contended that, even if the defendants were right in their first contention, this balance ought to be turned into English money on Aug. 31, 1896, when the excavating work was finished and paid for by the Spanish government. At that date the rate of exchange for a Mexican dollar stood at 2s. 6d. The defendants, on the other hand, contended that the balance ought to be turned into English money on Nov. 13, 1897, when the amount due was first ascertained and the dollar was worth only 1s. 10¼d.

In these circumstances the plaintiff served the defendants with a notice of motion asking that it might be directed that the account should be taken with monthly rests, and that the amount of Mexican dollars found to be due at the foot of each monthly account should be converted into English money sterling as on the date of such monthly account, and at the rate of exchange between Mexican currency and English currency at that date; or, in the alternative, that the amount of Mexican dollars found to be due at the end of each year should be converted into English money sterling as on that date, or that the amount of Mexican dollars found to be due on the date of the grant of letters of administration should be converted as on that day; or that the amount of Mexican dollars found to be due on the date of the judgment should be converted as on that day, or on such date and at such rate of exchange as to the court should seem fit; and further, that the defendants should pay to the plaintiff interest at the rate of 4 per cent. per annum from the date of the judgment upon the amount found to be due. The motion was heard by

A Kekewich, J., on Feb. 11, 1898, and was refused with costs. The plaintiff appealed. The notice of appeal asked for a declaration that in taking the account the plaintiff was entitled to have the amount of dollars found due at the end of each month converted into English money at the rate of exchange prevailing at that date; or, in the alternative, that he was entitled to have the dollars found by the account delivered B to be due on Aug. 31, 1896, converted as on that day; or, in the alternative, at the rate of exchange on such day as the court thought fit.

H. Terrell, Q.C., and *Cecil Walsh* for the plaintiff.
Renshaw, Q.C., *J. Tanner*, and *C. W. Bardswell* for the defendants.

Cur. adv. vult.

C Mar. 23, 1898. The following judgments were read.

SIR NATHANIEL LINDLEY, M.R., stated the facts and continued: Before considering the questions raised by this appeal it is necessary to ascertain the grounds on which any judgment or order for payment in English money can be properly made in a case where the plaintiff sues upon a contract to pay in the D currency of a foreign country. The terms of the contract in the present case confer no right to payment in English money. If the defendants had tendered to their creditor either in Mexico or wherever he demanded payment the amounts due from them in Mexican dollars at the proper times they would have offered to perform their obligations in strict accordance with their contract.

The necessity for considering what amount the defendants ought to pay in English E money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and speaking generally the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid, whether for principal, interest, or damages, must be expressed in English money, or such order cannot be enforced by the F ordinary writs of execution. Whether before the Debtors Act an order in Chancery for the payment of so many Mexican dollars could have been made and could have been enforced by attachment I do not pause to inquire. With this possible exception the above statement is correct and affords the true explanation of the necessity for considering how much money in English currency the defendants ought to pay the plaintiff. If the defendants were within the jurisdiction of any other civilised G State and were sued there, as they might be, the courts of that State would have to deal with precisely the same problem, and to express in the currency of that State the amount payable by the defendants instead of expressing it in Mexican dollars. If this be the true explanation of the necessity for expressing in English money what the defendants ought to pay, it follows that such necessity does not arise until the court orders payment. But it does not follow that the sum to be inserted in the H order is the equivalent at that time of the moneys payable by the terms of the contract, for the defendants may be liable, not only to pay those sums, but also damages in the shape of interest or otherwise for not having paid them at the proper time. The obligations, if any, of the defendants in this respect must be determined before the amount for which they are liable can be calculated and expressed in any order for payment.

I The foregoing considerations furnish the principles on which the present case must be decided; and that principle was clearly expressed by Lord Eldon in *Cash* v. *Kennion* (1). He said (11 Ves. at p. 316):

> "I cannot bring myself to doubt that where a man agrees to pay £100 in London on Jan. 1, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of the country ought to give him just as much as he would have had if the contract had been performed."

The application of this principle to various circumstances is illustrated by other decisions (e.g., *Cockerell* v. *Barber* (2), *Scott* v. *Bevan* (3), *Bertram* v. *Duhamel* (4), but it is unnecessary to refer to them at length, and I pass to the facts of the present case. A

It must be borne in mind that for two years after Morison's death he had no legal personal representative to whom the defendants could pay anything. During all that time the defendants did not break their contract in not making the payments which they had agreed to make, and, there being no breach of contract, damages for non-payment during that time are out of the question. Moreover, there is no evidence that interest is payable by the law of Mexico on debts in respect of which there is no contract to pay interest, as is the case here. When, in May, 1896, the plaintiff became Morison's administrator he became entitled to demand from the defendants (i) payment at once in Mexican dollars of all arrears due under the contract; and (ii) payment in future, in Mexican dollars and at the stipulated times, of the amounts which should thereafter become due under the contract. Failure by the defendants to make these payments would be breaches by them of their contract, and would expose them to claims for damages in some shape or other. B C

How these damages would have to be ascertained by an English court if it became necessary to assess them is a question of some difficulty, as will be seen by turning to STORY ON THE CONFLICT OF LAWS, ss. 308 et seq. and SEDGWICK ON DAMAGES (3rd Edn.), p. 250. But, for reasons which I proceed to state, I am of opinion that no claim by the plaintiff to damages in any shape can be supported in the present case. The order of Nov. 4, 1897, was the judgment on the trial of the action, and it limits the right of the plaintiff to an account of what is due to him from the defendants under their agreement with Morison. This judgment excludes all claim to damages for non-payment of particular sums charged against the defendants in taking the account. If the plaintiff wanted to charge the defendants with damages in taking the account he should have obtained some declaration or inquiry entitling him to such damages. Before the Judicature Acts no one ever heard of investigating damages in taking an account in Chancery of money due under a contract. Since the Judicature Acts damages can be given in the Chancery Division where they could not have been given before, but even now a judgment or order for an account of what is due under a contract does not involve an inquiry as to damages in taking the account. D E F

The absence from the judgment of Nov. 4, 1897, of any declaration or inquiry as to damages is easily explained by the long delay in obtaining letters of administration to Morison's estate, during which time no damages could be payable by the defendants; but even as to damages since the plaintiff obtained letters of administration the judgment pronounced is fatal to the plaintiff's first contention, that he is entitled to have all sums payable by the defendants turned into English money at the times when those sums became payable according to the terms of the contract. Such a contention can only be supported on the theory that the defendants are liable for damages for default in payment. To substitute English money for Mexican dollars every time a payment ought to have been made is not to take an account of what is due under the contract, but to give damages for every breach of it which the plaintiff can prove that the defendants committed, which is a totally different matter. Even as regards the balance of 19,600 dollars found due to the plaintiff, I see no grounds for awarding him damages for the non-payment of that sum before it was ascertained. The plaintiff urges that it now appears that this sum ought to have been paid on Aug. 31, 1896; but how could it have been paid then when no one knew what the amount payable was? The sum in question is the balance due on taking the whole account. Under the judgment of Nov. 4, 1897, the defendants are not chargeable with damages for delay in accounting, any more than they are chargeable with damages for not punctually paying sums properly placed to their debit in taking the account. Moreover no undue delay in accounting was proved so far as we know. As soon as the balance was ascertained the defen- G H I

dants offered to pay it to the plaintiff either in Mexican dollars or in English currency equal to their then value, as the plaintiff might prefer. This offer the plaintiff declined.

In my opinion, the defendants have been in the right throughout in this particular controversy, having regard, as we must, to the terms of the contract and to the judgment of Nov. 4, 1897, which is not appealed against. The appeal, in my opinion, fails, and ought to be dismissed with costs.

RIGBY, L.J., stated the facts and continued: The judgment contains no directions as to the way of taking the account, and orders no inquiries for the purpose of fixing the defendants with anything more than the balance which may be found due as the result of taking the account, and under it no claim for damages could arise. It is plain that the parties contemplated the probability of their settling the account out of court, and the defendants promptly rendered, on Nov. 15, 1897, an account showing a balance due to the plaintiff, down to Aug. 31, 1896, of 19,366 dollars Mexican currency. This account did not profess to be a final account, as certain further sums would become payable on commission on the completion of the excavation contract entered into by the defendants, but it included everything down to the date of its being rendered. So far as the balance in Mexican currency is concerned, it has been admitted by the plaintiff to be correct as to figures if only the account is to be taken in the manner in which the defendants had taken it—that is to say, in Mexican currency. The plaintiff, however, contended that it had not been rightly taken, and, down to the bringing of the present appeal, the parties have been at variance as to the way in which the account should be taken.

The difference arose in this way. The defendants, after taking the account in Mexican currency, turned the balance (admitted to be correct as a mere question of figures) into English money at the rate of exchange of the day—22¼d. per dollar, which brought out a sum of £1,795 8s. 11d., from which they deducted £327 6s. 6d., and offered the balance—£1,468 2s. 5d. This the plaintiff refused to receive, claiming to have the account taken on the principle of charging the defendants with the sums payable monthly, estimated in English money at the respective dates on which they became payable. This principle, if allowed, would have necessitated the entire opening of the account from beginning to end, and would, of course, have brought out a balance very different in value from the actual balance of 19,366 dollars shown in the account. After a further unexplained delay of nearly three months the plaintiff, on Feb. 4, 1898, brought this motion. He was not, in my judgment, entitled to a direction to the effect of any one of the alternatives suggested in the notice of motion, though probably the defendants would have had no objection to that alternative which suggested as the time for ascertaining the value of the dollars the date of the judgment, viz., Nov. 4, 1897. In support of the claim for interest at 4 per cent. from the date of the judgment I can see no possible ground. The judgment was not a final judgment for an ascertained sum, and it would be altogether without precedent to grant interest in the circumstances. The claim, however, plainly shows, as do the others, that the account rendered on Nov. 15, 1897, was not accepted as a sufficient settlement of accounts.

As to the first alternative claim, which seems to have been most argued in the court below, as it was on the appeal, it would be sufficient to say that it treats the defendants as having been in default from the death of Mr. Morison, and would be giving the plaintiff the advantage of the delay in taking out administration and in the conduct of the action which would be plainly unjust. In addition to this it proceeds upon an entire misapprehension of the nature of an action for account in equity, which is an action for the balance found due on the taking of the account, and not for the several items to be included in it. The notice of appeal drops all the claims for directions contained in the motion before KEKEWICH, J., except the first, and substitutes for the abandoned alternatives one for fixing Aug. 31, 1896, as the day for conversion of Mexican dollars. It seems to me that a sufficient answer to

that claim is, that the account showing a balance to that date was not delivered until Nov. 15, 1897, and, even if accepted on that date, could not have formed the basis of an order at an earlier period. But in truth, as before pointed out, it was not accepted in any sense as a satisfactory account until, at the earliest, during the argument of the appeal motion; so that it would be impossible to give a direction on the new alternative. To the present time there has been no settled account.

There is no evidence that the law of Mexico is in any material respect different from our own, so that, if the suit had been prosecuted there, it would have been impossible to get an order for the payment of the balance before Nov. 15, 1897. This shows that there can properly be no question as to an earlier conversion. Independently of the cases cited as to conversion into English money of foreign currency, not only was the order of KEKEWICH, J., which is appealed against, quite right, but no order on the substituted alternative could now properly be made, and the only order ought to be that the appeal be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I have come to a different conclusion, with great hesitation, as the question raised is in a sense a question of equity practice. I should have liked on such a question to have deferred to the Master of the Rolls and RIGBY, L.J., but I think it my duty, as a question of principle is also involved, to express my own opinion.

The question, and the only question, argued before us in this case has been what is the proper mode of taking the account ordered in an action brought in this country by a creditor to have an account taken of money payable abroad by the defendants in foreign currency—whether such account should be taken in the relative values of the English and foreign currencies as of the date of taking the account, or as of the date when the debts became payable, or as of some other and what date or dates. It was not questioned on either side but that the total debt ordered to be paid after taking the account must be expressed in English currency, and that the amount in English currency must be arrived at by taking the real value in English currency of the foreign currency at the place where payable as a purchasable commodity—that is, in practice, according to the rate of exchange existing at the particular time between the currencies. The only question has been as to what that particular time was.

I will first consider the question irrespective of the form of action. It seems clear that, in an action in whatever form, in the English courts for the recovery of a debt payable in foreign currency, the amount of the English judgment or order must be expressed in English currency, and that, unless the relative values of the respective currencies are fixed by statute, or some authority binding the English courts, or by the agreement of the litigants, the amount of the English judgment or order must be based on the quantity of English sterling money which one would have to pay here to obtain in the market the amount of the debt payable in foreign currency, delivered at the appointed place of payment—that is, the amount payable according to the rate of exchange. *Scott* v. *Bevan* (3) was an authority for this mode of computation. Also this mode of computation is in accordance with the rule applied on the dishonour of a bill of exchange payable in foreign currency in a foreign country: *Suse* v. *Pompe* (5). It seems plain that this mode of computing the value of foreign currency in English sterling money, and thus converting the one currency into the other, is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place; and if this is so, it follows that the date as of which that value must be ascertained is the date of the breach, and not the date of judgment.

If this is the general rule in an action for the recovery in English courts of sums payable abroad in foreign currency, I see no reason why a different rule should be applied in a case where the form of action is, as it is in this case, an action for an account. Suppose the account had been an account of a number of bushels of maize which the defendants had received in Mexico on account of the plaintiff, the amount

payable by the defendants to the plaintiff would have to be fixed according to the value of the maize at the date when the defendants ought to have accounted for the maize in question according to the course of business between themselves and their principal, and it seems to me that the Mexican dollar should be accounted for on the same footing. It may be that in the present case it might have been troublesome to ascertain the dates at which the various sums payable as commission in dollars became payable; but this would not, in my judgment, have been a sufficient reason for fixing the amount of the result of the account in English sterling money according to the value of the dollars at the date of the completion of the taking of the account. This difficulty, however, does not arise in the present case, because the plaintiff is willing that the value shall be taken of the dollar as of Aug. 31, 1896, the date down to which the defendants in fact rendered their account, including all the sums now claimed by the plaintiff.

I only wish to add a word or two about some of the cases cited. *Cash* v. *Kennion* (1) and *Cockerell* v. *Barber* (2) have really but little bearing on the question. In *Cash* v. *Kennion* (1) the only question to be decided was who was to bear the cost of remittance to England of a debt paid abroad but payable in England? Was it the creditor or the debtor? The Court decided that the debtor must bear the cost of remittance, which cost was a commission to the agent who collected the money for which the defendant had to account to plaintiff. In *Cockerell* v. *Barber* (2), LORD ELDON, in an action brought in England to recover a legacy payable in India of "30,000 sicca rupees" so described in the will, refused to allow the cost of remittance to the plaintiff, but declared that the legacy was to be paid according to the current value of the sicca rupee in Calcutta. LORD ELDON seems to have intended by this the real par of exchange. At all events, 2s. 1d., which was the rate the defendant successfully urged upon LORD ELDON, does not seem to have been the original relative value of the sicca rupee to English sterling, for this, I believe, was 2s. 6d. I think LORD ELDON meant the depreciated value of the rupee in Calcutta; but the main bearing of the case is not on the question of the rate of conversion, but of the date, and as to this LORD ELDON says, in so many words, in *Cash* v. *Kennion* (1) (11 Ves. at p. 316):

> "Where a man agrees to pay £100 in London upon Jan. 1, he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just so much as he would have had if the contract had been performed."

This puts the conversion on the basis of indemnity against damages for breach of contract, and so does *Cockerell* v. *Barber* (2), according to my understanding of the judgment. The same view is taken in SEDGWICK ON DAMAGES (4th Edn.), p. 270.

In STORY ON THE CONFLICT OF LAWS, s. 309, it is said:

> "The proper rule would seem to be in all cases to allow that sum in the currency of the country where the suit is brought which should approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par, of exchange."

By this I understand the learned author to adopt the rule laid down in *Scott* v. *Bevan* (3). With regard to this case I would observe that, although the case is a strong authority for treating the value of the foreign currency in English currency as a question of damages—the declaration of the plaintiff and the judgment of the court both so treating it—I am not sure that the allowance of the interest as from the date of the original debt down to the date of the payment into court in the English action is quite consistent with this view; but, be this how it may, there can be no doubt but that the court took as the measure of value £160 Jamaica to £100 English sterling, and, if this is so, I think it follows that the date for the application of the rate should have been the date of the Jamaica judgment, when the obligation sued on arose, and not the date of the English judgment.

I think that the order of KEKEWICH, J., ought to be amended by declaring that the plaintiff is entitled to have the amount of Mexican dollars found to be due by the account of Aug. 31, 1896, converted into English money sterling at the rate of exchange prevailing between the said currencies on that day. It seems to me that, to hold otherwise, would make the plaintiff's remedy for the recovery of what is due to him differ according to the form of procedure, and according as he brings his action in the Queen's Bench or in the Chancery Division.

Appeal dismissed.

Solicitors: *Jaques & Co.*, for *Samuel Wright & Co.*, Bradford; *Angove & Bromwich.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

SOUTHWARK AND VAUXHALL WATER CO. *v.* WANDSWORTH DISTRICT BOARD OF WORKS

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Chitty and Henn Collins, L.JJ.), July 27, 28, August 8, 1898]

[Reported [1898] 2 Ch. 603; 67 L.J.Ch. 657; 79 L.T. 132; 62 J.P. 756; 47 W.R. 107; 14 T.L.R. 576]

Street—Surface—Lowering—Duty of highway authority—Lowering of water pipes already in soil—Prevention of freezing of water—Metropolis Management Act, 1855 (18 *& 19 Vict., c.* 120), *s.* 98.

A local authority, under powers conferred on them by the Metropolis Management Act, 1855, s. 98, proposed to lower the surface of streets in their district, which would result in the thickness of the soil covering water pipes and mains of the plaintiff water company being so reduced that the water in the pipes would be in danger of being frozen in severe weather. Upon motion by the company to restrain the local authority from carrying out their proposed works without also lowering the pipes to the existing depth,

Held: on the true construction of s. 98, the section imposed no duty on the defendants to lower the plaintiffs' pipes, and, therefore, the plaintiffs were not entitled to the injunction claimed.

Geddis v. *Bann Reservoir Proprietors* (1) (1878), 3 App. Cas. 430, distinguished.

Notes. Section 98 of the Metropolis Management Act, 1855, has ceased to have effect so far as it relates to the alteration, for the purposes of authorities' works, of the position of any apparatus to which the Public Utilities Street Works Act, 1950 (29 HALSBURY'S STATUTES (2nd Edn.) 315) applies.

Considered: *Howard-Flanders* v. *Maldon Corpn.*, [1926] All E.R. Rep. 110; *Graigola Merthyr Co.* v. *Swansea Corpn.*, [1928] Ch. 235. Referred to: *East Fremantle Corpn.* v. *Annois*, [1900-3] All E.R. Rep. 73; *Ash* v. *Great Northern Piccadilly and Brompton Rail. Co.* (1903), 67 J.P. 417; *The Johannesburg*, [1907] P. 65; *Provender Millers (Winchester), Ltd.* v. *Southampton County Council*, [1939] 3 All E.R. 882; *Dormer* v. *Newcastle-on-Tyne Corpn.*, [1940] 1 K.B. 586.

As to street operations affecting the apparatus of statutory undertakers, see 19 HALSBURY'S LAWS (3rd Edn.) 259-270, and cases there cited.

Cases referred to:

(1) *Geddis* v. *Bann Reservoir Proprietors* (1878), 3 App. Cas. 430, H.L.; 38 Digest (Repl.) 16, *64*.

(2) *Julius* v. *Bishop of Oxford* (1880), 5 App. Cas. 214; 49 L.J.Q.B. 577; 42 L.T. 546; 44 J.P. 600; 28 W.R. 726, H.L.; 42 Digest 716, *1351.*

(3) *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (1885), 15 Q.B.D. 1; 54 L.J.Q.B. 414; 53 L.T. 457; 49 J.P. 470; 33 W.R. 892; 1 T.L.R. 452, C.A.; 38 Digest (Repl.) 37, *186.*

(4) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 38 Digest (Repl.) 400, *608.*

(5) *Hammersmith and City Rail. Co.* v. *Brand* (1869), L.R. 4 H.L. 171; 38 L.J.Q.B. 265; 21 L.T. 238; 34 J.P. 36; 18 W.R. 12, H.L.; 38 Digest (Repl.) 15, *59.*

(6) *Coats* v. *Clarence Rail. Co.* (1830), 1 Russ. & M. 181; 8 L.J.O.S.Ch. 72; 39 E.R. 70, L.C.; 11 Digest (Repl.) 147, *259.*

(7) *Trower* v. *Chadwick* (1836), 3 Bing. N.C. 334; 2 Hodg. 267; 3 Scott, 699; 6 L.J.C.P. 47; 132 E.R. 439; reversed sub nom. *Chadwick* v. *Trower* (1839), 6 Bing. N.C. 1; 8 Scott, 1; 8 L.J.Ex. 286; 133 E.R. 1, Ex. Ch.; 36 Digest (Repl.) 39, *187.*

(8) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest (Repl.) 6, *4.*

Also referred to in argument:

Boulton v. *Crowther* (1824), 2 B. & C. 703; 2 L.J.O.S.K.B. 139; 107 E.R. 544; sub nom. *Bolton* v. *Crowther*, 4 Dow. & Ry. K.B. 195; 38 Digest (Repl.) 19, *83.*

Bold v. *Williams* (1857), 28 L.T.O.S. 269; 21 J.P. Jo. 84; 38 Digest (Repl.) 19, *81.*

R. v. *St. Luke's* (1871), L.R. 6 Q.B. 572; on appeal, L.R. 7 Q.B. 148, Ex. Ch.; 11 Digest (Repl.) 141, *218.*

Thompson v. *Brighton Corpn.*, *Oliver* v. *Horsham Local Board*, [1894] 1 Q.B. 332; 63 L.J.Q.B. 181; 70 L.T. 206; 58 J.P. 297; 42 W.R. 161; 10 T.L.R. 98; 38 Sol. Jo. 97; 9 R. 111, C.A.; 26 Digest (Repl.) 420, *1292.*

Cowley v. *Newmarket Local Board*, [1892] A.C. 345; 62 L.J.Q.B. 65; 67 L.T. 486; 56 J.P. 805; 8 T.L.R. 788; 1 R. 45, H.L.; 26 Digest (Repl.) 419, *1290.*

Atkinson v. *Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex.D. 441; 46 L.J.Ex. 775; 36 L.T. 761; 25 W.R. 794, C.A.; 38 Digest (Repl.) 51, *263.*

Metropolitan Asylum District v. *Hill* (1881), 6 App. Cas. 193; 50 L.J.Q.B. 353; 44 L.T. 653; 45 J.P. 664; 29 W.R. 617, H.L.; 38 Digest (Repl.) 36, *185.*

Edgware Highway Board v. *Colne Valley Water Co.* (1877), 46 L.J.Ch. 889; 43 Digest 1072, *97.*

East Molesey Local Board v. *Lambeth Waterworks Co.*, [1892] 3 Ch. 289; 62 L.J.Ch. 82; 67 L.T. 493; 2 R. 88, C.A.; 43 Digest 1072, *96.*

Appeal by the defendants from a decision of KEKEWICH, J., on a motion by the plaintiffs, the Southwark and Vauxhall Water Co., for an interlocutory injunction to restrain the defendants, the Wandsworth District Board of Works, their servants and agents, from lowering the surface of the streets and footways in their district whereunder the pipes and mains of the plaintiffs were laid, in any manner which would leave such pipes and mains without a sufficient covering of soil or other material to protect them from injury whether by the passing of traffic, the effect of frost or otherwise, unless the defendants should first alter the position of the pipes and mains by placing them at a depth below a proposed new surface not less than the depth at which the same were below the existing surface. The defendant board in the course of improving footways in their district, proposed to lower the surface of the streets and footways in such a manner that the depth of soil over certain water pipes and mains of the plaintiffs, which was from 1 foot 4 inches to 1 foot 10 inches, would be reduced by from 1 foot 2 inches to 3 inches, in one place leaving only 2 inches of soil above the pipes. It was admitted by the defendant

board that the water in the pipes would be in danger of being frozen for part of their length if the proposed lowering of the surface was effected. The defendant board proposed to carry out their works under the Metropolis Management Act, 1855, s. 98, which provides :

> "It shall be lawful for every vestry and district board from time to time to cause all or any of the streets within their parish or district, or any part thereof respectively, to be paved or repaired when and as often and in such form and manner and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in, into, or through the same to be turned or altered, in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong."

KEKEWICH, J., granted the plaintiffs an injunction restraining the defendant board from lowering the surface of the streets and footways in their district in such a manner as to leave pipes of the plaintiffs more exposed to injury from frost or otherwise than they were before such lowering. The defendants appealed.

Renshaw, Q.C., and *L. Chubb* for the defendants.
Warrington, Q.C., and *Gore-Browne* for the plaintiffs.

Cur. adv. vult.

Aug. 8, 1898. The following judgments were read.

SIR NATHANIEL LINDLEY, M.R.—Section 98 of the Metropolis Management Act, 1855, in terms simply confers a power; its language imposes no duty. The words are, "it shall be lawful," etc. These words may no doubt under certain circumstances impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention. Nothing can be clearer on this point than the judgment of LORD CAIRNS in *Julius* v. *Bishop of Oxford* (2). The defendants have not touched or disturbed the plaintiffs' pipes. They have in no way injured them, and this circumstance distinguishes the case from *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (3), in which the steam rollers used by the defendants broke the plaintiffs' gas pipes. The same circumstance—viz., the non-interference with the plaintiffs' property—distinguishes this case from *Geddis* v. *Bann Reservoir Proprietors* (1), where the defendants flooded the plaintiff's land and said in effect that they could not help it. The answer was that they could help it if they kept a stream into which they poured water free from obstruction by mud, which they could do if they chose. LORD BLACKBURN'S remarks (3 App. Cas. at p. 456), on which the plaintiffs mainly relied, had reference to that state of things, and do not show what the plaintiffs must show—viz., that s. 98 imposes a duty on the defendants to lower the plaintiffs' pipes, although the plaintiffs do not want to do so for their own purposes.

Underlying the plaintiffs' contention is the assumption that they are entitled to have a certain amount of soil over their pipes. I can find no warrant for this assumption; and as the defendants are clearly empowered by s. 98 to remove the soil above the pipes, I see no ground for saying that the additional power conferred upon them of lowering the plaintiffs' pipes imposes the duty of lowering them in order to protect them from injury. The plaintiffs pay nothing for the privilege of laying their pipes down in a public path or road, and they run the risk of having it made higher or lower by the road authorities under their statutory powers. This conclusion is strengthened by s. 61 of the Towns Improvement Act, 1847, which is in pari materia, and empowers the Improvement Commissioners to raise or lower pipes if they deem it necessary so to do. No duty to do so is cast upon them. Section 98 of the Metropolis Management Act, although not quite so clearly worded, has, in my opinion, the same meaning. The appeal motion having by consent been treated as an appeal from a final judgment in the action, the order appealed from

must be discharged and judgment be entered for the defendants with costs here and below, and the costs below must be taxed as between solicitor an client, pursuant to the Public Authorities Protection Act, 1893, s. 1.

CHITTY, L.J.—I am of the same opinion. This is a case of importance, as the decision will affect not only water companies, but gas and other companies who have the statutory privilege of laying pipes under the public streets in the metropolis. For these privileges they make no payment.

The case turns on s. 98 of the Metropolis Management Act, 1855. The section confers powers on the road authority to pave and repair the streets when and so often as and in such manner as that authority thinks fit, and to raise or lower the ground or soil in such manner as they think proper. This is the principal power, and it is discretionary. Then they have power to alter the position of mains and pipes in or under the street. This is a supplemental or additional power; if it is exercised, the alteration of the position of the mains or pipes is subject to the approval of the engineer of the company to which the mains or pipes belong. In this case the road authority has not altered the position of the pipes, nor have they in any way disturbed or interfered with them. The effect of their works, which have been lawfully executed under their principal power, is to bring the surface of the street nearer to the pipes which remain in situ. The consequence is that the water in the pipes, being but a few inches from the surface, is more exposed to frost. In exercising the power the road authority has not been guilty of any negligence. I am unable to find in the section any express or implied duty cast upon the road authority, when they exercise their power of altering the level of the road, whether by raising or lowering it, to exercise at their own expense their power of altering the position of the pipes for the benefit of the company owning the pipes, much less any duty to place the pipes at a depth below the new surface corresponding with the depth at which they stood below the old surface. I think that no such duty is imposed upon the defendants.

The real question is on whom the expense of altering the position of the pipes is to fall. It appears to me that it falls on the company. They are under no statutory obligation as to the particular depth at which their pipes are to be placed from the surface of the road; it is for them to place them at such a depth as will protect the water from freezing. As between the road authority and the company I think that the road authority is paramount. They are entrusted with the powers over the street, not for their own profit as a statutory body, but for the benefit of the public using the street as a highway. The statutory undertaking of the water company is vested in them with a view to their own profit as a company, and for the purpose of affording a supply of water to the consumers of water within their district. Where the road authority alters the level of the street s. 98 does not afford any means of ascertaining the point at which the supposed duty of the road authority begins in reference to the distance from the surface at which the pipes are to be left, subject only to this qualification—that where the position of the pipes themselves is altered the approval of the company's engineer is required in relation to the position where the pipes are to be relaid. In regard to the authorities cited, I think they are distinguishable as stated by the Master of the Rolls. I agree with HENN COLLINS, L.J. (whose judgment I have had an opportunity of reading), in his statement of the general principles of law derived from the authorities in reference to the exercise of statutory powers.

HENN COLLINS, L.J.—I am of the same opinion, but I will add a few words on the point, based on the dictum of LORD BLACKBURN in *Geddis* v. *Bann Reservoir Proprietors* (1). The point urged is that the plaintiffs have suffered damage by the exercise by the defendants of their statutory powers; that the defendants were armed by the same statute with other powers which, if used, would have mitigated the damage; and that, therefore, they were bound to use them. I think it is quite clear,

as pointed out by the Master of the Rolls, that the power to move the pipes is merely ancillary to the power of levelling the highway, and that there is no statutory duty on the defendants to exercise it unless they require it for the performance of their primary obligation. But it is not on the assertion of such a statutory duty that the arguments for the defendants' liability is or must be based, but on the broader proposition that, being possessed of a power of mitigating damage arising from their proceedings under the statute, they are bound to exercise it. So stated, it is merely an assertion of the proposition so frequently affirmed, that, where statutory rights infringe upon what but for the statute would be the rights of other persons, they must be exercised reasonably so as to do as little mischief as possible. The public are not compelled to suffer inconvenience which is not reasonably incident to the exercise of statutory powers. The railway sparks cases are instances of this principle: see *Vaughan* v. *Taff Vale Rail. Co.* (4); *Hammersmith and City Rail. Co.* v. *Brand* (5); *and Coats* v. *Clarence Rail. Co.* (6).

In the *Geddis Case* (1), LORD BLACKBURN was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and when they had not exercised these powers they could not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which LORD BLACKBURN thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out. Here the levelling of the road could be and was effectively carried out without in any way disturbing the plaintiffs' pipes or infringing any of their rights. I think the dictum of LORD BLACKBURN must be read with reference to the case he was dealing with, and cannot be pressed to cover this one.

But it must be admitted that the defendants are bound to exercise their statutory power with reasonable regard for the rights of other persons. I think, when it is once clear that the main purpose of the defendants could be completely carried out without recourse to the power of moving the pipes, the obligation of the statutory body must be tried by the same standard of duty as is applicable to private persons. Of course, being merely a creature of statute, they cannot exercise powers if the statute has not conferred them, but it does not follow that they are bound to use them because they possess them any more than a private person would be. They merely fall under the general principle sic utere tuo ut alienam non lædas. Here the plaintiffs have no right to any particular thickness of soil above their pipes; they are subordinate in this respect to the duties of the road authority: see *Gas Light and Coke Co.* v. *St. Mary Abbott's, Kensington, Vestry* (3). But they are not trespassers. Their pipes are lawfully in the road, and the defendants' acts have undoubtedly damaged, if they have not injured, them. I think they can have no higher claim to consideration at the hands of the defendants than the owner of a house for which no right of support from the adjoining house had been acquired would be entitled to claim against the adjoining owner who in pulling his house down withdraws support to which his neighbour is not entitled. I think it is clear in such case that, though the pulling-down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection, as, for instance, by shoring it up.

There is a broad distinction between exercising a right with reasonable care so as not to do avoidable damage and taking active measures to ensure the continuance of something that is not a right in the adjoining owner. *Chadwick* v. *Trower* (7), which goes, perhaps, further than any other case in the plaintiffs' favour, merely decides that, supposing there is a duty upon a person pulling down his own house to take care not to injure his neighbour's vault in so doing, where he knows of its

existence, though it has acquired no right to support, there can be no such duty where he does not know of it. And it cannot be the law that the pulling-down owner is bound to find a substitute or equivalent for the support which he has a right to remove. That he has such a right is clear: see *Dalton* v. *Angus* (8). I think the result is that, though the person pulling down is bound to do no unnecessary damage, he is not fixed with any obligation to take active steps to mitigate a mischief which follows inevitably upon the reasonable exercise of his own rights. I think, therefore, the only obligation on the defendants was to use reasonable care to do no unnecessary damage to the plaintiffs, and I think the existence of the power to move the pipes, and the fact that it was unused, would afford no evidence of want of such reasonable care, and that, therefore, the judgment ought to be for the defendants.

Appeal allowed.

Solicitors: *Lanfear, Tanner & Lanfear; W. W. Young & Son.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

FILBY *v.* HOUNSELL

[CHANCERY DIVISION (Romer, J.), July 13, 14, 31, 1896]

[Reported [1896] 2 Ch. 737; 65 L.J.Ch. 852; 75 L.T. 270; 45 W.R. 232; 12 T.L.R. 612; 40 Sol. Jo. 703]

Specific Performance—Sale of land—Offer to purchase made to vendor's agent—Acceptance by agent on behalf of principal—Vendor named in acceptance, but not in offer—Sufficiency of memorandum in writing—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A leasehold house was put up for sale by auction by J. & Co., a firm of auctioneers, but was not sold. On the same day the defendant wrote to J. & Co. as follows: "I hereby offer the sum of £350 for . . . and if my offer is accepted I will pay deposit and sign contract on the auction particulars." J. & Co. replied as follows: "On behalf of our client, Mrs. M. A. F. [the plaintiff], we beg to accept your offer for . . . subject to contract as agreed." J. & Co. inclosed for signature by the defendant a draft contract which was substantially the same as that indorsed on the auction particulars, but the defendant never signed this contract and subsequently he refused to complete.

In an action for specific performance brought by the plaintiff the defendant contended, inter alia, that there was insufficient memorandum to satisfy s. 4 of the Statute of Frauds as there was no memorandum or note of the contract signed by him as the party to be charged, and that the acceptance of his offer by J. & Co. was only conditional by virtue of the words "subject to contract as agreed."

Held: (i) the offer signed by the defendant contained the names of the actual contracting parties, it being immaterial that one of those parties was acting as agent for an undisclosed principal, and, therefore, the provisions of the Statute of Frauds were satisfied; (ii) as the form of the contract was in writing, definitive in all its terms and clearly identified by the offer, the contract was complete on acceptance of that offer whether the draft contract was signed or not, and so the contract was absolute and not conditional; accordingly the plaintiff was entitled to an order for specific performance.

Notes. Section 4 of the Statute of Frauds (which imposed the need of a written memorandum before certain contracts could be enforced) has been largely repealed, but it still applies to a guarantee, and under s. 40 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 500), no action may be brought on a contract for the sale of land, etc., unless the agreement or memorandum thereof is in writing.

Considered: *Clark* v. *Robinson* (1903), 51 W.R. 443. Explained and Distinguished: *Lovesy* v. *Palmer*, [1916-17] All E.R. Rep. 1034. Considered: *Rossdale* v. *Denny*, [1921] 1 Ch. 57; *Abdul Karim Basma* v. *Weekes*, [1950] 2 All E.R. 146. Approved: *Davies* v. *Sweet*, [1962] 1 All E.R. 92. Referred to: *Chillingworth* v. *Esche* (1923), 92 L.J.Ch. 467; *Smith-Bird* v. *Blower*, [1939] 2 All E.R. 406.

As to the essentials of a contract required to be in writing, see 8 HALSBURY'S LAWS (3rd Edn.) 93 et seq.; and for cases see 12 DIGEST (Repl.) 145 et seq.

Cases referred to:

(1) *Morris* v. *Wilson* (1859), 33 L.T.O.S. 56; 5 Jur.N.S. 168; 12 Digest (Repl.) 181, *1231*.

(2) *Commins* v. *Scott* (1875), L.R. 20 Eq. 11; 44 L.J.Ch. 563; 32 L.T. 420; 23 W.R. 498; 12 Digest (Repl.) 164, *1059*.

(3) *Warner* v. *Willington* (1856), 3 Drew. 523; 25 L.J.Ch. 662; 27 L.T.O.S. 194; 20 J.P. 774; 2 Jur.N.S. 433; 4 W.R. 531; 61 E.R. 1002; 12 Digest (Repl.) 163, *1049*.

(4) *Reuss* v. *Picksley* (1866), L.R. 1 Exch. 342; 4 H. & C. 588; 35 L.J.Ex. 218; 15 L.T. 25; 12 Jur.N.S. 628; 14 W.R. 924, Ex. Ch.; 12 Digest (Repl.) 173, *1129*.

(5) *Potter* v. *Duffield* (1874), L.R. 18 Eq. 4; 43 L.J.Ch. 472; 22 W.R. 585; 12 Digest (Repl.) 161, *1032*.

(6) *Williams* v. *Jordan* (1877), 6 Ch.D. 517; 46 L.J.Ch. 681; 26 W.R. 230; 12 Digest (Repl.) 162, *1039*.

(7) *Jarrett* v. *Hunter* (1886), 34 Ch.D. 182; 56 L.J.Ch. 141; 55 L.T. 727; 51 J.P. 165; 35 W.R. 132; 3 T.L.R. 117; 12 Digest (Repl.) 164, *1052*.

(8) *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124; 48 L.J.Ch. 10; 39 L.T. 173; 42 J.P. 804; 26 W.R. 865, H.L.; 12 Digest (Repl.) 165, *1063*.

Also referred to in argument:

Thomas v. *Brown* (1876), 1 Q.B.D. 714; 45 L.J.Q.B. 811; 35 L.T. 237; 24 W.R. 821, D.C.; 12 Digest (Repl.) 165, *1060*.

Sale v. *Lambert* (1874), L.R. 18 Eq. 1; 43 L.J.Ch. 470; 22 W.R. 478; 12 Digest (Repl.) 165, *1062*.

Coombs v. *Wilkes*, [1891] 3 Ch. 77; 61 L.J.Ch. 42; 65 L.T. 56; 7 T.L.R. 592; 40 W.R. 77; 12 Digest (Repl.) 164, *1051*.

Lloyd v. *Nowell*, [1895] 2 Ch. 744; 64 L.J.Ch. 744; 73 L.T. 154; 44 W.R. 43; 13 R. 712; 12 Digest (Repl.) 96, *565*.

Winn v. *Bull* (1877), 7 Ch.D. 29; 47 L.J.Ch. 139; 42 J.P. 230; 26 W.R. 230; 12 Digest (Repl.) 94, *544*.

Action for the specific performance of an agreement to buy a leasehold house.

The plaintiff, Mrs. M. A. Filby, on Sept. 24, 1895, caused a leasehold house belonging to her to be put up for auction by Messrs. Frank Jolly & Co., a firm of auctioneers. A memorandum was indorsed on the printed conditions of sale whereby the purchaser acknowledged that he had paid

> "to Messrs. Frank Jolly & Co., the auctioneers, the sum of £ , as a deposit and in part payment of the said purchase money,"

and agreed "to pay the balance of the purchase money and to complete the purchase according to the within conditions of sale." The property was not sold at the auction, but on the same day the defendant wrote to Messrs. Jolly & Co. the following letter:

A "September 24, 1895.—To Frank Jolly & Co.—I hereby offer the sum of three hundred and fifty pounds (£350) for No. 1, Kenmure Road, Hackney, lease about eighty-one years, ground rent £8, and if my offer is accepted I will pay deposit of £35 and sign contract on the auction particulars."

Messrs. Jolly & Co. replied as follows:

B "September 25, 1895.—Dear Sir,—On behalf of our client, Mrs. M. A. Filby, we beg to accept your offer of three hundred and fifty pounds (£350) for No. 1, Kenmure Road, Hackney, subject to contract as agreed. We inclose draft contract herewith, and shall be glad to receive same signed together with cheque for deposit at your early convenience.—Yours faithfully, Jolly & Co."

C The contract inclosed was in substantially the same terms as the contract indorsed on the particulars of sale. The defendant never signed this contract, and subsequently refused to complete.

The plaintiff having brought an action for specific performance, the defendant, besides raising a defence on the merits, pleaded that the Statute of Frauds had not been complied with, and also that the acceptance of his offer by Messrs. Jolly & Co.

D was conditional only by virtue of the words "subject to contract as agreed."

S. O. Buckmaster for the plaintiff.
Beddall for the defendant.

Cur. adv. vult.

E **ROMER, J.,** read a judgment in which he dealt with the defence raised on the merits, and continued: The next defence raised before me is that of the Statute of Frauds. This certainly gives rise to some nice questions, but I have come to the conclusion that the plea of the statute does not avail the defendant. The point arising on that plea is that which concerns the name of the vendor. The defendant says that he has signed nothing which directly or by sufficient reference sets forth

F in writing who the vendor is. And it is true that the plaintiff's name as vendor does not appear in the offer of purchase of Sept. 24, 1895, signed by the defendant, and that you cannot gather who the vendor is from the auction form of contract or particulars which are sufficiently referred to for identification in the offer. But the offer does contain the names of the contracting parties. The offer is to Frank Jolly & Co., and I think it makes no difference that the offer is made to them as agents for

G an undisclosed principal.

For the purpose of satisfying the Statute of Frauds it appears to me sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parole.

H That is well settled. This was pointed out by WOOD, V.-C., in *Morris* v. *Wilson* (1), and by SIR GEORGE JESSEL, M.R., in *Commins* v. *Scott* (2), where he says (20 Eq. at pp. 15, 16):

"There can be no doubt that if a written contract is made in this form, 'A. B. agrees to sell Blackacre to C. D. for £1,000,' then E. F., the principal of A. B., can sue G. H. the principal of C. D. on that contract."

I The offer, then, in the case before me signed by the defendant does, in my opinion, sufficiently give the names of the contracting parties. If that be so then the statute is satisfied in that respect, for it is settled law that a signed offer in writing which sufficiently sets forth particulars may be accepted by parole, and that the signed offer simply accepted by parole sufficiently complies with the statute: see *Warner* v. *Willington* (3); and *Reuss* v. *Picksley* (4). For the purposes of this point I am now considering, the defendant's offer was accepted, and it is not necessary that he should have recognised that acceptance in writing. Nor does

it appear to me material that the acceptance disclosed the name and was on behalf of the vendor, the previously undisclosed principal. A simple acceptance by Frank Jolly & Co. would be clearly sufficient, and, later on, they might have disclosed the fact that they accepted on behalf of their principal. And I cannot see that it makes any difference that they disclose at the time of acceptance the name of the principal or accept directly on behalf of the principal instead of first simply accepting it and then stating who the principal is.

I, therefore, hold that this objection fails. Indeed, I do not think the point is novel. Substantially the same point was decided by WOOD, V.-C., in *Morris* v. *Wilson* (1), mentioned above, in accordance with the view I have expressed. And the cases relied upon by the defendant are distinguishable. In *Potter* v. *Duffield* (5) you could not gather from anything signed by the defendant's agent who the contracting parties were. The defendant's agent was not mentioned as a contracting party. There was no offer of any kind in writing to him as agent for the vendor or otherwise. And the same observations apply to *Commins* v. *Scott* (2) so far as relates to the first point taken by counsel on behalf of the plaintiffs in that case, and decided against them by SIR GEORGE JESSELL. In *Williams* v. *Jordan* (6) the offer to take a lease was only addressed "Sir," and you could not gather from it to whom the offer was addressed. It certainly was not addressed to the person who subsequently purported to accept it on behalf of the lessor. Lastly, in *Jarrett* v. *Hunter* (7), though that gives rise to more difficulty, the contract did not show who the vendor was, or who were the contracting parties. I gather that the solicitor for the vendor, who signed, did not purport to sign as a contracting party or on behalf of his undisclosed principal. And the point that the writing signed could or might be taken as a contract between the purchaser and the solicitor as agent for the undisclosed principal vendor was apparently not taken by the counsel for the plaintiffs or considered by the judge who decided that case.

The only other point taken on behalf of the defendant in the case before me is that the acceptance of his offer was not a simple one, but was conditional, because of the words "subject to contract as agreed." At first sight, those words may appear to make the acceptance conditional. But when the offer is carefully looked at, it appears to me that the acceptance was absolute, and not conditional. The offer stated in effect that if accepted the defendant would pay a deposit of £35 and sign the form of contract on the auction particulars. That form of contract was in writing, and was definitive in all its terms, and clearly identified by the offer. It left nothing to be agreed upon thereafter. The signing of it was a form. The contract between the parties was complete on acceptance of the offer, whether the form on the auction particulars was signed or not. I might make in this case somewhat similar observations to those which LORD CAIRNS, L.C., made in *Rossiter* v. *Miller* (8), with regard to the provision as to a further agreement to be signed by the purchaser in that case.

The acceptance, therefore, in the case now before me when it spoke of "subject to contract as agreed" was clearly only referring to the form of contract mentioned in the offer, and which the defendant had offered to sign. The acceptance of the offer was not made subject to any new terms, but was one in accordance with the terms of the offer; this being sufficiently shown by the important words "as agreed." It follows that the defendant fails in all his defences, and that the plaintiff is entitled to specific performance of the contract, with costs up to and including judgment.

Solicitors: *Lewin & Co.; J. R. Pakeman.*

[*Reported by* A. GLOVER, ESQ., *Barrister-at-Law.*]

Re DAGNALL. Ex parte SOAN AND MORLEY

[Queen's Bench Division (Vaughan Williams and Wright, JJ.), August 3, 1896]

[Reported [1896] 8 Q.B. 407; 65 L.J.Q.B. 666; 75 L.T. 142; 45 W.R. 79; 40 Sol. Jo. 731; 3 Mans. 218]

Bankruptcy—Act of bankruptcy—Suspension of payment of debts—Issue of circular by solicitors intimating intention to suspend—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 4 (1) (*h*).

Bankruptcy—Married woman—"Carrying on trade"—Trade debts unpaid after sale of business—Married Women's Property Act, 1882 (45 & 46 *Vict.*, *c.* 75), *s.* 1 (5).

By s. 1 (5) of the Married Women's Property Act, 1882 [repealed]: "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws as if she were a feme sole."

The respondent, a married woman, carried on trade as a publican separately from her husband, thus making herself liable under the Married Women's Property Act, 1882, s. 1 (5) [repealed], to the operation of the bankruptcy laws. She sold the goodwill of her business, but retained the licence, and debts incurred while the business was being carried on remained unpaid. She later instructed her solicitors to issue a circular to her creditors convening a meeting and intimating, although not specifically stating in terms, that she was about to suspend payment. Two trade creditors thereupon presented a bankruptcy petition against her alleging that the issue of the circular amounted to an act of bankruptcy.

Held: the circular, being so worded as to make it a dishonest act to pay an individual creditor before the date of the creditors' meeting, amounted to an intention to suspend payment, and, therefore, to an act of bankruptcy; (ii) the respondent was "carrying on a trade" within the meaning of the Married Women's Property Act, 1882, s. 1 (5), at the time the circular was issued and would continue to do so until all her trade debts were paid; therefore, she was subject to the bankruptcy laws and a receiving order could be made against her.

Re Stevens, Ex parte M'George (1) (1882), 20 Ch.D. 697, distinguished.

Notes. Section 1 (5) of the Married Women's Property Act, 1882, has been repealed. By s. 1 (d) of the Law Reform (Married Women and Tortfeasors) Act, 1935, a married woman is subject to the laws of bankruptcy as if she were a feme sole. By s. 1 (2) of the Bankruptcy Act, 1914, the expression "a debtor" includes any person who at the time of any act of bankruptcy done or suffered by him, was "carrying on business in England, personally or by means of an agent or manager." Section 4 (1) (h) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 1 (1) (h) of the Bankruptcy Act, 1914.

Considered: *Re Worsley*, [1901] 1 K.B. 309; *Re A Debtor* (1912), 28 T.L.R. 386; *Re Midgeley* (1913), 57 Sol. Jo. 247. Distinguished: *Re A Debtor* (1915), 31 T.L.R. 150. Applied: *Re Debtor (No. 3 of 1926)*, [1926] All E.R. Rep. 337; *Re A Debtor (No. 335 of 1947)*, [1948] 2 All E.R. 533. Approved: *Theophile* v. *Solicitor-General*, [1950] 1 All E.R. 405. Referred to: *Re Clark, Ex parte Pope and Owles*, [1914] 3 K.B. 1095; *Re Reynolds, Ex parte White*, [1915] 2 K.B. 186; *South Behar Railway* v. *I.R. Comrs.*, [1925] A.C. 476; *Re A Debtor*, [1927] 1 Ch. 97.

As to notice of suspension or intended suspension of payment, see 2 Halsbury's Laws (3rd Edn.) 283 et seq.; and for cases see 4 Digest (Repl.) 113 et seq. For the Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321 et seq. For the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1, see 11 Halsbury's Statutes (2nd Edn.) 811.

Case referred to : A

(1) *Re Stevens, Ex parte M'George* (1882), 20 Ch.D. 697; 51 L.J.Ch. 909; 47 L.T. 213; 30 W.R. 817, C.A.; 4 Digest (Repl.) 16, *71*.

Also referred to in argument :

Ex parte Bamford (1809), 15 Ves. 449; 33 E.R. 824, L.C.; 4 Digest (Repl.) 78, *670*.

Re Schomberg, Ex parte Schomberg (1874), 10 Ch. App. 172; 31 L.T. 665; 23 B W.R. 204, L.JJ.; 4 Digest (Repl.) 22, *169*.

Re Taylor, Ex parte Salaman (1882), 21 Ch.D. 394; 47 L.T. 495; 31 W.R. 282, C.A.; 4 Digest (Repl.) 16, *79*.

Re Reynolds, Ex parte Reynolds (1882), 52 L.J.Ch. 431; 47 L.T. 448; 31 W.R. 323; 4 Digest (Repl.) 16, *75*.

C

Appeal from the decision of the registrar of the Brighton County Court.

In the spring of 1894 the respondent, a married woman, began to carry on the trade of a publican separately from her husband. On Dec. 15, 1894, she sold the goodwill of her business, but the licence remained in her name, and debts incurred while carrying on the business remained unpaid. On Jan. 2, 1895, a firm of solicitors, acting on her instructions, issued a notice convening a meeting of her D trade creditors which ran as follows :

> "Sir,—Mrs. Dagnall has placed her affairs in our hands, and in pursuance of our advice we have received instructions to call a meeting of her creditors and lay her circumstances before them. We beg therefore to inform you that such meeting will be held at our office . . . on Tuesday next, Jan. 8, 1895 . . . Please send us at once a statement of your account . . ." E

Two trade creditors thereupon presented a bankruptcy petition against the respondent alleging that the issue of the circular amounted to an act of bankruptcy. The registrar dismissed the petition and held that as the respondent had sold her business before the issue of the circular she was not carrying on trade at that time, and therefore was not subject to the bankruptcy laws. The petitioning creditors F appealed.

Bigham, Q.C., and *Glen* for the appellants.
Witt, Q.C., and *Poley* for the respondent.

VAUGHAN WILLIAMS, L.J.—The question we have to decide is whether this G married woman was, when this circular was issued, subject to the bankruptcy laws. There is no doubt that at one time she had been engaged in trade, and on Dec. 15 she sold her business. On Jan 2, through her solicitor, she issued a circular to her creditors intimating an intention to suspend payment. It has been suggested that the circular does not amount to an act of bankruptcy, because it was not stated in terms that payment was about to be suspended. In my opinion the circular was so H worded that it would have been a dishonest act to pay the creditors separately, after its issue and before the meeting was convened, and for that reason it amounted to an intention to suspend.

The other point turns on the interpretation to be placed upon s. 1 (5) of the Married Women's Property Act, 1882. [His Lordship read the sub-section.] Counsel for the appellants say that the meaning of this sub-section is that if a I married woman has once made herself liable to the bankruptcy laws by engaging in trade, she cannot by retiring from trade divest herself of that liability. In my opinion this is not the true construction. I think that the statute means by "carrying on" so long as she carries on and no longer. What constitutes "carrying on" trade is a pure question of fact to be decided in every individual case, and if it was not for the decision in *Re Stevens, Ex parte M'George* (1), I should have had no difficulty in holding that the "carrying on" continued till the trade debts were paid. It seems to me that the trading cannot be considered complete until all the

A obligations incurred in the trading are discharged. If I had been sitting as a jury-man, I should have found that this lady was engaged in trade at the time when the circular was issued. This was the view taken in all the other cases, and I have to consider whether the decision in *Ex parte M'George* (1) prevents me from holding that the nonpayment of the debts of this married woman amounts to a carrying on of trade.

B The decision in that case was on the Bankruptcy Act, 1869, and I do not consider it has any bearing on the construction which should be placed on this section of the Married Women's Property Act. It is an Act which enables a married woman to do what she could not previously do, and it defines the liabilities to which she is in consequence to be subject. The intention of s. 1 (5) of the Married Women's Property Act, 1882, is to define how far a married woman engaged in trade incurs a C personal liability with respect to particular debts. In my opinion liability for trade debts is included by this sub-section in the words "carrying on trade." I think the debtor was carrying on trade when this notice was issued, and that the appeal must be allowed.

D **WRIGHT, J.**—I agree. In my judgment the natural meaning of the statute is that a married woman who carries on trade is liable to the bankruptcy laws, and that she does not cease to carry on trade, and cannot divest herself of that liability while her trade debts are unpaid. I think the cases cited have no bearing on the interpretation of this statute.

Appeal allowed

E Solicitors : *Barraud, Regge & Jupp; Barnett.*

[*Reported by* J. A. THOMAS, ESQ., *Barrister-at-Law.*]

F

Re CLARK. Ex parte BEYER, PEACOCK & CO.

G [COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), August 7, 1896]

[Reported [1896] 2 Q.B. 476; 65 L.J.Q.B. 684; 75 L.T. 304; 45 W.R. 118; 12 T.L.R. 625; 40 Sol. Jo. 732; 3 Mans. 203]

Bankruptcy—Notice—Validity—Foreign debtor domiciled and resident abroad at time of issue—Service in England—No residence in England in previous twelve months—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 6 (1).

H A bankruptcy notice, which has been served on a debtor in England, cannot be set aside upon the ground that the debtor is a foreign subject, domiciled and resident out of England. It is immaterial that the debtor was not in England at the date when the notice was issued, and had not ordinarily resided or had a dwelling-house or place of business in England within twelve months of that date.

I **Notes.** Sections 4 and 6 of the Bankruptcy Act, 1883, have been repealed. For s. 4 (1) (g) of the 1883 Act, see now s. 1 (1) (g) of the Bankruptcy Act, 1914. For s. 4 (2) of the 1883 Act, see now s. 2 of the 1914 Act. For s. 6 (1) (d) of the 1883 Act, see now s. 4 (1) (d) of the 1914 Act.

Distinguished : *Re Clark, Ex parte Clark* (1897), 77 L.T. 417.

As to liability of foreigners to the bankruptcy laws, see 2 HALSBURY'S LAWS (3rd Edn.) 255 et seq.; and for cases see 4 DIGEST (Repl.) 24 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Cases referred to in argument: A

Re Easton, Ex parte Dixon (1893), 9 T.L.R. 408; 37 Sol. Jo. 479; 10 Morr. 111, D.C.; 4 Digest (Repl.) 110, *977*.

Re Faithfull, Ex parte Moore (1885), 14 Q.B.D. 627; 54 L.J.Q.B. 190; 52 L.T. 376; 33 W.R. 438; 1 T.L.R. 263; 2 Morr. 52, C.A.; 4 Digest (Repl.) 96, *865*.

Re Lynes, Ex parte Lester & Co., [1893] 2 Q.B. 113; 62 L.J.Q.B. 372; 68 L.T. 739; 58 J.P. 5; 41 W.R. 488; 9 T.L.R. 449; 37 Sol. Jo. 480; 10 Morr. 124; B 4 R. 416, C.A.; 4 Digest (Repl.) 32, *280*.

Re Pearson, Ex parte Pearson, [1892] 2 Q.B. 263; 61 L.J.Q.B. 585; 67 L.T. 367; 40 W.R. 532; 8 T.L.R. 622; 36 Sol. Jo. 573; 9 Morr. 185, C.A.; 4 Digest (Repl.) 25, *210*.

Re Sawers, Ex parte Blain (1879), 12 Ch.D. 522; 41 L.T. 46; 28 W.R. 334, C.A.; 4 Digest (Repl.) 24, *203*. C

Appeal by judgment creditors from an order of the registrar setting aside a bankruptcy notice which had been served upon the judgment debtor.

On June 13, 1896, Messrs. Beyer, Peacock & Co. obtained judgment against Clark the debtor for £4,000. On June 23 a bankruptcy notice in respect of this judgment debt, which had been issued on the application of the judgment creditors, was served upon the judgment debtor in England. On July 14 the registrar, upon D the application of the judgment debtor, made an order setting aside the bankruptcy notice. He found that the debtor was a foreign subject domiciled and resident out of the jurisdiction at the time when the bankruptcy notice was issued, and when it was served; that the debtor had not ordinarily resided or had a dwelling-house or place of business in England within twelve months of that time; and that when the bankruptcy notice was issued the debtor was not within the jurisdiction. The E judgment creditors appealed.

The Bankruptcy Act, 1883, provides:

"Section 4.—(1.) A debtor commits an act of bankruptcy in each of the following cases: (g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him F in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not within seven days after service of the notice, in case the service is effected in England, and, in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to G effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

(2.) A bankruptcy notice under this Act shall be in the prescribed form, and shall state the consequences of non-compliance therewith, and shall be served H in the prescribed manner.

Section 6.—(1.) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (d) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided, or had a dwelling-house or place of business, in England."

T. Willes Chitty and *Herbert Chitty* for the judgment creditors. I
Muir Mackenzie for the debtor.

LINDLEY, L.J.—In my opinion the contention of the creditors is well founded and must succeed. The question on this appeal arises upon the construction of s. 4 (1) (g) of the Bankruptcy Act, 1883. In this case the creditors had obtained a final judgment against Clark, and Clark was therefore a debtor against whom a final judgment had been obtained. On June 23 a bankruptcy notice in respect of

A that judgment debt was served upon the debtor, who had then returned to England and rendered himself liable to be proceeded against under the English bankruptcy laws. It was contended for the debtor that he was not a "debtor" within the meaning of s. 4 of the Bankruptcy Act when the bankruptcy notice was issued, because he was a foreigner out of the jurisdiction at that time. The question we have to B determine is, whether there was anything wrong in the issue of the bankruptcy notice.

The construction which we are asked to put upon s. 4 is a very narrow one. I cannot see why we should so construe that section. The question really is whether there was a good service of the notice, and I think that there was. I cannot see how the issue of the bankruptcy notice can be objected to. The bankruptcy notice, therefore, in this case was valid, and ought not to have been set aside. The point raised C by the creditors is a good one, and this appeal must be allowed.

LOPES, L.J.—I think that s. 4 (1) (g), must be considered apart from the provisions of s. 6 (1) (d). Section 4 (1) (g), says that a debtor commits an act of bankruptcy

D "if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England . . . a bankruptcy notice under this Act, . . ."

In my opinion, this case is brought within both the words and the meaning of that section. The debtor is clearly a debtor, and the creditor has obtained final judgment against him.

E I agree that "debtor" means a debtor who is subject to the bankruptcy law of this country. This debtor came to England in June last. When he came to this country he became a debtor subject to the bankruptcy law of this country. That being so, he had served upon him a bankruptcy notice which complied in every respect with the terms of s. 4 (1) (g). That being so, the section has been complied with; it says "has been served on him in England," but says nothing about the F issue of the notice. Here the debtor had served on him in England this bankruptcy notice.

The point has been made that the bankruptcy notice was issued while the debtor was abroad, and that it is therefore invalid. I cannot think that that fact is important. This seems to me to be very analogous to the case of a writ of summons which is often issued when the defendant is out of the country and is afterwards G served upon him when he comes within the jurisdiction. If the contention of the debtor were correct, what an extraordinary state of things would exist. If the bankruptcy notice were issued an hour before the debtor landed in England, it would be bad; but, if it were issued an hour after he landed, it would be good. I am of opinion that this bankruptcy notice was a good notice, and that it ought not to have been set aside. The appeal must be allowed.

H **RIGBY, L.J.**—I am of the same opinion. The issuing of a bankruptcy notice does not affect the debtor in any way. It is not until the bankruptcy notice is served upon him that the debtor is in any way affected. For that reason, in s. 4 (1) (g), of the Bankruptcy Act, 1883, the service of a bankruptcy notice upon a debtor is provided for, and nothing is said as to the issue of the notice. The bankruptcy I notice cannot be served until it has been issued. The important fact which is necessary to bring a debtor within the bankruptcy law is the service of the bankruptcy notice. As the service in this case was effected in this country, the debtor was at the time of service a debtor subject to the bankruptcy law of this country. I can see no reason why this bankruptcy notice should be set aside, and I think that the appeal must be allowed.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co.; Harwood & Stephenson.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

Re SWABEY. Ex Parte SWABEY

[Queen's Bench Division (Vaughan Williams and Wright, JJ.), May 18, 1897]
[Reported 76 L.T. 534]

Bankruptcy—Discharge—Suspension—Excessive period Right of court to review order—Bankruptcy Act, 1890 (53 & 54 *Vict.*, *c.* 71), *s.* 8. B

Suspension of discharge from bankruptcy for five years is a severe sentence which should be reserved for very bad cases. The court has a right to review the length of a term of suspension.

Notes. As to discharge of a bankrupt see now s. 26 of the Bankruptcy Act, 1914, as amended by the Bankruptcy (Amendment) Act, 1926, s. 1. C

Referred to: *Re Benjamin, Bankrupt* v. *Official Receiver*, [1943] 1 All E.R. 468; *Re Smith*, [1947] 1 All E.R. 769.

As to order of discharge, see 2 Halsbury's Laws (3rd Edn.) 515 et seq.; and for cases on suspended discharge see 4 Digest (Repl.) 616. For the Bankruptcy Act, 1914, s. 26, as amended by the Bankruptcy (Amendment) Act, 1926, see 2 Halsbury's Statutes (2nd Edn.) 354. D

Case referred to in argument:

Re Tobias & Co., Ex parte Tobias, [1891] 1 Q.B. 463; 60 L.J.Q.B. 244; 64 L.T. 115; 39 W.R. 399; 7 T.L.R. 296; 8 Morr. 30, D.C.; 4 Digest (Repl.) 586, *5237*.

Appeal by a bankrupt from a decision of the deputy judge of the Croydon County Court, suspending his discharge for five years, from Feb. 9, 1897. E

The receiving order and the order for adjudication were both made on Mar. 6, 1894. The liabilities amounted to about £750, and the assets realised £109 10s. 1d., and dividends amounting to 1s. 2d. in the pound had been paid. The report of the official receiver showed that the bankrupt had started business in 1887 with borrowed money, £120 of which he had never repaid, and that in June, 1891, he had effected a private arrangement with his creditors under which he had paid 11s. 4d. in the pound. Under that arrangement £400 owing to his friends was excluded, and was scheduled in this bankruptcy. The report also showed that trade debts to the amount of £258 16s. 6d. had been incurred with a knowledge of insolvency; but that the debtor had been put to great expense by illness in his family, and had not been guilty of any extravagance. F G

F. O. Robinson, in support of the appeal, which was unopposed.

VAUGHAN WILLIAMS, J.—We are of the opinion that in this case more severity has been exercised than is desirable. There is no doubt as to our right to review the length of the term of suspension, and in our judgment suspension for five years should be reserved for very bad cases. We think that the justice of the case will be met by suspending the discharge of the bankrupt for two years from the date of the order in the county court. H

Solicitors: *Aird, Hood & Co.*

[*Reported by* J. Anwyl Theobald, Esq., *Barrister-at-Law.*]

I

A

BASTER *v.* LONDON AND COUNTY PRINTING WORKS

[QUEEN'S BENCH DIVISION (Darling and Channell, JJ.), April 25, 1899]

B [Reported [1899] 1 Q.B. 901; 68 L.J.Q.B. 622; 80 L.T. 757; 63 J.P. 439; 47 W.R. 639; 15 T.L.R. 331; 43 Sol. Jo. 438]

Master and Servant—Contract of service—Termination—Summary dismissal—Act of forgetfulness by servant—Matter of degree—Damage to valuable machine.

C The right of a master summarily to dismiss a servant for an act of forgetfulness is one of fact and degree in each case, but an act of forgetfulness by the servant by which damage is caused to a valuable machine of which the servant has the care and management may amount to such neglect of duty as to justify the master in dismissing him without notice.

D **Notes.** As to termination of a contract of hiring and service, see 25 HALSBURY'S LAWS (3rd Edn.) 483 et seq.; and for cases see 34 DIGEST 59 et seq.

Cases referred to in argument:

Callo v. *Brouncker* (1831), 4 C. & P. 518; 2 Man. & Ry.M.C. 502, N.P.; 34 Digest 76, *533*.

Edwards v. *Levy* (1860), 2 F. & F. 94, N.P.; 34 Digest 78, *553*.

E *Fillieul* v. *Armstrong* (1837), 7 Ad. & E.L. 557; 2 Nev. & P.K.B. 406; Will. Woll. & Dav. 616; 7 L.J.Q.B. 7; 1 Jur. 921; 112 E.R. 580; 34 Digest 68, *455*.

Pearce v. *Foster* (1886), 17 Q.B.D. 536; 55 L.J.Q.B. 306; 54 L.T. 664; 51 J.P. 213; 34 W.R. 602; 2 T.L.R. 534, C.A.; 34 Digest 74, *507*.

F **Case Stated** by a metropolitan police magistrate sitting at Bow Street Police Court. At the hearing on Jan. 11, 1899, of a complaint made by the appellant against the respondents in which the appellant claimed £4 8s. from the respondents for two weeks' wages in lieu of notice the following facts were proved. On Dec. 16, 1898, the appellant was engaged in the care and management of a printing press of the value of £800, used by him in the respondents' printing business, when a roller known as the "top-rider" jammed under the cylinder, doing damage to the G machine to the extent of £30. On being asked by the respondents' manager for an explanation of the cause of the accident, the appellant stated that the "top-rider" had jumped out of the forks in which it should revolve. The manager, believing that the accident was due to the appellant's want of care, and that he had caused it by neglecting to place one end of the "top-rider" in the forks before he started the machine as it was his duty to do, paid the appellant his wages up to that day and H dismissed him without notice. The magistrate was satisfied on the evidence that the only way in which the accident could have occurred was by the appellant's forgetfulness to fix the end of the "top-rider" in the forks before starting the machine, notwithstanding the appellant's strong belief that he had done so; and he held that such forgetfulness in the performance of an important part of the appellant's duty amounted to neglect which justified his dismissal without notice. The I appellant now appealed.

W. M. Thompson for the appellant.

Colam for the respondent.

DARLING, J.—I am of opinion that the decision of the magistrate was right. [HIS LORDSHIP stated the facts and the magistrate's finding, and continued:] It has been argued for the appellant that mere forgetfulness is not a ground for summary dismissal, but I do not think that that argument is well founded. I think that to

forget to do something which it is of great importance that the servant should remember may show such a disregard to the master's interests as amounts to neglect. Neglect as often arises from forgetfulness as from anything else; and if the forgetfulness be with respect to an important thing, it may well, in my opinion, be good ground for dismissing the servant without notice. To forget to do some trivial or not very important thing in the business is not enough to justify dismissal; but to forget to do a thing which, if it be not done, may cause serious damage or injury, may be a serious neglect of duty, and forgetfulness of that kind may be most serious, and may justify dismissal. Take the case of a signalman on a railway who does not attend to his signals. That would be a serious matter, and yet nobody would say that his omission was anything but forgetfulness; but could it be said, in view of the serious consequences that might result, that such forgetfulness was not a serious neglect of his duty? It has been argued that forgetfulness is not enough unless it be habitual forgetfulness. How are we to say how many instances of forgetfulness will be required before they amount to such neglect as would justify dismissal? We could not possibly do so. The question must depend on the circumstances of each case.

In the present case, we have a machine worth £800, and it is damaged to the extent of £30 by the appellant's forgetfulness. I think that that was evidence of neglect to justify dismissal. But it is said that the machine was so complicated that a mere act of forgetfulness ought not to be sufficient. That argument may operate against the workmen themselves, as one act of forgetfulness on the part of one of them in charge of the machinery may sacrifice the lives of hundreds of them; and yet it is gravely contended that forgetfulness should not be held to be negligence unless it is habitual. I am unable to see that. The working classes themselves are more in danger of sustaining injuries through accidents caused by acts of forgetfulness on the part of those in charge of machinery than any other class, and when we consider the working of mines and railways in this country, and remember that one act of forgetfulness may cost the lives of hundreds, it is impossible to say that one act of forgetfulness may not be a sufficient reason for dismissal or that forgetfulness while in charge of complicated machinery should be looked on with leniency.

CHANNELL, J.—I am of the same opinion. It is not possible, and I shall not attempt, to give any exact definition of what amount of forgetfulness may justify dismissal without notice. It depends on the character of the act of forgetfulness and the character of the work which the workman has to do. I think that it is a question of fact and degree in each case, and the magistrate here has decided that the forgetfulness of the appellant in the performance of an important part of his duty amounted to neglect which justified his dismissal. I cannot say that the magistrate was wrong in the conclusion he came to. I think that the question is one of fact and degree in all cases.

Appeal dismissed.

Solicitors: *George Jolly; Powell & Skues.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

Re PARKER-JERVIS. SALT *v.* LOCKER

[CHANCERY DIVISION (Kekewich, J.), August 4, 5, 1898]

[Reported [1898] 2 Ch. 643; 67 L.J.Ch. 682; 79 L.T. 403; 47 W.R. 147]

Estate Duty—Incidence—Annuity—Annuity given "without any deduction whatsoever"—Further annuity given without qualification—Liability of annuitant to bear estate duty—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 14 (1).

By the Finance Act, 1894, s. 14 (1): "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property . . . under a disposition not containing any express provision to the contrary."

In 1861 donees of a power charged settled estates with a jointure of £1,000 per annum in favour of the wife of one of the donees "without any deduction whatsoever except in respect of income tax." On the death of the surviving donee in 1896 the whole settled estates passed and became liable to estate duty, and the jointress became entitled to receive her jointure.

Held: no part of the estate duty was payable by the jointress, as the words used amounted to "an express provision to the contrary" within the Finance Act, 1894, s. 14 (1).

In the exercise of a power of appointment, the life tenant of settled estates appointed a jointure rentcharge of £500 per annum to his wife if she should survive him, and secured the rentcharge on the whole of the settled property. The application of the Finance Act, 1894, s. 14 (1), was not excluded. On the death of the life tenant leaving his wife surviving the whole of the settled property passed and became liable to estate duty. On the question of the incidence of the estate duty,

Held: the jointress must pay interest on a rateable proportion of the estate duty according to the value of the slice of the settled property required to produce her rentcharge.

Notes. Applied: *Re St. Albans, Loder* v. *St. Albans*, [1900] 2 Ch. 873. Distinguished: *De Quetteville* v. *De Quetteville* (1905), 92 L.T. 758. Applied: *Re Palmer, Palmer* v. *Palmer*, [1916-17] All E.R. Rep. 892; *Re Portman, Portman* v. *Portman*, [1924] 2 Ch. 6. Considered: *Re Cassel's Will Trusts, Public Trustee* v. *A.-G.*, [1946] 1 All E.R. 704. Referred to: *Re Turnbull, Skipper* v. *Wade*, [1905] 1 Ch. 726; *Re Booth, Pleace* v. *Booth*, [1916] 1 Ch. 349; *Re Tinkler, Loyd* v. *Allen*, [1917] 1 Ch. 242; *Re Wedgwood, Allen* v. *Public Trustee*, [1921] All E.R. Rep. 545; *Re Abergavenny Settled Estates, Abergavenny* v. *Nevill*, [1926] Ch. 465; *Re Sebright, Public Trustee* v. *Sebright*, [1944] Ch. 287; *Re Weigall's Will Trusts, Midland Bank Executor and Trustee Co., Ltd.* v. *Weigall*, [1956] 2 All E.R. 312.

As to apportionment of duty, see 15 HALSBURY'S LAWS (3rd Edn.) 136 et seq.; and for cases see 21 DIGEST (Repl.) 81 et seq. For the Finance Act, 1894, s. 14, see 9 HALSBURY'S STATUTES (2nd Edn.) 375.

Cases referred to:

(1) *Turner* v. *Mullineux* (1861), 1 John. & H. 334; 70 E.R. 775; 39 Digest 167, *579*.

(2) *Gleadow* v. *Leetham* (1882), 22 Ch.D. 269; 52 L.J.Ch. 102; 48 L.T. 264; 31 W.R. 269; 39 Digest 167, *581*.

(3) *Re Countess of Orford, Cartwright* v. *Duc del Balzo*, [1896] 1 Ch. 257; 65 L.J.Ch. 253; 44 W.R. 383; sub nom. *Re Earl of Orford, Neville* v. *Cartwright, Cartwright* v. *Duc del Balzo*, 73 L.T. 681; 21 Digest (Repl.) 85, *387*.

Also referred to in argument:

Re Saunders, Saunders v. *Gore*, post p. 461; [1898] 1 Ch. 17; 67 L.J.Ch. 55; 77 L.T. 450; 46 W.R. 180; 42 Sol. Jo. 65, C.A.; 21 Digest (Repl.) 162, *939*.

Re Meyrick, Meyrick v. *Hargreaves*, [1897] 1 Ch. 99; 66 L.J.Ch. 33; 75 L.T. 621; 45 W.R. 120; 41 Sol. Jo. 97; 21 Digest (Repl.) 73, *325*.

Festing v. *Taylor* (1862), 3 B. & S. 235; 1 New Rep. 32; 32 L.J.Q.B. 41; 7 L.T. 429; 27 J.P. 281; 9 Jur.N.S. 44; 11 W.R. 70; 122 E.R. 89, Ex. Ch.; 28 Digest (Repl.) 199, *830*.

Lord Lovat v. *Duchess of Leeds* (1862), 2 Drew. & Sm. 62; 31 L.J.Ch. 503; 6 L.T. 307; 10 W.R. 397; 62 E.R. 545; 28 Digest (Repl.) 198, *829*.

Re Bannerman's Estate, Bannerman v. *Young* (1882), 21 Ch.D. 105; 51 L.J.Ch. 449; 39 Digest 167, *583*.

Adjourned Summons.

By an indenture of settlement dated Dec. 10, 1861, executed on the marriage of Edward John Parker-Jervis with Grace Catherine Jervis, Edward Swynfen Parker-Jervis and Edward John Parker-Jervis in exercise of powers conferred on them by a previous settlement of Mar. 27, 1861, conveyed settled estates known as the Stone Aston Estate to the use of trustees for eighty years to secure Mrs. Edward John Parker-Jervis in the event of her surviving Edward John Parker-Jervis an annuity of £800 during the joint lives of herself and Edward Swynfen Parker-Jervis, and in case she should survive both Edward Swynfen Parker-Jervis and Edward John Parker-Jervis, that she should thenceforth during her life receive a jointure of £1,000 per annum "without any deduction whatsoever except in respect of income tax," with remainder to trustees for two hundred years to secure the jointure, with remainder to trustees for five hundred years on trust for raising portions for the younger children of the marriage, with remainder to the use of the first son of the marriage in tail male, with divers remainders over. Edward John Parker-Jervis died on July 31, 1868, in the lifetime of his father, Edward Swynfen Parker-Jervis, and his widow subsequently married William Locker, who died in 1885.

By a disentailing deed and resettlement dated Nov. 14, 1884, Edward Swynfen Parker-Jervis and his grandson Edward St. Vincent Parker-Jervis (the son of Mrs. Edward John Parker-Jervis, now Mrs. Locker) resettled, inter alia, the Stone Aston Estate (subject to the annuity and jointure in favour of Mrs. Locker, and the portions for younger children, contained in the deed of Dec. 10, 1861) to such uses as Edward Swynfen Parker-Jervis and Edward St. Vincent Parker-Jervis should by deed jointly appoint, with remainder to Edward Swynfen Parker-Jervis for life, with remainder to Edward St. Vincent Parker-Jervis for life with remainder to his first and other sons successively in tail male with divers remainders over. Power was thereby given to Edward Swynfen Parker-Jervis to appoint to a future wife (his first wife having died) a jointure of £500 per annum, and to charge the estates thereby settled with portions for his then present or future children and to secure such jointure and portions by limiting a term or terms in the settled estates and it was thereby declared that the last-mentioned powers of jointuring and charging portions were to be substituted for the original powers which were contained in the deed of Dec. 10, 1861, which powers were thereby released by Edward Swynfen Parker-Jervis.

Edward Swynfen Parker-Jervis, by a settlement dated July 10, 1886, made on his marriage with Maude Parker-Jervis, appointed, under the powers given him by the resettlement of Nov. 14, 1884, a jointure of £500 per annum to Maude Parker-Jervis if she should survive him, and secured the same on all the estates settled by the deed of Nov. 14, 1884. There was no issue of this marriage.

By an indenture of Feb. 20, 1896, the Reversionary and General Securities Co., Ltd., as mortgagees of the life estate of Edward St. Vincent Parker-Jervis, granted

and assigned the lands, hereditaments, money, and investments, subject to the uses or trusts of the deed of Nov. 14, 1884, to John Saltren Willett his executors, administrators, and assigns for the term of one hundred years as therein set out. John Saltren Willett subsequently mortgaged his interest in the settled estates to the University Life Assurance Society.

Edward Swynfen Parker-Jervis died on Jan. 3, 1896, whereupon the Commissioners of Inland Revenue claimed estate duty under the Finance Act, 1894, in respect of all the property comprised in the deed of Nov. 14, 1884, as passing on the death of Edward Swynfen Parker-Jervis including Mrs. Locker's jointure of £1,000 per annum and Mrs. Maude Parker-Jervis's jointure of £500 per annum. The duty claimed on the aggregated property passing on the death was assessed at seven per cent., the principal value being calculated at between twenty-four and twenty-five years' purchase, but as Mrs. Locker's jointure of £1,000 did not arise under a disposition made by the deceased Edward Swynfen Parker-Jervis, but under the settlement of Mar. 27, 1861, the commissioners excepted from the aggregated property a portion assessed by them at £24,640 (being the principal value of the jointure capitalised at between twenty-four and twenty-five years' purchase like the rest of the estate) on which portion they charged duty at the rate of four per cent.

This summons was taken out by the trustees of the term of five hundred years and generally of the settlement of Dec. 10, 1861, and of the resettlement of Nov. 14, 1884, to which Mrs. Locker, Mrs. Maude Parker-Jervis, St. Vincent John Parker-Jervis (tenant in tail in remainder, eldest son of Edward St. Vincent Parker-Jervis), John Saltren Willett, and the University Life Assurance Society were made defendants. The summons asked (i) whether the plaintiffs, as such trustees as aforesaid, had power under the Finance Act, 1894, s. 9 (5), to raise the amount of the estate duty payable on the death of Edward Swynfen Parker-Jervis in respect of the jointure of £1,000 charged in favour of Mrs. Locker on the Stone Aston Estates, and any interest and expenses properly paid or incurred by them in respect thereof by a mortgage of the said estates or a part thereof, notwithstanding that such jointure had been treated by the Commissioners of Inland Revenue for the purposes of estate duty as an estate by itself, and had not been aggregated with any other property passing on the death of Edward Swynfen Parker-Jervis; (ii) how the estate duty payable in respect of the jointure of £1,000 was to be borne as between the persons interested in the Stone Aston Estates, and in particular whether such estate duty ought to be repaid by Mrs. Locker to the plaintiffs or other persons paying the same, or whether she ought to pay interest upon the amount of such duty to John Saltren Willett and the University Life Assurance Society, and if so, at what rate; (iii) how the proportion of the estate duty payable on the death of Edward Swynfen Parker-Jervis in respect of the estates comprised in the indenture of re-settlement of Nov. 14, 1884, to be borne by Maude Parker-Jervis, as being entitled to the jointure of £500 charged thereon was to be determined; and (iv) whether Maude Parker-Jervis would be entitled to charge the proportion of estate duty to be borne by her as aforesaid upon the corpus of the estates, and, if so, on what terms as to interest or otherwise.

At the hearing of the summons a point was taken on the first question raised as to whether the trustees could properly be held accountable for and had the power to raise the duty on the whole of the settled estates, or whether the power of raising the duty and the liability for payment devolved on J. S. Willett, the assignee of the legal tenant for life. J. S. Willett, however, consented to concur in the proposed mortgage, and his Lordship then, without determining whether the plaintiffs as such trustees as aforesaid had power to raise the duty, declared that J. S. Willett as tenant for life had power to raise the duty payable in respect of the whole of the estates, including Mrs. Locker's jointure, and any interest and expenses properly paid or incurred in respect thereof by a mortgage of the estates or part thereof, and directed the plaintiffs to raise so much of the duty on the whole estates, including Mrs. Locker's jointure, as they should think fit out of the settled

personalty, the residue of the duty to be raised by J. S. Willett by mortgage of part of the estates on the request of the plaintiffs.

Austen-Cartmell for the trustees.
Reginald Hughes for Mrs. Locker and Mrs. Maude Parker-Jervis.
Jessel for J. S. Willett.
S. R. Earle for the tenant in tail in remainder.
F. Stallard for the mortgagees of the life estate.

KEKEWICH, J.—There are two questions to be decided, both arising under the Finance Act, but otherwise of an entirely different character, even though they both concern annuities and both those annuities are jointure rentcharges. I will deal first with the question whether Mrs. Locker is entitled to be paid her annuity or jointure free from any deduction in respect of the estate duty leviable on the property out of which that annuity is payable and on which it is charged. If it should appear that she is bound to contribute to the estate duty, then the further question will arise, what proportion ought she to pay, a question which equally arises as regards the other annuity to Mrs. Maude Parker-Jervis, and which may be considered as completely distinct from the first question.

Without looking for the moment at any authorities, and without for the moment referring to the Act, let me consider the contract between the parties, because this is a contract. This is a settlement whereby an annuity is charged in the proper form on the estate for the benefit of Mrs. Locker who is a contracting party. If the parties in so many words said the annuity is to be paid free of any charge whatever, the owner of the property who charges that property with the annuity has contracted that so many pounds shall come to the hands of the person in whose favour he makes the charge, and it is rather startling to be told that that contract shall not take effect and that some deduction shall nevertheless be made and that the person entitled to the charge shall not receive the amount stated, but something less. Many persons no doubt think that they are going to receive certain sums annually or quarterly and do not receive them because the revenue makes certain deductions. I suppose that any member of the Bar, on receiving an appointment to the Bench, might think he was going to receive a salary of a certain amount, but he would soon find out his mistake, because the revenue takes care that he does not. The money is retained as against him and as against everybody else for income tax and all the decisions as regards income tax have gone on that footing, that although it is possible to provide for the payment of an annuity clear of income tax it has to be done by cumbrous machinery, and it is, in effect, necessary to provide that in addition to an annuity chargeable with income tax, there shall be a further annuity equivalent to the income tax, varying according as the income tax rises or falls. But that, so far as I am aware, has never been extended to any other tax, and it has never been said, so far as I am aware, that other taxes are not deductions. By some legal interpretation it has been held again and again that income tax is not a deduction. To take one example, Wood, V.-C., says in *Turner* v. *Mullineux* (1) (1 John. & H. at p. 335), quoted by Kay, L.J., in *Gleadow* v. *Leatham* (2) (22 Ch.D. at p. 272): "This court always holds that income tax is not a deduction." It really is not in one sense, because it is a sum paid by the person entitled to the annuity, paid in respect of the income which he receives. It is not really chargeable until he really receives the income. In that sense it is logically and technically not a deduction. Every other tax that prevents the annuity coming into the hands of the annuitant clear has always been held, so far as I am aware, to be a deduction.

Turning to this settlement, I find that the parties have contracted that Mrs. Locker shall be paid the £1,000 a year without any deduction whatever, except in respect of income tax. There is no attempt to make it clear of income tax, and not only that, there not being any desire to make it clear of income tax, the usual words are put in the settlement. Then it is said that the words "without any

A deduction" do not refer to estate duty because that is not a deduction. It is unnecessary to say more on that point than I have already said. But it was urged that this was a settlement made in 1861, and it is therefore impossible that the contracting parties could have contemplated such a charge as this estate duty which is imposed more than thirty years afterwards. It is a sufficient answer to say that the parties did not contemplate that or any other duty; what they did contemplate B was that the annuity should be paid without any deduction whatever, and I think it is only fair to say that they must be taken to have contemplated some possible deduction for tax because they have excepted deductions in respect of income tax. But one need not dwell much on that, because the parties have contracted for the annuities to be paid without any deduction whatever, and if the argument prevails that Mrs. Locker is to take £1,000 a year less some sum to be ascertained for estate C duty, she will not get £1,000 a year. She will get £1,000 a year with a deduction, less some sum in respect of the estate duty. That seems to me to be not in accordance with the contract. Here I have these words "without any deduction whatever," and I think that means on the contract that there was to be no deduction in the events which have happened in respect of the estate duty.

I am told, however, that apart from the contract, the Finance Act, 1894, is D against my interpretation, and that depends on s. 14 (1) which provides that where the person who pays the estate duty, pays the whole of it, then he may recover from the person entitled to any sum charged on the property a rateable proportion, that is the proper proportion which the owner of the charge ought to provide; but that must be under a disposition not containing any express provision to the contrary. The provision here is not express, no doubt, in the sense which I have mentioned E and which was argued to be the right one; there is no express mention here of the estate duty, but I see no difficulty myself in saying that an express provision is one which expressly provides against any deduction fairly including the deduction in question, and it is not necessary to say that there must be an express provision mentioning estate duty. One observation probably will be sufficient to deal with F that. If that argument is sound no settlement dated before the passing of the Finance Act, 1894, or at any rate before it was known to the public that this estate duty was contemplated by Parliament, could possibly contain an express provision because it would have been impossible before it was passed by Parliament for anyone to frame words which would expressly mention the estate duty which was afterwards imposed. Reference has been made to *Re Countess of Orford, Cartwright* G v. *Duc del Balzo* (3). In one sense it does apply. It is directly applicable to the case in hand but for the words "under a disposition not containing any express words to the contrary."

The other point is a much more difficult one. The question is how the duty chargeable to the jointress, Mrs. Maude Parker-Jervis, is to be ascertained—a question which has not been dealt with and probably did not occur to the framers H of the Finance Act, 1894, in its full difficulty, and therefore we have no full provision directly dealing with it. All one can do is to see what was the intention of the legislature having regard to the general scheme of the Act and to those special provisions which bear on it. How is Mrs. Maude Parker-Jervis, who is entitled to a jointure, to be charged. She must be charged with some duty; some deduction must be made in respect of her duty. It is practically immaterial for this purpose I whether the duty is charged on the whole or any part of the estate. I do not wish to encumber my view of the case with any distinction on that ground. I do not think so far as I can see, that that makes any difference whatever.

The first point which occurs to me to guide my decision is that the estate duty is by the Act charged on the property. It is quite unnecessary to go through the Act for that purpose, but it is the property which passes which is charged. It is the property which as a whole passes by the death which is charged with the estate duty. The legislature does not concern itself as between the owner of the estate, the taxpayer, and the taxed property for the purpose of ascertaining what is to be paid

to the Revenue. The legislature takes the estate as a whole passing on the death, and says that property, whatever it is, shall be charged with duty at a certain rate. On that principle the duty is ascertained, and it has to be paid by some person. Then, not for the sake of the Revenue at all, which is already thoroughly protected, but for the sake of assisting different persons to bear their own burdens in the proper rateable proportions, the Act contains several provisions distributing those burdens, and the question is how those burdens are to be distributed. Mrs. Maude Parker-Jervis is entitled to a jointure of so much chargeable on the estate, the whole of which is chargeable with the duty. One very ready way of ascertaining her proportion is to say, "You are entitled to a jointure of £500 a year, payable out of property which realises more than that, and you must bear the burden in exact proportion to the capital value of your jointure. The duty is charged on the capital value of the whole. You are entitled to something which, though it is an annual charge, and an annual charge of a limited duration, yet is capable of valuation by the simplest possible means, that is to say, by an actuarial assessment, and you must pay the duty on that." For many purposes the actuarial assessment is the very best possible way, and if you apply it to a very large number of cases so as to strike an average, it would on that average work with very great fairness. Many cases have come before me to illustrate that. But the question is whether that ought to be applied to a case which is one of a large number of cases where neither party can possibly have the benefit of the average. It is all very well to say that if you take a score or more jointresses and assess their jointures on the actuarial principle, they would not between them pay too much or too little, but would pay really exactly what they ought to pay, but it is another thing to say Mrs. Maude Parker-Jervis will not pay too much. It is quite possible that she may pay more than is a reasonable proportion attributable to her interest. On the other hand, if she live to an old age it is quite possible that she may have an advantage and pay too little, but it seems to me it is so problematical, so speculative, that I ought not to adopt that view if there is any other possible view.

There is another possible view, and it is on the whole a reasonable one which I ought to adopt. I do not propose to go through the sections of the Act, but it seems to me tolerably clear that this lady is entitled to a charge on the estate for the duty which she pays, and that whatever part of the duty she or anyone else pays is by the Act imposed on the estate and is paid out of the inheritance. If she were liable to pay the duty in the first instance, she would be entitled to a charge for what she paid. That seems to me to be so under s. 9 of the Act. She would be in the position of a person having a charge on the estate and in respect of that charge would have to be paid. She is entitled, so it seems to me, to say: "You charge that duty on the whole estate, and, so far as I am a mortgagee, though of a limited character, I must keep down the interest on that charge; I shall only do it during my life; it may be a short time or a long time." Then the answer to that is: "Yes, but on your death there will be nobody left to pay that interest and the result will be that it will have to be borne by the inheritance; it may be by a tenant for life in possession or by a tenant in tail, but practically in legal language it will have to be borne by the inheritance." That is quite fair. I think that is exactly the scheme of the Act. The scheme of the Act is that the duty shall be levied on the inheritance and the inheritance shall bear it. I think it would be going contrary to the general scheme of the Act if I were to say that any part of the capital sum of the duty as a whole ought to be borne by any person having a limited interest. No doubt in one sense every person having a limited interest bears a proportion of the duty. He bears it in proportion to his limited interest. The tenant for life unfortunately bears a heavy burden. He bears it in this way, that instead of having the clear income which his predecessor had—I am speaking of course of estates free from incumbrances—he has it less a charge on the property which has to be raised by mortgage or otherwise, and the result is that he has to pay his £4 per cent., or whatever it is, on that charge during his life. If the property is sold he has less income from the

property. If the duty is paid out of capital money there is a cesser of interest arising from that capital money, but in either case the burden of the duty is cast on the inheritance.

If the view which I take is the right one, and this lady has to bear her proportion of the duty during her life, the same thing will follow. The jointress is a limited owner, and she must pay interest on the rateable part of the duty ascertained according to her rateable proportion of the entire property. The rest of the property will be that of which the tenant for life remains in possession, and he will have to pay interest on the duty charged on that in proportion, and so during their joint lives they will divide the charge in a fair way. If she dies first he will pay the interest on the whole. That seems to me to be the scheme of the Act, and, having gone through the different clauses, I am of opinion that they all point that way, and I have not seen any clause which in the slightest degree contradicts it. I repeat there is no particular provision in the Act to that effect; it seems to me to have been left very much at large. But I have to consider how best to ascertain that which is undoubtedly true, namely, that the jointress must bear a fair proportion of the duty. I think that is the way to do it. We know here what the principal value of this jointure is. The parties have ascertained it; but, if they had not, it would have been necessary to ascertain what proportion of the whole estate was required to produce the jointure, that is, so much of the estate as is represented by the jointure. A rateable part of the duty levied on the whole estate must then be paid in respect of that portion of the estate. That sum will actually be, or will be supposed to be, raised by mortgage, or it may be paid by appropriation of capital money, and the jointress must pay interest during her life on that sum at such rate as may be negotiated.

Order accordingly.

Solicitors: *Stuart & Tull; Waltons, Johnson, Bubb & Whatton; J. E. Lickfold.*

[*Reported by* C. F. DUNCAN, ESQ., *Barrister-at-Law.*]

FITZGERALD AND OTHERS *v.* FIRBANK

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), May 10, 1897]

[Reported [1897] 2 Ch. 96; 66 L.J.Ch. 529; 76 L.T. 584; 13 T.L.R. 390; 41 Sol. Jo. 490]

Profit à Prendre—Fishery—Grant of exclusive right of fishing with rod and line—Licence or profit à prendre—Pollution of river by stranger—Right of action.

A grant from the freeholder of an exclusive right of fishing with rod and line for a specified term of years at a certain rental in part of a river is not a mere licence, but implies a right to take away the fish when caught, and is a profit à prendre. Therefore, the grantees of such an incorporeal hereditament have a right of action against any person who pollutes the river to the prejudice of, and injury and damage to, the grantees and their fisheries.

Smith v. *Kemp* (1) (1693), 2 Salk. 637 and *Holford* v. *Bailey* (2) (1849), 13 Q.B. 426, considered.

Notes. Considered: *Peech* v. *Best*, [1930] All E.R. Rep. 268. Applied: *Nicholls* v. *Ely Beet Sugar Factory, Ltd.*, [1931] All E.R. Rep. 154. Considered: *Paine & Co.* v. *St. Neots Gas and Coke Co.*, [1939] 3 All E.R. 812. Referred to: *Lowe* v. *Adams*, [1901] 2 Ch. 598; *Wenner* v. *Morris* (1935), 79 Sol. Jo. 252; *Nicholls* v.

Ely Beet Sugar Factory, Ltd., [1936] Ch. 343; *Newcastle-under-Lyme Corpn.* v. *Wolstanton, Ltd.*, [1946] 2 All E.R. 447; *Pride of Derby and Derbyshire Angling Association, Ltd.* v. *British Celanese, Ltd.*, [1952] 1 All E.R. 1326; *Bason* v. *Clarke*, [1955] 1 All E.R. 914.

As to the creation and duration of a profit à prendre and the rights of an owner, see 12 HALSBURY'S LAWS (3rd Edn.) 624-626; and for cases see 19 DIGEST (Repl.) 213-215.

Cases referred to:

(1) *Smith* v. *Kemp* (1693), 2 Salk. 637; Holt, K.B. 322; Carth. 285; 4 Mod. Rep. 186; Skin. 342; 90 E.R. 1078; 19 Digest (Repl.) 225, *1666*.

(2) *Holford* v. *Bailey* (1846), 8 Q.B. 1000; 16 L.J.Q.B. 68; 10 Jur. 822; reversed (1849), 13 Q.B. 426; 18 L.J.Q.B. 109; 13 L.T.O.S. 261; 13 Jur. 278; 116 E.R. 1325, Ex. Ch.; 19 Digest (Repl.) 225, *1668*.

(3) *Holford* v. *Pritchard* (1849), 3 Exch. 793; 18 L.J.Ex. 315; 13 L.T.O.S. 74; 154 E.R. 1065; 31 Digest (Repl.) 310, *4472*.

Also referred to in argument:

Webber v. *Lee* (1882), 9 Q.B.D. 315; 51 L.J.Q.B. 485; 47 L.T. 215; 47 J.P. 4; 30 W.R. 866, C.A.; 19 Digest (Repl.) 214, *1569*.

Hindson v. *Ashby*, [1896] 2 Ch. 1; 65 L.J.Ch. 515; 74 L.T. 327; 60 J.P. 484; 45 W.R. 252; 12 T.L.R. 314; 40 Sol. Jo. 417, C.A.; 25 Digest (Repl.) 13, *111*.

A.-G. v. *Emerson*, [1891] A.C. 649; 61 L.J.Q.B. 79; 65 L.T. 564; 55 J.P. 709; 7 T.L.R. 522, H.L.; 25 Digest (Repl.) 22, *202*.

Muskett v. *Hill* (1839), 5 Bing. N.C. 694; 7 Scott, 855; 9 L.J.C.P. 201; 132 E.R. 1267; 19 Digest (Repl.) 215, *1575*.

Newby v. *Harrison* (1861), 1 John. & H. 393; 4 L.T. 397; 9 W.R. 849; 70 E.R. 799; affirmed, 4 L.T. 424, L.C.; 19 Digest (Repl.) 216, *1584*.

Heap v. *Hartley* (1889), 42 Ch.D. 461; 58 L.J.Ch. 790; 61 L.T. 538; 38 W.R. 136; 5 T.L.R. 710; 6 R.P.C. 495, C.A.; 30 Digest (Repl.) 527, *1644*.

Duke of Somerset v. *Fogwell* (1826), 5 B. & C. 875; 8 Dow. & Ry.K.B. 747; 5 L.J.O.S.K.B. 49; 108 E.R. 325; 19 Digest (Repl.) 216, *1586*.

Ibottson v. *Peat* (1865), 3 H. & C. 644; 159 E.R. 684; sub nom. *Ibbotson* v. *Peat*, 6 New Rep. 124; 34 L.J.Ex. 118; 12 L.T. 313; 29 J.P. 344; 11 Jur.N.S. 394; 13 W.R. 691; 25 Digest (Repl.) 386, *135*.

Appeal by the defendant from a decision of KEKEWICH, J., in a witness action.

The True Waltonian Society, which was established in 1830 and consisted of forty members, had a fishery at Rickmansworth in the river Colne extending from Tolpits Bridge, down to Springwell, and thence along the Grand Junction Canal and the back river of the Colne about a mile and a half; the length of the whole fishery was nearly five miles. By an indenture dated Sept. 7, 1891, and made between the freeholder, Lord Ebury, (the "lessor") of the one part and the plaintiffs, Charles Fitzgerald, Edward Bawdon and Arthur Price, three officers of the Society, of the other part, the lessor had granted to the plaintiffs the upper portion of the fishery running from Tolpits Bridge to Mill End Bridge, a distance of about two miles. The deed witnessed that, for the considerations thereinafter mentioned, and subject to the rent, covenants, and conditions thereinafter contained, the lessor did thereby grant to the lessees for the period thereinafter mentioned "the exclusive right of fishing" in the part of the river Colne, thereinafter specified, together with a right of way for the purpose of exercising such right of fishing along both banks of the river; that the right of fishing should only extend to fair rod-and-line angling at proper seasons, and to netting for the sole purpose of procuring fish baits; that the grant should be for the term of fifteen years from Mar. 25, 1891, at a rental of £50 per annum for the first five years, £75 per annum for the second five years, and £100 per annum for the last five years, determinable nevertheless as therein mentioned; that the liabilities of the lessees

to the lessor thereunder should consist of and be limited to the following obligations: The lessees should, at their own expense, cut and keep down the weeds in a specified portion of the river, and also attend to the banks of such portion of the river at such times and in such manner as theretofore carried out by them, and should during every period of five years of the term thereby granted expend a sum of not less than £166 in such weed-cutting, banking, and the stocking of the fishery; but that such specified outlay of £166 during each of such periods of five years should be exclusive of, and additional to, the disbursement on the river for fish-stocking alone of the sum of £200 then in the hands of, and to be retained by, the lessees as the agreed net balance of the sum of £440 recently recovered by the lessor and lessees in a certain action.

The lower part of the fishery, about three miles long, was held under a grant from one Shakell, the freeholder, for a term of 21 years from Mar. 25, 1895, and was in substantially the same terms as the deed of Sept. 7, 1891. During the five years preceding the action the society had spent a total sum of £1,155, a yearly average sum of £231, in maintaining, stocking and preserving the fisheries.

In August, 1895, the plaintiffs noticed that the water was coming from the Chess and its branches into the fishery in a disturbed condition, so as to interfere seriously with the fishing and it was ascertained that the source of pollution were the gravel works of the defendant, Joseph Firbank, a railway contractor, at Rickmansworth. The pollution consisted of the discharge of dissolved London clay, gravel-washings, and other suspended matter into the plaintiffs' water by the defendant at three points, viz., where the Chess entered the Colne at the Grand Junction Canal Iron Bridge, where the Bury Stream (a branch of the Chess) entered the Colne below the first weir, and where the Town Ditch (also a branch of the Chess) ran into the Colne at the Culvert. The pollution was such as to discolour the water, and render it so muddy and turbid and thick with suspended matter and grit, that all angling was stopped, that the fish were driven away, and that the weeds could not be cut, both because they were hidden by the turbid and muddy water, and because the grit settled upon them so thickly that they were very hard to cut. The result was that not only trout, but also coarse fish, had been driven almost entirely out of the plaintiffs' fisheries, the fish left in the river were rendered less ready to take and were kept short of food, and the suspended matter formed deposits on the spawning beds, and so made them unfit for spawning fish, and would prevent the hatching of ova and rearing of young fry.

By this action the plaintiffs, on behalf of the Society, claimed an injunction to restrain the defendant, his agents, workmen, and servants, from polluting the rivers Chess and Colne, to the prejudice of, and injury and damage to, the plaintiffs and their fisheries, in the river Colne, and more especially from discharging into such rivers large quantities of water thick with yellow mud and other suspended matters, and from doing anything to injure the fish or fishing, or to silt up or otherwise prejudicially affect, injure, or damage the plaintiffs or their fisheries. They also claimed damages for the injuries already done, and any necessary inquiry. The action was set down for trial without pleadings.

The defendant having ceased to discharge the matter complained of into the river before the trial of the action, the case was argued on the question of damages. KEKEWICH, J., awarded the plaintiffs £150 damages, and the defendant appealed.

Bramwell Davies, *Q.C.*, and *Kenyon Parker* for the defendant.
Warrington, *Q.C.*, and *Ashton Cross* for the plaintiffs.

LINDLEY, L.J.—The plaintiffs in this case are the grantees—I am reading from Lord Ebury's grant—of an exclusive right of fishing in the river Colne in Hertfordshire. The right of fishing thereby granted is only to extend to fair rod-and-line angling at proper seasons, and to netting for the sole purpose of procuring fish baits.

Then there are provisions which may or may not be important, namely, that the lessees are to cut and keep down the weeds and attend to the banks and re-stock with fish.

The first question is, what is granted by this deed? What passed to the grantees by the words "exclusive right of fishing?" Counsel for the defendant wanted to persuade us that they did not include the right of catching and taking away the fish caught—that it was a licence to hook and to return the fish when hooked to the water, I suppose. No authority whatever was brought to our attention in support of so very strange a contention as that; and, on looking into the authorities which one is accustomed to refer to in cases of this kind, one sees that such a proposition as that cannot for a moment be maintained. The law was laid down in *Smith* v. *Kemp* (1), and is repeated in COMYN'S DIGEST (5th Edn.), vol. 5, p. 362, tit. "Piscary":

> "If a grant be de libera piscaria, the grantee shall have the property of the fish there, and shall maintain trespass for fishing there."

With reference to the right of taking away the fish hooked, you cannot draw any distinction between one kind of right of fishing and another. If a person chooses to pay anything for the sport of catching fish and returning them to the water, of course, he can do so; but that is not what is understood by lawyers or men of sense as a right of fishing. The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt about that. Therefore, the plaintiffs have got a right of some sort as distinguished from a mere revocable licence.

What is that? It is a good deal more than an easement; it is what is commonly called a profit à prendre. It is of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights. That is very old law; but it was very carefully considered, and the law will be found laid down, in *Holford* v. *Bailey* (2), which came before the Court of Exchequer Chamber. Again, if he has a possessory right, and if not a grantee by deed, but only claiming under an agreement, he can be said to have the use and occupation of the right: that was decided in *Holford* v. *Pritchard* (3). Therefore, we have the plaintiffs' rights pretty accurately defined. The plaintiffs having got those rights, what has the defendant done? Has he interfered with them? He has not challenged those rights at all, but he has done that which prevents the plaintiffs from exercising those rights to the extent to which they would be entitled and would exercise them if not wrongfully prevented. What has the defendant done? He has worked out some gravel pits, and has washed the gravel, and has turned the dirty water containing a quantity of silt into the river Chess. That silt has found its way down to the river Colne, and has damnified the plaintiffs to this extent, that it has driven away the fish and injured the breeding there. Is that what is called a damnum sine injuria? It cannot be so, if I am correct in the first proposition that the plaintiffs have rights, and that those rights have been damnified, and damnified by fouling the river. What justification has the defendant for fouling the river Colne to the damage of anybody who has rights in that river? None at all. He was a wrong-doer the moment he sent the silt into the river. If the plaintiffs had no rights in the river, of course, they had no right legally to complain. It seems to me that this is a somewhat unusual case, and I am not aware of any precedent for what I may describe as an action of nuisance by the owner of a sole and exclusive right of fishing; but once grant such a right, he can sue in trespass for it. I cannot see why he could not maintain an action on the case for nuisance at common law. It seems to me that there is nothing in the points raised by the appellant when they are closely looked at, and that, therefore, the appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The first question that we have to consider is, What passes by this grant? There are two grants, but the same words

A are used in both, and I need only refer to Lord Ebury's grant. What is given in that grant is the exclusive right of fishing. It was argued by counsel for the defendant that all that that meant was a right to the grantees to amuse themselves; that they were entitled to hook the fish; and that, when they had hooked the fish and brought them to the bank, they were to be handed over to Lord Ebury. With all respect to counsel, I could not follow him at all. I think that that is a kind of idea B which would be ridiculed by anyone who knows anything about fishing, and I think that I may say also anybody who knows anything about the law appertaining to this subject. According to my view, what passed by that deed was an exclusive right to fish. When I look at *Smith* v. *Kemp* (1) I find this (2 Salk. at p. 637):

> "Libera piscaria, which is where the right of fishing is granted to the grantee, C and such a grantee hath a property in the fish, and may bring a possessory action for them without making any title."

It seems to me that it cannot be contended that this is only a mere licence; it is a profit à prendre. It is the right to fish in the water, and, when the fish are caught, it is a right to the property in the fish. What has the defendant done? I am not going into the precise things that he has done, because it is admitted that what D he has done has lessened the number of the plaintiffs' fish, has interfered with the spawning grounds, and has thereby prevented ova and fry from being deposited as they otherwise would be. It, therefore, curtailed the rights to which, in my opinion, the plaintiffs were entitled. If that is the case, it is perfectly clear to my mind that there is a right of action in the plaintiffs, and that the judgment of the learned judge in the court below, who so held, is perfectly right. E

RIGBY, L.J.—I am of the same opinion. It has been argued in this case that the plaintiffs have nothing more than a licence. I consider that the distinction between a licence and a grant is as plainly marked out as anything in our law; and, if you find a person affecting to grant by deed rights in respect of real property F which are capable of being so granted, that is a grant and not a licence. I do not mean to assert that there might not be a deed so particularly worded as to enable you to say that the grant did not mean what it appeared to mean. But a grant by deed creates an incorporeal hereditament, where the subject of the grant is of such a nature as the law allows an incorporeal hereditament to be granted.

I will only read from the judgment of the Court of Exchequer, in *Holford* v. *Bailey* G (2), one passage. There the question was as to the true point of the distinction between "licence" and "grant"; and the learned judge who gave the judgment of the court says this (13 Q.B. at p. 446):

> "To give the plaintiff a sole and exclusive right, even for an hour, a deed was necessary, and that would be a grant; and whether the grantee of a fishery had it in fee, or for a term of years, or even for an hour, he could sue for a H disturbance during the time that the interest under his grant continued."

The distinction between "deed" and "grant" is laid down very clearly, but I never heard, and I do not think anybody else ever did before this, of a case in which there was an argument addressed to the court, that what purports to be a grant by deed, there being nothing more than that, warrants it in being considered as a I licence. But that same passage also lays down what I conceive to be undoubted law, namely, that the grantee in such a case may sue for a disturbance. A disturbance is a very general phrase. In that case it was held that he might sue in trespass and there were three points raised in the court below: one was, that you could not sue in trespass, but that you must sue on the case. That was met by an argument that the plea could not mean an action on the case. Then there was another point about several fishery, which we do not need to deal with because the decision of the Queen's Bench was overruled in that respect. But the important point was that you could not sue in trespass, and in the Court of

Exchequer it was held that you might sue in trespass, and it was not necessary for them to decide the question whether that might not be a count in case. They said it was not necessary for them to decide it, but they saw no reason to doubt that the Queen's Bench were right there, and I believe they were, because, of course, everything in that count pointed to trespass. But that does not mean that you can only sue in trespass. Quite the contrary. The difficulty was because the action was in trespass, and, therefore, there was one form of disturbance.

I cannot doubt, on the construction of the grant in the present case, the right of the plaintiffs by virtue of that grant to sue for a wrongful act—a wrongful act which operates as a disturbance of that right, which, indeed, is a very important matter in regard to the infringement of the right. The argument was pushed with the greatest courage to this extent—that, unless you tried to do the very thing that they were authorised to do, you might destroy the whole subject-matter of the grant, and be liable to no action at all; that the only way in which you might or could do it was by imitating them, or doing something which they are entitled to do under their grant. I never heard any case which gave the slightest colour to such a doctrine at all. I hold that, on the incorporeal hereditament, there is a right of action against any person who disturbs them, either by trespass, or by nuisance, or in any other substantial manner.

Appeal dismissed.

Solicitors: *Bircham & Co.; Arthur Price.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

KIRKHAM *v.* ATTENBOROUGH. KIRKHAM *v.* GILL

[Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), December 17, 1896]

[Reported [1897] 1 Q.B. 201; 66 L.J.Q.B. 149; 75 L.T. 543; 45 W.R. 213; 13 T.L.R. 131; 41 Sol. Jo. 141]

Sale of Goods—Contract—Goods delivered on sale or return—Goods pawned by buyer—Act adopting the transaction—Title of pawnee—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 18, *r.* 4 (*a*).

Where a person to whom goods have been delivered on sale or return pawns them, he does an act adopting the transaction within s. 18, r. 4 (a), of the Sale of Goods Act, 1893, and the property in the goods passes to him, so that the original vendor cannot recover the goods from the pawnee.

Notes. Distinguished: *Weiner* v. *Smith*, *Weiner* v. *Gill*, [1904-7] All E.R. Rep. 773. Considered: *Janesich* v. *Attenborough* (1910), 102 L.T. 605; *Bradley and Cohn* v. *Ramsay* (1912), 106 L.T. 771. Applied: *Genn* v. *Winkel*, [1911-13] All E.R. Rep. 910. Followed: *Lindon Jewellers, Ltd.* v. *Attenborough*, [1934] All E.R. Rep. 270. Referred to: *Kempler* v. *Bravingtons* (1925), 133 L.T. 680; *Buller & Co., Ltd.* v. *T. J. Brooks, Ltd.*, [1930] All E.R. Rep. 534; *Armstrong* v. *Strain*, [1951] 1 T.L.R. 856.

As to the transfer of property in specific goods from seller to buyer, see 34 Halsbury's Laws (3rd Edn.) 67 et seq.; and for cases see 39 Digest 501 et seq.

Cases referred to in argument:

Moss v. *Sweet* (1851), 16 Q.B. 493; 20 L.J.Q.B. 167; 16 L.T.O.S. 341; 15 Jur. 536; 117 E.R. 968; 39 Digest 511, *1276.*

A *Re Florence, Ex parte Wingfield* (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 246, C.A.; 39 Digest 510, *1268*.

Henderson & Co. v. *Williams*, [1895] 1 Q.B. 521; 64 L.J.Q.B. 308; 72 L.T. 98; 43 W.R. 274; 11 T.L.R. 148; 14 R. 375, C.A.; 43 Digest 521, *594*.

Appeals by the defendants from decisions of GRANTHAM, J.

B The plaintiff was a manufacturing jeweller who had, for some time, been in the habit of delivering jewellery to one Winter "on sale or return." The prices were always stated on a contract note, which was headed "on sale or return." Early in 1895, the plaintiff delivered certain jewellery to Winter on "sale or return," which Winter shortly after pawned with the respective defendants. In January, 1896, Winter died. He had not paid the plaintiff for any of the jewellery pledged C with the defendants, nor had he intimated to the plaintiff that he did not intend to return such jewellery. The plaintiff demanded the return of the jewellery in question from each of the defendants, and the defendants refused to return it unless paid the amount due to them respectively. In actions by the plaintiff against the defendants for trover and conversion of the goods, the learned judge gave judgment for the plaintiff in each case. The defendants appealed.

D *Bonsey* and *Attenborough* for the defendant Attenborough.

Bucknill, Q.C., and *Attenborough* for the defendant Gill.

McCall, Q.C., and *W. E. Hume Williams* for the plaintiff.

LORD ESHER, M.R.—In this case there was a contract between the plaintiff E and Winter, the terms of which were that the goods were delivered to Winter "on sale or return." That is a contract which is so common in business, that it has become well known to the courts, and it has been interpreted. Where a particular kind of contract has become well known, and the courts have determined what is its true construction, all the courts adopt that construction in subsequent cases. The construction which has been put on this contract is, that, if those are the only F terms, the contract does not pass the property in the goods at the moment when the contract is made, but at a subsequent time on the happening of certain events. The contract by which goods are delivered "on sale or return" means this: the purchaser may return the goods within a reasonable time, and the option of return belongs solely to the purchaser; the other party cannot even ask for the return of the goods, and his only right is to sue for the price if the goods are not returned. G That being the meaning of the contract, we have to see how the party who has the option is to exercise that option.

The rules for determining that question are now put in a code, though they are somewhat unhappily expressed. What has the purchaser to do in order to show that he has accepted the goods, as sold and bought? The Sale of Goods Act, 1893, s. 18, says that

H "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . . Rule 4: When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction."

I "Acceptance" means acceptance of that part of the contract which makes him the purchaser absolutely. Such acceptance gives the seller the right to be paid, and sue for the price; that is the only right of the seller, and he cannot ask for the return of the goods. The words "does any . . . act adopting the transaction" are difficult to construe. What "transaction" is the buyer to adopt? It cannot be the transaction by which the goods were delivered to him "on sale or return." That transaction had already been adopted. The words must, therefore, mean an adoption of the transaction so as to make the buyer the absolute purchaser of the

goods. That will be some act which signifies that he intends to be the absolute purchaser. If he does some act which would be right only if he were the absolute purchaser, that signifies an acceptance or adoption within the statute.

It has been argued that the buyer must do something which is quite inconsistent with a power to return the goods. That proposition is too wide. The act must be an act which is inconsistent with his not being the absolute purchaser of the goods. If a man has become a buyer under a simple contract of "sale or return," and nothing has been said as to time of payment, the price must be paid within a reasonable time. That is a transaction on credit. In this case, an act was done by the man who was in possession of the goods under a contract of "sale or return"; he pawned the goods. He had not then the power of returning the goods, unless he repaid the amount advanced by the pawnee. That is inconsistent with his free power to return the goods. He ought not so to deal with the goods unless he means to treat himself as being the absolute purchaser. The evident conclusion is that he has treated himself as the absolute purchaser. On the terms of the section we must hold that, by doing such an act, the buyer became the absolute purchaser, and the property in the goods passed. The only right of the seller was to sue for the price. The decision of GRANTHAM, J., cannot be supported, and the appeals must be allowed.

LOPES, L.J.—The important question in this case is, what is the meaning of the contract under which goods are delivered "on sale or return"? The position of a person to whom goods have been delivered on a contract of "sale or return" is this: He has an option of becoming the absolute purchaser of the goods, and may become the absolute purchaser in three ways. He may buy them at the price fixed; he may retain them so long as to make it unreasonable to return them; or he may do something inconsistent with a return of the goods, that is, with his being other than the absolute purchaser of the goods. That is the meaning of the contract of "sale or return." The words of s. 18 of the Sale of Goods Act, 1893, are difficult to construe. [HIS LORDSHIP read s. 18, r. 4, and continued:] I think that, if he retains the goods for an unreasonable time, he does something which is inconsistent with a return of the goods. Again, if he does an act which is inconsistent with a return, as, for instance, if he sells the goods, that is an act "adopting the transaction," and the property passes. Again, if he pawns the goods, he adopts the transaction, because he has not then the free control over the goods so as to be able to return them. In all these cases, he comes within the words of the section, as having done an act "adopting the transaction," and the property in the goods passes. If that is the true construction of the section, it is perfectly clear that the defendants are entitled to retain the goods, because they have been pawned to them. An act has been done which is inconsistent with a return of the goods, and, therefore, the property in the goods passed to Winter, and, therefore, to the defendants. The decision of GRANTHAM, J., was erroneous, and these appeals must be allowed.

RIGBY, L.J.—I entirely agree with the judgments and reasons which have been given, and I have nothing to add.

Appeals allowed.

Solicitors: *Stanley Attenborough & Tyer; Attenborough & Son; Colyer & Colyer.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

Re DAY. SPRAKE *v.* DAY

[CHANCERY DIVISION (North, J.), August 11, 1898]

[Reported [1898] 2 Ch. 510; 67 L.J.Ch. 619; 79 L.T. 436; 47 W.R. 238]

B

Administration of Estates—Real estate—Devise—Building contracts entered into by testator—Contracts not completed at time of death—Right of devisee to performance of contract at expense of estate.

By his will the testator devised real estate to E.L.S. for life with remainders over and gave his household furniture and farm stock to her absolutely and the C use of other land for a year after his death. Before his death the testator had entered into contracts, binding on him at his death, for the building of farm premises and cottages on the land given to E.L.S. for life, on that the use of which was given her for one year, and on other land which he had bought in his lifetime and had conveyed as a gift to the use of E.L.S. for life with remainder to her daughter M. At the testator's death these contracts were not D completed and his executors stopped completion but settled claims with the builders.

Held: E.L.S. was entitled to have the cottages contracted to be built on the land given to her for life completed at the cost of the testator's estate, but had no claim in respect of the contracts to build on the land conveyed to her before the testator's death.

E

Notes. Considered: *Ahmed Angullia Bin Hadjee Mohamed Salleh Angullia* v. *Estate and Trust Agencies (1927), Ltd.*, [1938] 3 All E.R. 106. Followed: *Re Rushbrook's Will Trusts, Allwood* v. *Norwich Diocesan Board of Finance*, [1948] 1 All E.R. 484.

As to the liability of executors on obligations of the deceased and the effect of the F death of the employer on a building contract, see 16 HALSBURY'S LAWS (3rd Edn.) 466, and for cases see 23 DIGEST (Repl.) 480 et seq.

Case referred to:

(1) *Cooper* v. *Jarman* (1866), L.R. 3 Eq. 98; 36 L.J.Ch. 85; 12 Jur.N.S. 956; 15 W.R. 142; 23 Digest (Repl.) 483, *5516*.

G Also referred to in argument:

Holt v. *Holt* (1694), 2 Vern. 322; 1 Eq. Cas. Abr. 274, pl. 11; 23 E.R. 808; 7 Digest (Repl.) 438, *389*.

Adjourned Summons by the defendants in an administration action for additional inquiries to determine (inter alia) whether the testator had at the time of his death H entered into any and what building contracts remained uncompleted, and whether his estate was under any liability therefrom, and what sums of money would have to be provided to have such contracts completed.

By his will, dated June 2, 1893, the testator appointed his sons and H. J. Sprake executors and gave E. L. Sprake Day absolutely his household furniture and effects and his live and dead farming stock; and devised his freehold house called Weston I Manor House, with forty-three acres of land, to the use of E. L. Sprake Day for life, with remainder to Alice Maud Day, with remainders over. He also gave her the use of other lands for a year after his death, and he gave his residuary real and personal estate to his sons upon trust to raise and pay certain legacies, and subject thereto upon trust in moieties for his two sons for their respective lives with remainders over.

The testator died on Nov. 9, 1893, entitled to a considerable real and personal estate. On Nov. 10, 1893, the action was commenced for the administration of the real and personal estate of the testator by the plaintiffs who were the sons of the

testator. The defendants were H. J. Sprake Day and A. M. Day. In July, 1896, an administration order was made directing the usual inquiries. On May 29 and June 1, 1893, the testator had entered into building contracts for the erection of a new farm and dairy house, at the price of £859, on the land the use of which was given by the will to E. L. Sprake Day for one year; for the erection on part of the land devised by the will to E. L. Sprake Day for life, of two new cottages at a price of £400; for the erection on land at Misterton, which had been purchased by the testator, and by his direction conveyed to the use of E. L. Sprake Day and A. M. Day for their joint lives, with remainder to A. M. Day absolutely of four cottages and a washhouse, at an aggregate price of £1,369. These contracts were at the date of the testator's death uncompleted and binding as between the testator and the builders with whom they were made. The plaintiffs had stopped the completion of the contracts and settled the claims of the builders.

H. Terell, Q.C., and *Romer* for the defendants.
Macnaghten, Q.C., and *Carson* for the plaintiffs.

NORTH, J.—As regards the property which was devised by the testator for the benefit of E. L. Sprake Day, and which was the subject of a contract for building existing at the time of his death, I think a case is made for an inquiry, because it seems to me that *Cooper* v. *Jarman* (1) applies. It is said that that case stands by itself; but although, as far as I know, there has been no other case which supports it, on the other hand, there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise, still there the case stands, and I must follow it. But I do not think it applies to the Misterton property which was not given by the testator's will. That property had, at some time before his death been conveyed direct to E. L. Sprake Day at his instance. Then the testator entered into a contract for the building of four cottages upon this land. This contract has not been completed, but the person entitled to the benefit of it has carried in a claim against the testator's estate, and it appears from the chief clerk's note that a certain sum has been allowed.

I do not see that any claim has been made out by E. L. Sprake Day in respect of this property. The property was conveyed to her out and out; and the testator entered into some contract with respect to it, but whether under such circumstances that she could have compelled him to carry out the contract I do not know. I can understand that there might be circumstances under which he would have been bound to carry out such a contract, by reason of some consideration moving from her to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a stranger to the owner of the property before the testator's death and not taking under his will, can claim to have a contract entered into by the testator with a builder to erect houses upon it carried out. Under these circumstances I can only direct an inquiry whether the testator had entered into any, and what building contracts or contract affecting the property devised to E. L. Sprake Day for her life, with remainders over, and whether any and which of such contracts were uncompleted at his death in respect of which his estate was under any and what liability, and whether any and what compensation should be paid by the testator's estate in respect thereof.

Solicitors: *Hartcup, Davis & Cobbold; Edmonds & Co.*

[*Reported by* J. R. Brooke, Esq., *Barrister-at-Law.*]

Re ROTH. GOLDBERGER *v.* ROTH

[CHANCERY DIVISION (North, J.), February 12, 1896]

[Reported 74 L.T. 50]

Trust—Investment—Power to invest in specified securities—Estate consisting of securities not within power—Postponement of sale—Concurrence of trustees.

By his will the testator gave his residuary estate to trustees on trust to convert and invest the proceeds in their names in the public stocks, funds, or securities of Great Britain or of any foreign or colonial government, and they were empowered to postpone for such time as should seem expedient the sale, conversion, or getting in of any part of the trust estate. The testator's estate consisted chiefly of foreign stocks and bonds, some of which were payable to bearer. These investments were retained by the trustees for some years; then one trustee considered it best to convert, but the majority favoured further postponement.

Held: under the direction to invest the trustees had no power to purchase foreign bonds payable to bearer, but they had power, at the discretion and with the concurrence of all the trustees, to postpone the sale of investments of that character held by the testator at his death; there being one trustee objecting, the trustees must convert.

Notes. Referred to: *Re Mayo, Mayo* v. *Mayo*, [1943] 2 All E.R. 440; *Re Rudd's Will Trusts, Wort* v. *Rudd*, [1952] 1 All E.R. 254.

As to when concurrence of all trustees necessary, see 38 HALSBURY'S LAWS (3rd Edn.) 971, 972; and for cases see 43 DIGEST 870, 871.

Cases referred to in argument:

Lewis v. *Nobbs* (1878), 8 Ch.D. 591; 47 L.J.Ch. 662; 26 W.R. 631; 43 Digest 926, *3643*.

Re Smith, Smith v. *Thompson*, [1896] 1 Ch. 71; 65 L.J.Ch. 159; 73 L.T. 604; 44 W.R. 270; 43 Digest 936, *3749*.

Summons by one of four trustees to determine whether certain investments were authorised by the will; whether the trustees could retain certain investments forming part of the testator's estate which were not authorised for investments made by the trustees; and whether specified securities ought to be retained.

By his will, dated Mar. 13, 1890, the testator, Mathias Roth, after making certain pecuniary bequests, gave all the residue of his real and personal estate to his wife and three other trustees upon trust to permit his wife to have the use and enjoyment during her life of his furniture and of all the income of his property less an annuity thereinafter given, and upon further trust to sell his real estate, and receive, convert, and get in all moneys and effects which might be owing to or belong to him; and upon further trust to lay out and invest all moneys which might come to their hands under or by virtue of the will in the names of his wife, Emil Roth, John Thomas Campbell, and Rudolph Goldberger, or other the trustees or trustee for the time being of the will, in or upon any of the public stocks, funds, or securities of Great Britain or of any foreign or Colonial government or state to be approved of by his trustees or trustee or in or upon any real or leasehold securities in England or Wales. The trust fund was directed to be held in trust for the wife for life with remainder in equal shares for the testator's two daughters for life with remainder to their respective children, and the will provided that the trustees or trustee should have a discretionary power to postpone for such period as should seem expedient the sale, conversion, or getting in of any part of the trust estate.

The testator died on Oct. 19, 1891. At the time of his death the greater part of his property consisted of foreign stocks and bonds, some of which were payable

to bearer. Some of these securities were retained by the trustees until the autumn of 1894, when the applicant, Goldberger, one of the trustees, raised the question that they ought to be converted; the other three trustees wished to retain them.

Upjohn for the applicant trustee.
Fellows for the other three trustees.
Gore Browne for the testator's daughters.
Capron for other beneficiaries.

NORTH, J.—All I can do is to declare the construction of this clause in the will. I am not in a position to give definite advice to the trustees as to particular securities. [His Lordship read from the will the trust to pay all income to the testator's wife, the direction to convert and the power to postpone, and continued:]—So long as the trustees all think fit unanimously to retain the property in the state in which the testator left it and pay the income to the widow, in my opinion, they have power to do so. So far as they have gone they have acted within their powers. But the discretion to postpone, which the will gives, is a discretion of all the trustees. It is not a case in which the majority have any right to bind the minority. If they cannot all agree to retain the securities, they must be converted in the ordinary way under the trust for conversion. Then the power is to retain so long as expedient. They must exercise the discretion continually. It is not, in my opinion, within their powers to fix a time for retaining the investments, to pass a resolution for example that they will not realise the securities for five years. That must not be pressed too far. I do not say that they might not agree among themselves to postpone calling in a particular debt for six months. But as a rule they cannot fix a definite time for retaining the securities. If at any time they cannot agree to go on retaining they must convert. It is said to be hard that one trustee should overrule the other three, but there is nothing in the will about a majority, and the argument would apparently enable a bare majority of the trustees by a single resolution to put an end to the exercise of any discretion for the future.

A different question is raised as to some of these securities which are payable to bearer. I think there is nothing in the will to limit the trustees' discretion as to postponement to securities which are not payable to bearer. The circumstance that some securities are payable to bearer and, therefore, attended by a certain risk is one which the trustees are bound to take into account, but if they think fit to retain them they are not prohibited from doing so. But as to investment by the trustees I do not think these securities are within their power. The direction in the will is explicit. The investments are to be made in the names or name of the trustees or trustee. It is said that they may invest not in their names at all, but in securities which are payable to bearer, and satisfy the direction by keeping them at a bank or elsewhere in their joint names. I am of opinion they cannot. If such securities were intended there is a well known form of direction to trustees to invest in their names or under their legal control, and the testator has not used it. It is said that many of the securities named in the will are only payable to bearer, and that to exclude them is to strike out a great part of the power. I do not see the difficulty. As I read the power it is a power to invest in such of the securities named as could be purchased in the names of the trustees. The order should expressly state that the court does not express any opinion as to retaining or realising any particular investments.

Solicitors: *Morley, Shirreff & Co.; Lattey & Hart; Campbell, Reeves & Hooper.*

[*Reported by* J. R. Brooke, Esq., *Barrister-at-Law.*]

A

WAINWRIGHT *v.* MILLER

[CHANCERY DIVISION (Byrne, J.), June 1, 1897]

B [Reported [1897] 2 Ch. 255; 66 L.J.Ch. 616; 76 L.T. 718; 45 W.R. 652; 41 Sol. Jo. 561]

Power of Appointment—Fraud on power—Appointment of life interest in trust determinable if appointee became Roman Catholic or member of sisterhood—Gift over on determination of life interest—Avoidance of gift for remoteness.

By a marriage settlement, made in 1847, the wife's real and personal property C was settled (inter alia) on trust for herself for life, with remainder to the children or other issue of the marriage as the wife should by deed, will or codicil appoint. There were three daughters issue of the marriage. After the death of her husband, the widow, in April, 1890, by deed appointed, in exercise of the power, that the trust premises should after her death be held by the trustees as to one equal third part in trust for her daughter T. M.; as to one D other equal third part, in trust for her daughter J.; and as to the remaining one equal third part, on trust to pay the income thereof to her daughter H. E., if not at the date of the widow's death a member of the Roman Catholic Church or of any sisterhood, during her life or until she should become a member of the Roman Catholic Church or of any sisterhood, without power of anticipation during any coverture, and subject as aforesaid, as to the capital and income E thereof, for the said T. M. and J. in equal shares. The widow died in 1893. H. E. became a member of a sisterhood in 1895.

Held: (i) the appointment of one equal third part of the trust premises on trust to pay the income thereof to H. E. during her life or until she should become a member of the Roman Catholic Church or of any sisterhood was not a fraud on the power.

F *D'Abbadie* v. *Bizoin* (1) (1871), 5 I.R.Eq. 205, distinguished.

Hodgson v. *Halford* (2) (1879), 11 Ch.D. 959, followed on this point.

(ii) in accordance with the dictum of KNIGHT-BRUCE, V.-C., in *Boughton* v. *James* (3) (1844), 1 Coll. at p. 46, the gift over to T. M. and J. was not void for remoteness, and on the admissions of the parties had taken effect.

Hodgson v. *Halford* (2) (1879), 11 Ch.D. 959, distinguished on this second G point.

Notes. Distinguished: *Re Gage, Hill* v. *Gage*, [1898] 1 Ch. 498. Referred to: *Re Chardon, Johnston* v. *Davies*, [1927] All E.R. Rep. 483; *Re Pratt's Settlement Trusts, McCullum* v. *Phipps-Hornby*, [1943] 2 All E.R. 458.

As to fraud on a power, see 30 HALSBURY'S LAWS (3rd Edn.) 275 et seq.; and for H cases see 37 DIGEST 504 et seq. As to the application of the rule against perpetuities, see 29 HALSBURY'S LAWS (3rd Edn.) 308 et seq.; and for cases see 37 DIGEST 92.

Cases referred to:

(1) *D'Abbadie* v. *Bizoin* (1871), 5 I.R.Eq. 205; 37 Digest 110, *p.*

I (2) *Hodgson* v. *Halford* (1879), 11 Ch.D. 959; 48 L.J.Ch. 538; sub nom. *Re Lyon, Re Jacobs, Re Hodgson* v. *Halford*, 27 W.R. 545; 37 Digest 102, *372.*

(3) *Boughton* v. *James* (1844), 1 Coll. 26; varied on appeal sub nom. *Boughton* v. *Boughton, Boughton* v. *James* (1848), 1 H.L.Cas. 406; 10 L.T.O.S. 497; 9 E.R. 815, L.C.; 37 Digest 149, *753.*

(4) *Stuart* v. *Cockerell* (1869), L.R. 7 Eq. 363; 38 L.J.Ch. 473; 20 L.T. 513; affirmed (1870), 5 Ch. App. 713; 39 L.J.Ch. 729; 23 L.T. 442; 18 W.R. 1057, L.J.; 37 Digest 67, *96.*

(5) *Evans* v. *Walker* (1876), 3 Ch.D. 211; 25 W.R. 7; 37 Digest 97, *335.*

Also referred to in argument:

Jenner v. *Turner* (1880), 16 Ch.D. 188; 50 L.J.Ch. 161; 43 L.T. 468; 45 J.P. 124; 29 W.R. 99; 44 Digest 456, *2781.*

Pearks v. *Moseley*, *Re Moseley's Trusts* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, *98.*

Re Roberts, *Repington* v. *Roberts-Gawen* (1881), 19 Ch.D. 520; 45 L.T. 450, C.A.; 37 Digest 58, *25.*

Action for a declaration whether the trust contained in a deed of appointment by Tryphosa Sutton, deceased, dated April 19, 1890, supplemental to an indenture of settlement, dated April 13, 1847, for payment of the income of one equal third part of the trust premises subject to the settlement to the defendant Harriet Ellin Sutton, had determined, and if so, from what date it had determined, and for other relief. The plaintiffs, James Gadesden Wainwright and William Wainwright, sued as trustees of the settlement. The defendants were Tryphosa Mary Miller (wife of Edward Miller), Jane Sutton (spinster) and Harriet Ellin Sutton (spinster).

By an indenture, dated April 13, 1847, made between John Sutton of the first part, Tryphosa Sutton (then Tryphosa Wainwright, spinster) of the second part, and George Johnson Wainwright and William Wainwright (both since deceased) of the third part (being a settlement made on the marriage afterwards solemnised between John Sutton and Tryphosa Wainwright), Tryphosa Wainwright, in consideration of the then intended marriage, and with the consent of John Sutton, conveyed all the real property to which she was entitled to G. J. Wainwright and W. Wainwright, on trust, after the solemnisation of the marriage, to pay the income of the real property to Tryphosa Wainwright, or Sutton, for her life, and, after her decease, on trust for the children or other issue of the marriage (such issue to be born in the lifetime of Tryphosa Wainwright), at such ages, days, or times, for such estates or interests, and if more than one in such shares and proportions, and with, under, and subject to such powers, provisoes, conditions, and limitations, and in such manner as Tryphosa Wainwright, notwithstanding coverture, should by deed, with or without power of revocation or by will or codicil appoint, and in default of such appointment in trust for all the children of the marriage, and their respective heirs and assigns, if more than one, in equal shares as tenants in common. By the same indenture Tryphosa Wainwright assigned all her personal estate to G. J. Wainwright and W. Wainwright to be held by them on the same trusts, intents, and purposes, and with, under, or subject to the same powers, provisos, and declarations as the real estate, or as near thereto as the different natures of the estates and the rules of law and equity would admit. The marriage was duly solemnised. John Sutton died on July 22, 1868, and G. J. Wainwright on Sept. 5, 1869.

By an indenture dated Jan. 11, 1883, the plaintiffs, James Gadesden Wainwright and William Wainwright the younger, were appointed trustees of the marriage settlement jointly with William Wainwright the elder, and the trust premises were duly vested in the plaintiffs and William Wainwright the elder. William Wainwright the elder died on Feb. 5, 1888. There were three daughters, issue of the marriage, namely, the defendants, Tryphosa Mary Miller, Jane Sutton, and Harriet Ellin Sutton. By a deed-poll, dated April 19, 1890, Tryphosa Sutton, widow, in exercise of the power appointed given by the settlement, and of every or any other power in anywise enabling her in that behalf, appointed that the trust premises should after her death be held by the trustees or trustee for the time being thereof, as follows, namely:

> "As to one equal third part thereof in trust for the said Tryphosa Mary Miller, as to one other equal third part thereof in trust for the said Jane Sutton, and as to the remaining one equal third part thereof upon trust to pay the said income thereof to the said Harriet Ellin Sutton, if not at my death a member of the Roman Catholic Church, or of any sisterhood, during her life, or until

A she shall become a member of the Roman Catholic Church, or of any sisterhood, without power of anticipation during any coverture, and subject as aforesaid, as to the capital and income thereof for the said Tryphosa Mary Miller and Jane Sutton in equal shares."

The deed-poll contained a power of revocation which was not exercised.

B The widow Tryphosa Sutton died on Oct. 7, 1893, and since her death the income of the trust property had been paid to the defendants, Tryphosa Mary Miller, Jane Sutton, and Harriet Ellin Sutton, in equal shares. The defendant Harriet Ellin Sutton became a member of a sisterhood in July, 1895. The trustees of the marriage settlement of April 13, 1847, commenced this action on April 13, 1896.

For the defendant Harriet Ellin Sutton it was contended, on the authority of C *D'Abbadia* v. *Bizoin* (1), that the appointment of April 19, 1890, was void as being a fraud on the power since the appointor, Mrs. Sutton, had thereby attempted to give effect to her prejudice against the Roman Catholic Church which was an indirect purpose not warranted by the power. Further, on the authority of *Hodgson* v. *Halford* (2) the gift over to Tryphosa Mary Miller and Jane Sutton was void for remoteness because there was no certainty that it would vest within twenty-one D years of the death of the appointor who was the only one of the parties concerned who was alive at the date of the settlement creating the power.

Vaughan Hawkins for the plaintiffs.
J. G. Wood for the defendant Harriet Ellin Sutton.
Dibdin (*Eve*, *Q.C.*, with him) for the other defendants.

E **BYRNE, J.**—Two points have been taken in behalf of Harriet Sutton. One point is this. It is said that it is a fraud on the power to appoint in this form; and *D'Abbadie* v. *Bizoin* (1) has been cited in support of that view. On the other hand, it is admitted that *Hodgson* v. *Halford* (2), before HALL, V.-C., is an authority which is indistinguishable in principle from the present case. It is said that the F general rule laid down by the Vice-Chancellor in that case is too broadly expressed. Whether that be so or not, the case in question is one which, in its facts, comes so closely to the present that the principle applied in that case must apply in the one I have before me. I am asked to say that it is inconsistent with the authority of *D'Abbadie* v. *Bizoin* (1), which was cited before HALL, V.-C., in *Hodgson* v. *Halford* (2), although the Vice-Chancellor does not expressly deal with it in his G judgment. It is sufficient for me to say that the circumstances in *D'Abbadie* v. *Bizoin* (1) were very much more removed from the circumstances in the present case than the circumstances in *Hodgson* v. *Halford* (2), and I consider that the latter is an authority binding on me. Accordingly, I hold that this is not a case of fraud on the power. On that point the contention fails.

Then a second point is raised. It is said that the appointment is void on the H ground of remoteness. It is said that the appointment of one equal third part to pay the income to Harriet Sutton, who was not alive at the time when the deed of settlement creating the power of appointment was made, being given to her in the first place on the condition that she is not a member of the Roman Catholic Church; and, secondly, on the condition that she should not become a member of a sisterhood, is void, because it is said the event of entering a sisterhood might not I happen within a life in being at the date of the settlement, or within twenty-one years afterwards. I am of opinion that the gift is not void for remoteness. In the first place I would refer to what was decided by MALINS, V.-C., in *Stuart* v. *Cockerell* (4), and afterwards referred to in *Evans* v. *Walker* (5), where the Vice-Chancellor says (3 Ch.D. at p. 213):

"The first point is, whether the gift to the nephew and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life, and then to an

ascertained person, providing the vesting is not postponed. That point I commented upon in *Stuart* v. *Cockerell* (4)." A

The point so far is conceded by counsel on behalf of Harriet Sutton; but it is said that the uncertainty introduced by reason of the estate for life given to Harriet Sutton being made determinable upon the entering into a sisterhood, or becoming a member of the Roman Catholic Church, is such as to render the gift void, which, if the estate were not thus limited, would be perfectly good. B

It appears to me, in the first place, that *Hodgson* v. *Halford* (2) is not an authority in favour of Harriet Sutton on this point, and, among other things for this reason, which alone would be quite sufficient; that, in that case, the persons to take were not to be ascertained till after the happening of the event. It is clear in the present case that, if this were a gift to her for her life, and subject thereto, C the capital and income were to go to the persons named, it would be perfectly good. It is suggested that a contingency is introduced or an uncertainty of the event on which the person to take will take, because of this frame of limitation. In my opinion the gift is a gift of one estate to Harriet Sutton, and just as much a gift of one estate as if it were a gift to her for life. It is true that the estate may be determined prior to her death on the happening of a certain event. This, also, I D think, is clear, that the gift in favour of Tryphosa Mary Miller and Jane Sutton is a vested gift; and there is no uncertainty in the persons who are to take on the determination of the prior estate.

Two or three cases have been referred to, and I will first mention one as showing the opinion of KNIGHT-BRUCE, L.J., when Vice-Chancellor, upon this matter, although it was not necessary in the circumstances of that case for him to decide E the point. I refer to *Boughton* v. *James* (3), where the Vice-Chancellor says this (1 Coll. at p. 46):

"Undoubtedly, as estates in fee may be well given, so life interests may be well given by will to the children of a living person, who is a bachelor at the testator's death. But, as an estate in fee, to be devised validly must be so F devised as to vest within the compass of lives in being at the testator's death, and twenty-one years after the death of the survivor of them, so I conceive must a life interest. That it is limited in this duration can, I apprehend, make no difference. It may be true that a life estate, devised to a person not in existence at a testator's death, may be made by his will to cease before its natural termination at any time or upon any event, but that is a very different G question";

by which the learned judge means a very different question from that which he had to determine in the case before him. I read that as meaning that his Lordship thought that, just as estates in fee might be given, so life estates might be given, and that life estates might be given, although made to cease before the natural determination, at any time or in any event. H

I was also referred to a passage in LEWIS on THE LAW OF PERPETUITY (1843) at p. 173, where the learned author says:

"The remoteness against which the rule for prevention of perpetuities is directed, is remoteness in the commencement, or first taking effect of limitations, and not in the cesser or determination of them. An estate that is to I arise within the prescribed period may be so limited as to determine on the happening of any event, however remote, as, for example, the indefinite failure of issue of a person; which we shall presently see is too remote a contingency for the commencement of limitation. But an estate can only be made to determine upon an event thus remote, when, by its original form and limitation, it will regularly cease by the happening of the contingency as the term of the duration of the estate; for, as will hereafter be seen, a power reserved to a person to determine the limitation on such remote event would be void."

That is a direct statement of the view of the learned author which is in accordance with the view taken by KNIGHT-BRUCE, L.J., and I think it is correctly stated. I have now dealt with all the points that have been raised, and the result is that I hold, in the first place, that there is no fraud on the power; and, secondly, that the gift over in this case is good, and, upon the admissions made by the parties, has taken effect.

Solicitors: *Wainwright, Pollock & Co.; Leefe & Leefe; Sandilands, Armstrong & Jackson.*

[*Reported by* R. H. DEANE, ESQ., *Barrister-at-Law.*]

Re SAUNDERS. SAUNDERS *v.* GORE

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Chitty and Vaughan Williams, L.JJ.), November 17, 18, 1897]

[Reported [1898] 1 Ch. 17; 67 L.J.Ch. 55; 77 L.T. 450; 46 W.R. 180; 42 Sol. Jo. 65]

Power of Appointment—Duty on sum appointed—Appointment of funds of settlement sufficient "to raise the net sum of £2,000"—Right of appointee to £2,000 clear of all charges.

In exercise of a special power of appointment under a marriage settlement in favour of the children of the marriage, the wife by deed appointed that so much of the stock, funds, shares, and securities then subject to the trusts of the settlement "as shall be sufficient to raise the net sum of £2,000" should, subject to the life interest therein of the appointor, henceforth belong and be vested in her son, and be held in trust for him, his executors, administrators, and assigns.

Held: the appointee took the £2,000 clear of all charges, including succession duty, and not merely of the expenses of the trustees.

Banks v. *Braithwaite* (1) (1862), 32 L.J.Ch. 35, considered.

Notes. Applied: *Re Coxwell's Trusts, Kinloch-Cooke* v. *Public Trustee*, [1910] 1 Ch. 63. Referred to: *Re Chisholm, Goddard* v. *Brodie*, [1902] 1 Ch. 457; *Re Grant, Nevinson* v. *United Kingdom Temperance and General Provident Institution* (1915), 85 L.J.Ch. 31; *Re Sebright, Public Trustee* v. *Sebright*, [1944] 2 All E.R. 547; *Jaworski* v. *Institution of Polish Engineers in Great Britain*, [1950] 2 All E.R. 51.

As to succession duty, see 15 HALSBURY'S LAWS (3rd Edn.) 142 and 144, and for cases on money applied to payment of duty, see 21 DIGEST (Repl.) 162.

Cases referred to:

(1) *Banks* v. *Braithwaite* (1862), 32 L.J.Ch. 35; 7 L.T. 149; 10 W.R. 612; 21 Digest (Repl.) 130, *720.*

(2) *Haynes* v. *Haynes* (1853), 3 De G.M. & G. 590; 1 W.R. 204; 43 E.R. 232, L.JJ.; 21 Digest (Repl.) 130, *719.*

(3) *Re Currie, Bjorkman* v. *Lord Kimberley* (1888), 57 L.J.Ch. 743; 59 L.T. 200; 36 W.R. 752; 21 Digest (Repl.) 189, *1114.*

Also referred to in argument:

Wilks v. *Groom* (1856), 27 L.T.O.S. 270; 2 Jur.N.S. 798; 4 W.R. 697; 21 Digest (Repl.) 129, *717.*

Harper v. *Morley* (1838), 2 Jur. 653; 21 Digest (Repl.) 129, *715*. A
Peareth v. *Marriott* (1882), 22 Ch.D. 182; 52 L.J.Ch. 221; 48 L.T. 170; 31 W.R. 68, C.A.; 21 Digest (Repl.) 222, *209*.

Appeal from a decision of STIRLING, J., reported [1897] 1 Ch. 888.

In exercise of a power of appointment given to her by a marriage settlement, Mrs. Saunders made three several appointments by deed in favour of her son, E. G. Saunders. All the appointments were in the same form, and by the first she appointed B

> "that so much of the stock, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of £2,000 shall, subject to the life interest therein of the said Ellen Anne Saunders, henceforth belong and be vested in the said Edward George Saunders, and be held in trust for him, the said Edward George Saunders, his executors, administrators, and assigns." C

A question was raised whether E. G. Saunders was entitled to the sum appointed free of duty, as well as of all expenses of raising it. STIRLING, J., held that the duty must be paid out of the £2,000 and from that decision E. G. Saunders appealed. D

Cozens-Hardy, *Q.C.*, and *Medd* for E. G. Saunders.
Godefroi for parties in the same interest.
W. A. Peck for the trustees of the settlement.
Swinfen Eady, *Q.C.*, and *Peterson* for the assignees of H. E. Saunders, a son of Mrs. Saunders. E

SIR NATHANIEL LINDLEY, M.R.—The question in this case turns upon the construction of a deed appointing a certain fund which was the subject of the trusts of a marriage settlement. In the events which have happened those funds were vested in trustees upon trust for Mrs. Saunders for life, and subject to her life interest upon such trusts for the children of the marriage as she should by deed or will appoint. She made various appointments by deed, three of which at all events were in the same form, and I will deal with one of them. Mrs. Saunders appointed F

> "that so much of the stock, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of £2,000 shall, subject to the life interest of the said Ellen Anne Saunders, henceforth belong and be vested in Edward George Saunders, and be held in trust for him, the said Edward George Saunders, his executors, administrators, and assigns." G

E. G. Saunders was one of her sons.

The question is: What is the effect of the expression "the net sum of £2,000" in that particular document? The controversy relates to duties which are somewhat heavy, and the learned judge in the court below has construed this appointment in this way: He said ([1897] 1 Ch. at p. 892): H

> "Applying [the reasoning of KINDERSLEY, V.-C., in *Banks* v. *Braithwaite*] to the present case, what is given here is not the net sum of £2,000, but so much of the stock as will be sufficient to raise the net sum of £2,000; and when that is ascertained by the proper calculation, as the Vice-Chancellor says, that particular sum of stock is to belong to the appointee. In my opinion, the present case falls within *Banks* v. *Braithwaite* (1), and the appointment does not carry with it the succession duty and the appointee takes subject thereto." I

It appears to me that what is given to Mr. E. G. Saunders in this case is the net sum of £2,000 in stocks. I cannot follow in this deed the distinction between the measure of the sum and the sum itself. We are discussing simply a question of

A amount, and bearing that in mind it appears to me that the true meaning and true intent of these words is that this is an appointment of a net sum of £2,000 in a particular form. If that is the true construction, how can it be held that any expenses are to come out of this net sum of £2,000? The net sum which is here given is not to be subject to deduction. That is as I understand it. There were other appointments in the same form, and then the last appointment (which I will B call the residuary appointment) appears to have been subject to certain preceding appointments. That is how I read the appointment apart from all authority, and I cannot regard it as a gift of so much stock as would be sufficient to raise the sum of £2,000 to be given to George, without seeing that the intention is to give him that net amount. If I could arrive at any other conclusion, viz., that it was a gift of so much of what is called the measure of the £2,000, and the net sum was not C to be given to him, the case might be different. But this is not the least like instructions to a broker. You have to look at the document and the object of the document; it has nothing to do with what you are to do with the net sum when you have got it. This is a gift by appointment by a mother to her son, and the question is, what has she given?

D I am not going through the authorities, but, with reference to *Banks* v. *Braithwaite* (1), which was so much pressed upon Stirling, J., and in deference to which he gave this decision, I confess I should not have construed that document as Kindersley, V.-C., did. In that case, a testator gave the residue of his personal estate to trustees, upon trust to set apart £10,000 Consols, and pay the dividends to his sister for life, and after her decease to retain so much of the said sum of E £10,000 as should be sufficient to realise the clear yearly income of £150; and he directed the trustees to pay the dividends and other income of the stock so directed to be retained by them to his nephew. I should have read that as a gift of a clear yearly income of £150 to the nephew. However, I see the difference between that case and this, because there there was a difficulty in working out the principle which I should have endeavoured to apply to it with regard to certain rates and duties, F and so on. Here we are not embarrassed by that at all. This is a simple appointment to Edward George Saunders of this sum. It appears to me, on the true construction of this document, that *Banks* v. *Braithwaite* (1) and other cases like it do not apply. Of course there is a difference between a legacy and an appointed fund. In the case of legacies the rule is that the costs come out of residue unless the contrary intention is expressed; and, in the case of a legacy, when you get the word G "clear" or "net" there is nothing to which it can apply except the duties, for the expenses come out of the residue. That reasoning does not apply to an appointed fund. When you ask me what the meaning is of "clear" or "net" when applied to an appointed fund, I think prima facie it means what it says—clear of everything. There may be reasons for not giving effect to it, there may be difficulties about various rates and duties, and all sorts of things. Here there is no difficulty H at all. I cannot see any justification for saying that the "net sum" here means clear of the expense of raising it, but subject to something else. The appeal, therefore, must be allowed, and, with regard to costs in this particular case, it appears to me that the costs must come out of the last appointed fund. That is the only view I can take of this series of documents.

I **CHITTY, L.J.**—I agree. It is a question of the construction of the deed of appointment under a special power.

With regard to legacies, the authorities have settled that where a legacy is given to one person, so that only one rate of duty is payable, the legacy given is of a clear sum of money, the legatee takes free of duty. It is sufficient to refer to *Haynes* v. *Haynes* (2) for that proposition. There is undoubtedly some distinction between a legacy and a portion of a fund subject to a power of appointment. A legatee bears none of the expense of raising his legacy; that all falls on the general estate, and the legatee is entitled, where it is a legacy of £1,000, to his £1,000. In order to

free him from the legacy duty, however, there must be words which show that intention, and the word which has been relied on is the word "clear." I can make no distinction between the words that occur here, "net sum," and the words "clear sum." In the case of an appointment where there are no words of expression to the contrary, all the appointees have to bear rateably, according to the general rule, the expenses of the trustees of administering the fund, including the distribution. It might be said that the word "clear" or the word "net" in this instrument refers to those expenses only. I think it would be a very narrow construction. That is not the construction that was adopted by KAY, J., in *Re Currie* (3), where there was an appointment under a general power of appointment of so much of the trust funds as should be of the clear value of £1,000, and he held, and I agree with his reasoning, that that was an appointment of a sum of £1,000 clear of all the trustees' expenses, and clear also of the legacy or succession duty. I should say there is no distinction between legacy and succession duty in a case such as the present. That being so, I refer to the words that the appointor has used.

The appointment is not of a sum of money to be raised by the trustees by sale, it is an appointment of a portion of the trust funds. The trust funds, according to the statements agreed to at the Bar, were invested in ordinary trust investments, and liable to be changed from time to time under a power to vary securities. It is a portion of the trust fund thus invested that the appointor disposes of. You are to ascertain (by reading the words) what the portion is, and that portion is itself given to the appointee. It appears to me, on the true reading of this deed, that in ascertaining what portion is appointed you must, in accordance with the language used by the appointor, clear the portion from all charges, including succession duty. The words are: So much of the stock, etc. "as shall be sufficient to raise the net sum of £2,000." That net sum of £2,000 is to be arrived at by excluding from the £2,000 the trustees' expenses, and I think also succession duty. The case is not the same as that by which STIRLING, J., considered himself bound, namely, *Banks* v. *Braithwaite* (1). Observations have already been made by the Master of the Rolls on that case, and I must confess that I also should have arrived on the construction of that will at a different conclusion. The fund there of Consols was set apart for one purpose, and one purpose only, namely, for the benefit of the annuitant, and subject to that the fund that was to be returned in Consols was to go to the residuary legatee. The direction was to retain a sum of Consols sufficient to realise the clear yearly income of £150, and then the trustees were directed to pay the dividends on that sum to the annuitant in the manner mentioned in the will. I think the whole object of the testator there was to provide a clear yearly income of £150. I understand the reasoning of KINDERSLEY, V.-C., but I think it is too fine, if I may say so, to make it applicable to that case. Of course, the Consols may have been converted, and the rate of interest payable on the Consols might by Act of Parliament have been subsequently reduced. It is, as I have said, a question of construction, and I think that this case is not governed by *Banks* v. *Braithwaite* (1), and that the true construction is that this appointed portion of the trust funds was clear of all charges, and not merely of the expenses of the trustees.

VAUGHAN WILLIAMS, L.J.—The question in this case is a question of the construction of words appearing in a particular appointment. The Master of the Rolls and CHITTY, L.J., have already expressed very clear views as to what ought to be the construction of these words in the particular appointment. I cannot say that I am by any means as clear as they are as to what is the proper construction of the words appearing in this appointment; but, having regard to the fact that this is merely a question of the construction of the particular words in a particular document, I am not prepared to differ from that construction merely because I hesitate about that which to them seems clear. However I do wish to say a few words as to the difficulty that occurs to my mind in the construction of this document. The words of the document are these:

A "That so much of the stock, funds, shares, and securities now held by the present trustees of the said indenture of settlement upon and subject to the trusts thereof as shall be sufficient to raise the net sum of £2,000 shall, subject to the life interest therein of the said Ellen Anne Saunders, henceforth belong and be vested in the said Edward George Saunders, and be held in trust for him, the said Edward George Saunders, his executors, administrators, and
B assigns."

The question to my mind that has to be answered on the construction of this document is this: Ought the word "net" to be annexed to the gift, or what I agree is precisely the same thing, to the measure of the gift; or ought that word "net" to be annexed not to the gift or measure of the gift, but to the raising of the sum?
C Is the word "net" to be treated as qualifying the quantity of stock with which the trustees were to deal; or is the word "net" to be read here as annexed to the gift to Edward George Saunders?

Various authorities have been cited, but it seems to me that in this case, as indeed in every case, it is a dangerous thing to lay down any general rule as to the meaning of words of this sort. You must look always at the whole document and
D ascertain what the meaning of the words is when you have taken the whole document into consideration. It is not safe to say there are authorities which decide that a "clear gift" means in the case of a legacy a gift clear of legacy duty. No doubt, very often—and you may go beyond very often and say generally—in wills where there is a legacy given by such words, such would be the meaning of the word "clear," because there is nothing else which the gift in the nature of things
E can be clear of, and unless you give that meaning to the word "clear," you give no meaning to it at all. But even in the case of a legacy, it is not quite true to say that it is universally so, for I take it that, in the case of a legacy, if the word "clear" is used it might very well be that you might find in the nature of the gift something to indicate that the word was not meant there to import clear of legacy duty; as, for instance, if the gift in question was an annuity given to a series of
F annuitants in succession. But in the present case the question arises at an earlier stage.

The question in the present case, to my mind, is precisely the question which KINDERSLEY, V.-C., propounded to himself in *Banks* v. *Braithwaite* (1), and which STIRLING, J., propounded to himself in the present case; that is, is the word "net" here to be annexed to the gift or is the word "net" here to be applied simply to
G the duty which the trustees had to perform? Is it here to be construed merely as qualifying the subject-matter with which the trustees were to deal as distinguished from the quantum of the gift? One can quite understand that very often you may get a collocation of words which would make it plain that the word "net" or "clear" is meant to qualify the gift, is meant to be annexed to the gift, as in a case where you have the two words "raise" and "pay" placed in immediate collocation. If the
H will or appointment says you are to raise and pay the clear sum of so much I think it would be plain in such a case that this quality of clear of deduction is to apply not only to the sum to be raised but also to the sum to be handed over or given to the donee. In the present case you have not got any word as clear as that, because so far as the English grammar is concerned the word "net" seems to me to be limited in its application to the sum to be raised, or rather to the amount of Consols to
I be handed over, and not, as far as grammatical collocation is concerned, to apply to the amount which is to be transferred.

Having said this because I have a very strong feeling as to the danger of deciding the meaning of particular words in a particular document by laying down any rule of universal application, I prefer to say that, as far as my judgment is concerned, I concur in the decision of the court because I am not prepared to say that, having regard to the words of this particular document, the construction which the Master of the Rolls and CHITTY, L.J., think is the right construction is not the right construction. These documents are very generally drawn by professional men, but of

course occasionally they are drawn by laymen, and I do think that it is always a dangerous thing to conclude the construction of words in a particular document which may be under consideration by decisions that have been arrived at on similar words in other cases.

Solicitors: *Valpy, Chaplin & Peckham; Witham, Roskell, Munster & Weld; Hasties.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

DARTFORD RURAL DISTRICT COUNCIL *v.* BEXLEY HEATH RAIL. CO.

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), December 2, 3, 1897]

[Reported [1898] A.C. 210; 67 L.J.Q.B. 231; 77 L.T. 601; 62 J.P. 227; 46 W.R. 235; 14 T.L.R. 91]

Bridge—Railway—Line crossing footpath—Obligation of railway company to construct bridge to carry line or footpath—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 20), *s.* 46.

Section 46 of the Railways Clauses Consolidation Act, 1845, **held** not to impose upon a railway company whose line crossed a public footpath any obligation to carry the railway over the footpath or the footpath over the railway by means of a bridge.

Notes. Referred to: *Glasgow and South Western Rail. Co.* v. *Ayr Corpn.*, [1912] A.C. 520.

As to the construction of bridges by a railway company, see 31 Halsbury's Laws (3rd Edn.) 588 et seq.; and for cases see 38 Digest (Repl.) 306 et seq. For the Railways Clauses Consolidation Act, 1845, s. 46, see 19 Halsbury's Statutes (2nd Edn.) 616.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), reported [1896] 2 Q.B. 74, discharging an order of the Divisional Court (Day and Lawrance, JJ.).

In 1883 the respondents, the Bexley Heath Rail. Co., obtained an Act of Parliament authorising the construction of the railway, and its powers and provisions were amended and enlarged by subsequent Acts. These Acts incorporated the Railways Clauses Consolidation Act, 1845. In the construction of the railway the respondents carried the line on an embankment across a public footpath in the parish of Crayford. In February, 1895, the parish council of Crayford passed a resolution calling on the appellants, under the Local Government Act, 1894, to assert the right of the inhabitants in regard to the footpath so obstructed, and they took action accordingly.

The Divisional Court made an order directing that a writ of mandamus should issue commanding the respondents to carry their railway over the footpath or the

A footpath over the railway by means of a bridge. The Court of Appeal reversed their decision and discharged the rule for the writ with costs.

By the Railways Clauses Consolidation Act, 1845, s. 46:

"If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for that company to carry the railway across any highway, other than a public carriage road, on the level."

Macmorran, Q.C., and *Hohler* for the appellants.

Farwell, Q.C., and *Boyle* for the respondents were not called on to address the House.

LORD HALSBURY, L.C.—I regret, with A. L. SMITH, L.J., that we do not know the grounds on which this order was made by the Queen's Bench Division. I confess for myself I do not understand why the mandamus was issued. It is not the fault of the learned counsel for the appellants, who have both argued very ably and earnestly in favour of their proposition, but I am bound to say that I do not yet understand where the obligation to build the bridge comes from. I cannot find it in the Act of Parliament. All that I can conjecture to be the reasoning is this: Finding that the Railways Clauses Consolidation Act, 1845, certainly does not in terms contain any such obligation, you find in s. 46 a proviso which, unless there is such an obligation there, would, it is said, be an unreasonable proviso to put into the Act, because there is no such obligation in the statute, and by the hypothesis the proviso can only operate where there is such an obligation. I think that is stating fairly the argument which has been presented to your Lordships. But that argument assumes that the statute is the final end of legislation; and that is exactly what it is not, because the statute in its terms assumes that special Acts will be passed from time to time containing provisions of their own, and if there are some such provisions, as has been pointed out by the learned counsel, then the proviso has its natural and just operation. The whole argument is, that you must try the statute by itself and the proviso by itself and assume that there must be an obligation (which certainly in terms is not there), because, as they say, if you were to construe the whole statute there is the proviso, and it must operate on something, and, inasmuch as, if the obligation is not there the proviso operates upon nothing, it is an unreasonable course of legislation of which you cannot assume that the legislature would have been guilty.

It seems to me that I have already given the only answer which can be given, and it seems to be a complete answer, namely, that this is not the end of the legislation according to the statute itself, on the contrary, both by the form of the preamble and by the title of the statute it purports to be an Act of Parliament which contains within itself all such general provisions as are applicable to railways and are to be included, or are usually included, in every special Act. That appears to me to be the whole point, and although your Lordships have been engaged for a considerable period of time in the argument over this matter, it seems to resolve itself into this. I asked the question which each of the learned lords justices asked in turn without getting an answer. Where am I to find either in this special Act or in the general Act the obligation to build a bridge over a footpath? I cannot find it. Except in the proviso, with which I have already dealt, there is no such obligation to be found there, and there being no such obligation to be found no mandamus can be issued to command the railway company to do that which they are not bound to do under these Acts of Parliament.

I do not go into the sections that prescribe the heights and widths and gradients, and so on, of bridges which are to be built in a particular way because it cannot be contended, I do not think that even the learned counsel for the appellants have argued, that these provisions apply to bridges over footpaths, and if they do not apply to bridges over a footpath, if those are the things referred to in s. 46 as the obligations contained in the Act (I leave out the special Act because by the hypothesis there is no such provision there) then it appears to me that the absurdity is too manifest to require further exposition, that a bridge over a footway is to be included in a provision as to bridges which applies to turnpikes and carriage roads, and is not applicable to footpaths at all. Under these circumstances I move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON.—I think it is very clear that the court has no jurisdiction whatever to make the order which the appellants crave. Section 46 of the Railways Clauses Consolidation Act, 1845, deals with the erection of bridges in two sets of circumstances, it deals with bridges, in the first place, the height, width, and dimensions of which are prescribed by the Act itself; and it also deals, in the second place, with bridges, the height, width, and dimensions of which may at a future time be prescribed by a special Act of a railway company. The special Act of the railway company, who are the defendants in this case, does not make any such prescription, and therefore the case against them is necessarily based upon the terms of s. 46 of the Act of 1845. From the beginning to the end of that clause, there are no words which impose upon a railway company any obligation except to erect bridges of the height, width, and dimensions specified either in that Act or in the special Act, and in these circumstances the court can only exercise the right of enforcing that obligation. But the obligation not being imposed, the general right is not conferred upon the court of directing the railway company to erect any bridge over, it may be, a public footpath which they think proper.

LORD HERSCHELL.—I am of the same opinion. I think that the fallacy which runs through the argument of the learned counsel for the appellants, who both put their case very clearly and forcibly before the House, arises from this, that the fact is overlooked that the statute of 1845 has not of itself any operation in respect of any road whatsoever, whether a carriage way, a footpath, or a public road; it can only be brought into effect by some rights being given and corresponding obligations created by a special Act. When that special Act is passed, then within the area which it covers those sections and the provisions of the special Act together come into operation. That is the scheme of legislation. Certain provisions have been inserted in these clauses which it is assumed will meet the general case, and will save the trouble of specific legislation in respect of them. Being general rules they may of course be departed from in a particular case if the special legislation so provides. In the absence of such special legislation they are brought into operation by the special Act, but the Railways Clauses Consolidation Act, 1845, does not profess to provide for every case. It recognises that there may be cases, perhaps many cases, in which the matter is better left to be dealt with in a special Act, and in my opinion the case of bridges over footways is one of those cases. It is not an oversight, it is not clumsy legislation. It is, as far as I can see, the design of the legislature that, whereas, in the case of carriage ways or turnpike roads a general rule could be laid down in the general Act, in the case of footways a general rule cannot be laid down in the general Act, but provisions in respect of the matter must be left to be dealt with by the special Act. But the legislation in s. 46 is so framed that, when you deal with footways in respect of a particular railway by the special Act, then s. 46, having the general word "highway," applies to all those footways just as much as if the provision in respect of them had been found in the general Act instead of being inserted in the special Act. That makes the whole of the legislation

perfectly consistent and perfectly intelligible, and gets rid of all the suggested difficulties that have been pressed upon your Lordships by the learned counsel for the appellants. For these reasons I think the judgment should be affirmed.

LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and **LORD DAVEY** concurred.

Appeal dismissed.

Solicitors : *Pyke & Parrott*, for *J. & J. C. Hayward*, Dartford; *Dollman & Pritchard.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

STROUD *v.* LAWSON AND OTHERS

[Court of Appeal (A. L. Smith, Chitty and Vaughan Williams, L.JJ.), May 16, 1898]

[Reported [1898] 2 Q.B. 44; 67 L.J.Q.B. 718; 78 L.T. 729; 14 T.L.R. 421; 46 W.R. 626]

Practice—Parties—Joinder—Different causes of action—Different defendants—Claim against directors of company for fraud—Claim against company for declaration that dividend ultra vires—R.S.C., Ord. 16, *r.* 1.

In an action against the directors of a limited company and the company, the plaintiff claimed damages against the directors for fraudulently inducing him to buy shares in the company, and in his particulars of their alleged fraud he stated that they had wrongfully declared and paid an interim dividend which was not paid out of the profits of the company. The plaintiff also claimed on behalf of himself and all other shareholders of the company a declaration that the declaration of the interim dividend was ultra vires and illegal, and an order against the directors for repayment of such money to the company.

Held: the two causes of action did not arise "out of the same transaction or series of transactions" within R.S.C., Ord. 16, r. 1; and, accordingly, they could not be joined in one action.

Notes. Referred to : *Bendir* v. *Anson*, [1936] 3 All E.R. 326; *Banque des Marchands de Moscou (Koupetschesky) and A.-G.* v. *Midland Bank, Ltd.*, [1939] 2 All E.R. 364.

As to joinder of parties, see 30 Halsbury's Laws (3rd Edn.) 317; and for cases see Digest (Practice) 401.

Cases referred to :

(1) *Carter* v. *Rigby & Co.*, [1896] 2 Q.B. 113; 65 L.J.Q.B. 537; 74 L.T. 744; 60 J.P. 581; 44 W.R. 566; 12 T.L.R. 471, C.A.; Digest (Practice) 402, *1037.*

(2) *Hannay & Co.* v. *Smurthwaite*, [1893] 2 Q.B. 412; 63 L.J.Q.B. 41; 69 L.T. 677; 42 W.R. 133; 7 Asp.M.L.C. 380, C.A.; reversed sub nom. *Smurthwaite* v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; Digest (Practice) 399, *1013.*

(3) *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima*, [1895] A.C. 661; 64 L.J.P.C. 146; 73 L.T. 37; 11 T.L.R. 536; 8 Asp.M.L.C. 23; 11 R. 508, P.C.; Digest (Practice) 402, *1036.*

Appeal by the defendants in an action, from a decision of DARLING, J., affirming an order of the master refusing to strike out the plaintiff's statement of claim, on the defendants' summons to strike out, on the grounds that the Rules of the Supreme court did not allow such a joinder of causes of action and that there would be great inconvenience in trying the two cases together.

The action was brought by "Frederick Stroud on his own behalf and also on behalf of himself and all other the shareholders in the Beeston Pneumatic Tyre Co.", against Harry John Lawson, James Arnold Bradshaw, and Henry Jelley and also the Beeston Pneumatic Tyre Co., Ltd. (so far as material).

By the statement of claim it was alleged that the defendants Lawson, Bradshaw, and Jelley were the directors of the Beeston Pneumatic Tyre Co., Ltd. The defendants were at the time of the happening of the events complained of also the holders of a large number of shares in the company and otherwise largely personally interested in the company. The shares of the company were then selling at a very low price, considerably under their face value. The defendants Lawson, Bradshaw, and Jelley, intending and contriving to defraud the public and benefit themselves, conspired together and also separately endeavoured by means of deceit and fraud, to cheat and defraud such members of the public as could be induced to purchase shares in the company at extravagant prices and far beyond their real value. The particulars of the same defendants' deceit and fraud as follows: (a) They and each of them deceitfully and fraudulently made or authorised the public statement that each share in the company was worth a figure much in excess of its face value . . . (c) They and each of them also deceitfully and fraudulently made or authorised the public statement that they had been offered £15 per share . . . (d) On or about May 7, 1896, the defendants, as directors of the company, declared and, in the month of June, 1896, paid an interim dividend of 100 per cent. (in all the sum of £30,000) on and in respect of the ordinary shares of the company, but such dividend was not, nor was any part thereof, paid out of the profits of the company, nor did the profits of the company allow of any such payment, but the said sum, £30,000, was obtained by the defendants as such directors as aforesaid from the British Motor Syndicate, Ltd. (of which the defendant Lawson was the chairman), and for which sum of £30,000 the said defendants (as such directors as aforesaid) wrongfully issued to the said British Motor Syndicate, Ltd., 15,000 fully paid ordinary shares in the company, namely, at the price of £2 per share.

The plaintiff alleged that he had suffered damage in that (on the faith of the making and publication by or with the authority of the defendants Lawson, Bradshaw, and Jelley of the statements and declarations of the interim dividend which the defendants intended should come to his knowledge, and be acted upon by him, and the plaintiff, believing, as the defendants intended he should believe, that the statements and declaration of dividend were genuine and bona fide), the plaintiff purchased twenty ordinary shares of the company for the sum of £161 10s. 6d. and 100 ordinary shares of the company for the sum of £509 11s. 7d. The shares had fallen greatly in price, and the same were not, and never had been, worth more than their face value or thereabouts. The plaintiff, on behalf of himself and all the other shareholders in the company, said that the interim dividend was ultra vires and illegal. He claimed: (i) On his own behalf, £550 damages occasioned to him by the aforesaid deceit and fraud of the defendants (other than the company); (ii) on behalf of himself and all the other shareholders in the company, a declaration that the declaration of the said dividend of 100 per cent. was ultra vires and illegal, and that the defendants (other than the company) are jointly and severally liable to make good to the company all moneys paid by them out of the company's assets on account or in respect of the said dividend, and judgment against them jointly and severally for repayment of such moneys accordingly; (iii) costs.

Brooke Little for the defendants.
Mattinson, Q.C., and *G. F. Hart* for the plaintiff.

A. L. SMITH, L.J.—There are two distinct causes of action appearing on this statement of claim, and, in my opinion, the plaintiff cannot go on with both, but we must put him to his election as to which he will proceed with.

The plaintiff sues in the first place on behalf of himself alone, and he claims damages from the first three defendants in respect of alleged false and fraudulent representations by them by means of which they cheated him into becoming a shareholder in the company. That is an ordinary common law action of deceit. In the second place the plaintiff sues in another capacity, on behalf of himself and all other the shareholders in the company, and his claim is merely based on the alleged payment of a dividend out of capital by the three defendants. He alleges that the payment of the dividend was ultra vires, and he asks on behalf of himself and the other shareholders of the company that the three defendants may be directed to return the money paid away by them to the company that the company may use it for the benefit of the shareholders generally. In making a claim like that the plaintiff is obliged to sue as he has done on behalf of all the shareholders in the company, and he is also obliged to make the company a defendant in the action. It is a well-known form of action and one which formerly would have had to be commenced in chancery. That cause of action is here joined to the plaintiff's common law action of deceit. They are two separate and distinct causes of action, and do not arise out of the same transaction or series of transactions. There are different plaintiffs and different defendants in the two cases, and, in my opinion, the matter is not one which is within the provisions of R.S.C., Ord. 16, r. 1.

That rule was drawn up after the decisions in *Carter* v. *Rigby & Co.* (1), where an action was brought by the representatives of fifty miners who were drowned by the flooding of a coal mine, which was alleged to have been caused by the negligence of the defendants, and *Smurthwaite* v. *Hannay* (2). That was the case where sixteen holders of separate bills of lading joined in an action for non-delivery of certain bales of cotton shipped in the defendants' ship. The number of bales landed was short of the number in the bills of lading, and as many of the marks on the bales landed were obliterated it was impossible to identify such bales with those mentioned in the bills. It was held in the House of Lords that, as the causes of action were several, the holders of the bills of lading could not join in one action. In the Court of Appeal LORD ESHER, M.R., thought that all the claims sufficiently constituted one transaction to justify the plaintiffs joining in one action under the rule as it then existed. BOWEN, L.J., differed, and his opinion was upheld in the House of Lords, where it was decided that the plaintiffs could not sue together in one action. Then in 1896 came *Carter* v. *Rigby & Co.* (1). There the personal representatives of fifty miners, who had been drowned in the flooding of a coal mine, attempted to join in one action against the owners of the mine on the ground that it was one act of negligence on the part of the defendants which caused the flooding of the mine and the death of the miners. There also it was held that the plaintiffs could not join and sue in one action. The same question was also decided by the Privy Council in *Peninsular & Oriental Steam Navigation Co.* v. *Tsune Kijima* (3).

In consequence of these cases the present rule was made in 1896 which refers to a claim for relief "in respect of or arising out of the same transaction or series of transactions." To bring themselves within that rule plaintiffs must show that their claims are in respect of or arise out of "the same transaction or series of transactions." That has not been shown in the present case, and therefore, I think that we ought to put the plaintiff to his election which claim he will proceed with, the action of deceit in which he seeks for damages for himself, or the action on behalf of the shareholders of the company, having reference only to the ultra vires declaration of the dividend. Under these circumstances the appeal will be allowed.

CHITTY, L.J.—I am of the same opinion. It is clear that there are here two separate plaintiffs and two causes of action. The first cause of action is the fraud

alleged to have been perpetrated on the plaintiff by the three directors of the company, in inducing him to buy shares in the company. That is one distinct cause of action, and it does not arise out of the same transaction as the second cause of action which is the unlawful payment of dividend out of capital by the directors of the company. An action of that sort ought, prima facie, to be brought by the company, but in order to prevent directors from disputing just claims of this sort it has become the practice in such cases that one of the shareholders should be the plaintiff, suing on behalf of himself and the other shareholders, and that the company should be joined as a defendant so that it may receive the fruits of the action. Therefore in this action two separate plaintiffs and two separate causes of action have been joined together.

Then comes the question whether these two matters arise out of the same transaction within the meaning of R.S.C., Ord. 16, r. 1. That rule was drawn up in view of the difficulties raised by *Smurthwaite* v. *Hannay* (2) and *Carter* v. *Rigby & Co.* (1). It is obvious that it was not thereby intended to allow any number of plaintiffs to join in one action any number of separate causes of action, but to effect a modification of the old rule by giving a limited power to plaintiffs with separate causes of action to join together in one action. The limitation is plainly expressed in the rule. The rule provides that

> "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise . . ."

To bring a case within that rule both those conditions must be complied with, i.e., the right to relief claimed by the different plaintiffs must be in respect of or arising out of the same transaction or series of transactions, and also a common question of law or fact must arise.

Applying that to the present case I come without hesitation to the conclusion that the rights to relief claimed in this action do not arise out of the same transaction. The first cause of action is that by conspiracy and various fraudulent devices the directors of the company induced the plaintiff to become a shareholder, one of these fraudulent devices being the declaration and payment of dividend out of capital. In this respect the plaintiff is not suing as a shareholder. As regards the other cause of action the plaintiff repeats the allegations as to the payment of dividend out of capital, but without alleging fraud on the part of the directors. In this part of the claim he is suing as a shareholder in the company on behalf of himself and the other shareholders. The circumstance that the payment of dividend out of capital is given as a part of the cause of action in the one case as well as the ground of relief in the other does not show that the rights to relief claimed in the two cases arise out of the same transaction. They arise out of different transactions though they have a feature in common. It is not necessary for me to say what cases I think the rule applies to. But in the course of the argument I referred to a case of several persons owning several graves in a graveyard having separate rights of action arising out of disturbance of the graves by one common act. In such a case they could all join in one action. The sum of my judgment is that the separate causes of action in the present case are not "in respect of or arising out of the same transaction."

VAUGHAN WILLIAMS, L.J.—I agree, but having regard to the importance of this rule I think it proper to express in my own language my reasons for my judgment and my view as to the meaning of the rule. I agree that in this case there are in substance two different plaintiffs, because the person who is bringing this action

A is suing in two different capacities. But that fact does not seem to me to be very material to the question now before us, because the very object of R.S.C. Ord. 16, r. 1, is to enable several plaintiffs with different causes of action to join in one action. With regard to the defendants I agree with the contention of counsel who appeared on behalf of the plaintiff that substantially there is only one set of defendants here, namely, the three directors. They are the real defendants. The B company is named as a defendant, but it is put in only as part of the machinery of the action. But I do not know that it is a matter of much importance, in deciding the point now before us, whether as a matter of form there are more defendants with regard to the second cause of action than there are with regard to the first cause of action. For the purposes of the present case, however, I will treat the action as though it were brought simply against the three directors.

C That being so, the question arises whether, having regard to the terms of the present r. 1, of Ord. 16, we ought to allow these two causes of action to be joined in one action. It has been pointed out that these two causes of action are wholly different. One is simply for deceit, in the other the complaint is that the directors have done something ultra vires. But I do not understand that the present rule was intended to prevent the joinder of different causes of action. The intention was D that the rule should facilitate such a joinder and should enable plaintiffs to join their causes of action in cases in which, previously to the rule, they had been held unable to do so as in *Smurthwaite* v. *Hannay* (2). The intention of the new rule was, under certain limitations, to allow plaintiffs to join different causes of action. What is the limitation under which such joinder is to be allowed? The words of the rule are,

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> "All persons may be joined in one action, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise. . . ."

F I shall not concern myself about the latter words of the rule, because it is common ground that such a question would arise in the present case.

But that is not enough to bring the case within the rule. As I pointed out in the course of the argument the two conditions, viz., that the right to relief must arise out of the same transaction or series of transactions, and that the case must G be such that a common question of law or fact would arise, are not alternative. I am dealing now with that which is undoubtedly a condition of applying the rule, that the right to relief should be alleged to be "in respect of or arising out of the same transaction or series of transactions." That must be a feature common to all the causes of action of the different plaintiffs in the action. I do not take those words of the rule to mean that the whole of a transaction must be involved in all H the causes of action which the plaintiffs desire to join. If there were a transaction, or series of transactions, in respect of which one plaintiff was interested up to a certain point, and other plaintiffs were interested not only up to that point but in the entire transaction, or series of transactions, from beginning to end, I think that under this rule such causes of action might clearly be joined, because there would be a transaction or series of transactions, in respect of which the various plaintiffs would all I be claiming a right to relief, although their remedies or damages might be different.

I wish to go further and point out why, according to my view, the plaintiff in the case before us ought to be put to his election as to which of the two causes of action mentioned in his statement of claim he will proceed with. In the first part of the statement of claim he complains that the directors made certain representations to him with the object of deceiving him, and that he was thereby deceived and has suffered damage. That is the transaction on which he bases his cause of action. Can it be contended that the cause of action put forward in the latter part of the statement of claim is based on the same transaction as the first-mentioned cause

of action? Obviously it cannot. The transaction which consists in the improper declaration and payment of dividend is not part and parcel of the transaction which consists in deceiving the plaintiff by false representation into becoming a shareholder. The allegations of the plaintiff which are absolutely essential to his cause of action for deceit show that the transaction on which he there relies is a wholly different one from that on which he claims relief on behalf of himself and the other shareholders of the company. I think, therefore, that it is not true to say that the rights to relief claimed in the two parts of the statement of claim both arise out of the same transaction or series of transactions. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors : *Lewis Stroud; Steadman & Van Pragh.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

LOVETT *v.* LOVETT

[Chancery Division (Romer, J.), November 24, 25, 1897]

[Reported [1898] 1 Ch. 82; 67 L.J.Ch. 20; 77 L.T. 650; 46 W.R. 105; 42 Sol. Jo. 81]

Settlement—Marriage settlement—Trust, after death of parents, for child of marriage—Post-nuptial settlement by child, while infant, of interest under marriage settlement—No covenant to settle after-acquired property—Exercise by parent of power to appoint to child—Right of child to property.

By a marriage settlement dated April 15, 1874, property was vested in trustees on trust to pay the income arising therefrom to the husband for life, then to the wife for life, and after the death of the survivor on trust for the children of the marriage as the husband and wife should appoint jointly or as the survivor of them should appoint. In default of appointment the property was to be held in trust for the children of the marriage. The husband died in October, 1886, leaving one child of the marriage, the plaintiff in this action. The plaintiff married in January, 1892, and on July 27, 1892, while still an infant, she entered into a post-nuptial settlement by which, after reciting that the property comprised in the settlement of April 15, 1874, was vested in trustees (subject to the mother's life interest) in trust for the plaintiff her heirs and assigns, she conveyed that property, subject to the mother's life interest, to the trustees of the post-nuptial settlement on certain trusts. The post-nuptial settlement did not contain any covenant by the plaintiff to settle after-acquired property. By deed dated Aug. 5, 1897, the mother exercised her power of appointment under the settlement of April 15, 1874, irrevocably appointing the property comprised in that settlement to the plaintiff absolutely for her separate use. The plaintiff claimed a declaration that she was entitled to the property and that it had not passed under the post-nuptial settlement.

Held: (i) on the true construction of the post-nuptial settlement, it passed nothing more than the plaintiff's existing interest under the settlement of April 15, 1874, at the date of the post-nuptial settlement, viz., her interest in default of appointment; accordingly, the post-nuptial settlement did not cover the possible future interest which the plaintiff might, and in fact did acquire,

under an exercise of the mother's power of appointment, and this was so even though the post-nuptial settlement recited that subject to the mother's life interest the plaintiff was entitled to the property she purported to assign, for the recital should be construed as incomplete in that it did not state the fact that the plaintiff's interest was defeasible by the exercise of the power of appointment; (ii) there had been no estoppel since equitable estoppel was not applicable in favour of a volunteer; there was no estoppel by the terms of the conveying part of the post-nuptial settlement, the conveyance being an innocent one; and for the reason given in (i) the recital did not amount to an estoppel; accordingly the plaintiff was entitled to the declaration.

Notes. Applied: *Re Maddy's Estate, Maddy* v. *Maddy*, [1901] 2 Ch. 820. Distinguished: *Re Bulteel's Settlement, Bulteel* v. *Manley*, [1917] 1 Ch. 251; *Parr* v. *A.-G.*, [1925] All E.R. Rep. 578; *Re Dowie's Will Trusts, Barlas* v. *Pennefather*, [1949] 1 All E.R. 968. Referred to: *Re Walpole's Marriage Settlement, Thomson* v. *Walpole*, [1903] 1 Ch. 928; *Re Rush, Warre* v. *Rush*, [1922] 1 Ch. 302; *Re Brooks' Settlement Trusts, Lloyds Bank, Ltd.* v. *Tillard*, [1939] 3 All E.R. 920.

As to property vesting in person entitled to default of appointment, see 30 Halsbury's Laws (3rd Edn.) 240; and for cases see 37 Digest 476. As to estoppel by deed, see 15 Halsbury's Laws (3rd Edn.) 214; and for cases on the effect of recitals, see 21 Digest (Repl.) 330.

Case referred to:

(1) *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; 43 L.J.Ch. 269; 22 W.R. 194, H.L.; 21 Digest (Repl.) 392, *1213*.

Also referred to in argument:

Sweetapple v. *Horlock* (1879), 11 Ch.D. 745; 48 L.J.Ch. 660; 41 L.T. 272; 27 W.R. 865; 40 Digest (Repl.) 545, *540*.

General Finance Mortgage and Discount Co. v. Liberator Permanent Benefit Building Society (1878), 10 Ch.D. 15; 39 L.T. 600; 27 W.R. 210; 21 Digest (Repl.) 324, *797*.

Heath v. *Crealock* (1874), 10 Ch. App. 22; 44 L.J.Ch. 157; 31 L.T. 650; 23 W.R. 95, L.C. & L.JJ.; 21 Digest (Repl.) 333, *863*.

Mills v. *Fox* (1887), 37 Ch.D. 153; 57 L.J.Ch. 56; 57 L.T. 792; 36 W.R. 219; 21 Digest (Repl.) 392, *1218*.

Re Frowd's Settlement (1864), 4 New Rep. 54; 10 L.T. 367; 40 Digest (Repl.) 545, *538*.

Action claiming a declaration that the plaintiff was entitled to the property comprised in a settlement dated April 15, 1874, subject to a life interest, on the ground that the interest which the plaintiff took under the exercise of a power of appointment contained in the settlement was not comprised in a later settlement dated July 27, 1892.

By a settlement dated April 15, 1874, made on the marriage of Maresco Lloyd Frederick and Maria Louisa Frederick, certain lands at Cappagh, in the county of Dublin, were conveyed to trustees on trust to pay the rents and profits to Maria Louisa Frederick for life, and it was thereby agreed that the trustees should invest the residue which, after certain payments therein mentioned, should remain of the purchase moneys to arise from the sale of an undivided one-fourth share of certain other hereditaments, situate at Lambeth and Camberwell, and pay the interest and annual profits to the said Maresco Lloyd Frederick for his life, and after his decease to the said Maria Louisa Frederick for her life, and after the decease of the survivor, should stand possessed of the said lands thereby conveyed, and of the residuary moneys and the income thereof in trust for all such one or more exclusively of the other or others of the children or such remoter issue of the marriage as therein

mentioned in such manner as the said Maresco Lloyd Frederick and Maria Louisa Frederick should jointly appoint, and in default as the survivor should by deed or deeds with or without power of revocation and new appointment, or by his or her will or codicil appoint, and in default of such appointment, in trust for all the children of the marriage, and if there should be only one child, then the whole to be in trust for such child. Maresco Lloyd Frederick died in October, 1886. The plaintiff, who was the only child of the marriage, was born on Feb. 27, 1875, and on Jan. 28, 1892, married the defendant R. J. A. Lovett.

By a post-nuptial settlement, dated July 27, 1892, and made between the defendant R. J. A. Lovett of the first part, the plaintiff of the second part, the said Maria Louisa Frederick of the third part, and the defendants Ernest N. Lovett and G. W. Browne of the fourth part, after reciting that there was issue of the marriage of Mr. and Mrs. Frederick an only child, the plaintiff, an infant under the age of twenty-one years, who had attained the age of seventeen years on Feb. 27, 1892, and who shortly before that day had contracted a marriage in Ireland with the defendant, R. J. A. Lovett; that by virtue of the settlement of April 15, 1874, the lands at Cappagh were vested in the surviving trustee thereof on trust to pay the income thereof to the said Maria Louisa Frederick for life, and after her death to stand seised and possessed of the said lands in trust for the plaintiff, her heirs and assigns; that by the same settlement the undivided share in the hereditaments at Lambeth and Camberwell (therein called the London estate) were vested in the same trustee on trusts for sale and investments, and to pay the income thereof to the said Maria Louisa Frederick for her life, and after her decease to stand possessed of the sale moneys in trust for the plaintiff, her heirs, executors, administrators and assigns; and that by an order of the Lord Chancellor of Ireland, made on June 28, 1892, under the Infant Settlements Act, 1855, and the Infant Marriage Act, 1860, the Lord Chancellor being of opinion that the settlement proposed to be effected by the deed was a proper settlement to be made on the plaintiff's marriage, and that the indenture was a proper indenture for giving effect to such settlement, had, pursuant to the Act of Parliament, sanctioned and approved of such settlement, and had ordered the infant to be at liberty to execute the same on her marriage, it was witnessed that the plaintiff, in pursuance of the order and with the sanction of the Chancery Division of the High Court of Justice in Ireland, conveyed the lands at Cappagh, subject to the life interest of Maria Louisa Frederick therein, to the trustees on trust to sell and to pay the income to the plaintiff for her life, and after her death to the defendant R. J. A. Lovett for his life, and on the death of the survivor, on the usual trusts for their issue with a trust in default of issue in favour of the plaintiff. And the plaintiff also conveyed to the trustees the proceeds of sale and conversion of the undivided share of the London estate to which she was entitled under the indenture of settlement of April 15, 1874, in remainder expectant on the decease of Maria Louisa Frederick on similar trusts. The settlement did not contain any covenant to settle the plaintiff's after-acquired property or any power of revocation.

By a deed-poll, dated Aug. 5, 1897, Maria Louisa Frederick, in exercise of the power contained in the settlement of April 15, 1874, absolutely and irrevocably appointed that the trustee or trustees for the time being of that settlement, from and immediately after her decease, and in the meantime subject to her life interest, should stand seised and possessed of the whole of the land and hereditaments, trust funds, and premises, comprised in or subject to the trusts of the same indenture in trust for the plaintiff, her executors, administrators, and assigns, absolutely for her separate use.

The plaintiff brought this action, claiming the declaration.

Neville, *Q.C.*, and *Clare* for the plaintiff.

Levett, *Q.C.*, and *Dickinson* for the defendants, the trustees of the settlement of July 27, 1892.

Ashton Cross for the defendant, R. J. A. Lovett.

A **ROMER, J.**—The result at which I have arrived no doubt may appear somewhat startling, but after consideration, contrary to my first impression, I have come to the conclusion that the plaintiff is entitled to the relief she claims. The cases that have been cited before me I think establish, and in my opinion it is now the law, that if a person assigns his interest in property, whether real or personal, to which at the time he is entitled in default of appointment by another person, and after-
B wards he obtains that property under an exercise of the overriding power of appointment, he can claim the property notwithstanding the assignment, and even though the power was limited to a class of which he was one, and though that power and his interest in default of appointment were both created by the same settlement or instrument, the reason being that the interest he obtained by the exercise of the power was a distinct one from that he possessed at the date of the assignment.
C I apply that principle to the case before me. I bear in mind that the deed was a settlement by an infant of her then property. Prima facie it would only pass her then interest under the settlement referred to in the deed, and not an interest she had not then and only obtained afterwards, namely, the interest under the exercise of the power of appointment by the mother. Ought I in the first place to construe the deed, dealing with it as a question of construction, as one intended to pass
D this possible future interest—this expectancy? In the absence of some overwhelming reason to the contrary, I think I ought not to do so, bearing in mind, as I have already said, that the lady was an infant at the time, and seeing that the deed does not purport to pass anything but estates and interests then existing, and does not purport to settle or deal with after-acquired property. In the deed of settlement there is no reference whatever to the power of appointment. Had it been intended
E to release that power, or to prevent its being exercised, that could easily have been effected. The power could have been released, or if so intended, the mother might have exercised it in the settlement or immediately before it. There is no covenant in this deed referring to a settlement, and nothing that I can find which binds the mother or the infant in any way that the power to appoint shall not be exercised.

F The main contention of the trustees, who have very properly brought before me all the considerations which ought to bear in this case in favour of those claiming under the settlement, has been the recital in the deed of the lady's title. I look at that recital, and, except that it does not go far enough, so far as it does go it appears to me accurate. The infant was entitled as the matter then stood, subject to the life interest of her mother, to the property she purports to assign. What the
G recital does not say, and what no doubt it ought to have said, is this—that her estate and interest was liable to be defeated by an exercise of a power of appointment. It appears to me, looking at the considerations I have already pointed out, the form of this deed, and the position of the infant, that I ought to give a reasonable construction to this recital and make it accord with the facts, as in fact it does if you treat it as an incomplete recital or as a recital not stating all the facts, and I think
H it ought to be treated as a statement of what her then interest was, and as omitting reference to the fact that that interest was defeasible. Dealing, therefore, with this matter as a question of construction, it appears to me, as I have already said, that I ought not to construe this deed as intended to pass anything more than the lady's then interest in the property, and the property she was then entitled to, and, as I have already pointed out, that would not cover a property, an interest, or
I an estate which she had not then and did not acquire until after the settlement.

That appears to me really to dispose of this case, for I am satisfied that here there is no estoppel. Certainly, in my opinion, there cannot be any equitable estoppel. The principle of equitable estoppel has been, if I may say so, clearly stated by LORD SELBORNE in the case which has been cited before me of *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1), and it shows that equitable estoppel is not applied in favour of a volunteer, nor in this case can I see any estoppel at all. I can find no estoppel by the terms of the conveying part of the deed, the conveyance being what is called an innocent one, and I can find no

estoppel in the recital for the reasons I have already pointed out in dealing with the question of construction. That recital can have a meaning given to it which is in strict accordance with the facts, and need not be construed as a statement of what was not true at the time. It follows, in my opinion, that the plaintiff is entitled to the relief she has claimed, that is to say, the relief she has claimed at the bar, which is limited to the property which passed under the marriage settlement. There will be a declaration that the interest taken by the plaintiff under the exercise of the power of appointment is not comprised in the settlement.

Solicitors : *Cridland & Nell; Janson, Cobb & Pearson; Godfrey & Robertson.*

[*Reported by* G. Welby King, Esq., *Barrister-at-Law.*]

DE LAUBENQUE *v.* DE LAUBENQUE

[Probate, Divorce and Admiralty Division (Sir Francis Jeune, P.), November 14, 1898]

[Reported [1899] P. 42; 68 L.J.P. 20; 79 L.T. 708]

Divorce—Desertion—Never any cohabitation by parties.

There can be desertion without previous cohabitation by the parties. Accordingly, where the parties separated on leaving the church and the husband failed to cohabit with the wife although she was always ready and willing to cohabit with him it was **held** the husband had been guilty of desertion.

Fitzgerald v. *Fitzgerald* (1) (1869), L.R. 1 P. & D. 694 and *Buckmaster* v. *Buckmaster* (2) (1869), L.R. 1 P. & D. 713, explained.

Notes. The present grounds for divorce (which make adultery a ground in itself, without proof of desertion) are contained in the Matrimonial Causes Act, 1950, s. 1. (i).

Considered : *Shaw* v. *Shaw*, [1939] 2 All E.R. 381.

As to the meaning of desertion, see 12 Halsbury's Laws (3rd Edn.) 241-242, and for cases see 27 Digest (Repl.) 333. For the Matrimonial Causes Act, 1950, s. 1, see 29 Halsbury's Statutes (2nd Edn.) 389.

Cases referred to :

(1) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, *2784*.

(2) *Buckmaster* v. *Buckmaster* (1869), L.R. 1 P. & D. 713; 38 L.J.P. & M. 73; 21 L.T. 231; 17 W.R. 1114; 27 Digest (Repl.) 343, *2848*.

Undefended Petition by Mary Theresa De Laubenque for the dissolution of her marriage with Gustave De Laubenque, on the ground of the latter's adultery and desertion.

The marriage took place in Edinburgh on Sept. 1, 1888, under the following circumstances. The petitioner, then Mary Theresa Adair, resided with her parents in Edinburgh. The respondent was a medical student, at Edinburgh University. In 1887 he made the acquaintance of the petitioner, and subsequently became an intimate friend of the petitioner's family. An attachment grew up between the petitioner and respondent, and they became engaged, with the consent of the petitioner's father, John Adair. The respondent attempted to persuade the petitioner to elope with him to Paris, and to be married there, but this the petitioner refused to do. Eventually she consented to be secretly married to the respondent at a

registry office in Edinburgh, and to elope with him afterwards. Before the marriage took place the petitioner's parents discovered her intention. Finding her set on the marriage, her father agreed that the marriage should take place; but being under the impression that the domicil and nationality of the respondent were French, declined to allow the parties to cohabit until any formalities necessary by French law had been complied with. The marriage was accordingly solemnized before the registrar, and, the parties being both Roman Catholics, also at the Roman Catholic cathedral.

The parties separated on leaving the church, and the petitioner only saw the respondent twice afterwards, on both occasions in the presence of her father. Subsequently the respondent went to Paris under the pretence of satisfying John Adair as to his nationality and the necessities of the French law. John Adair became suspicious, and followed the respondent to Paris. There he discovered that the respondent was a man of no means and had been born at St. Lucia and was a British subject. John Adair informed the respondent that when he had the means of providing a home his daughter was ready for him. The petitioner, however, swore that she was willing to go to the respondent at any time on his request and without proof of his means, and that she had never authorised her father to enter into any agreement making her consent to cohabitation conditional. From October, 1888, the respondent had made no communication to the petitioner. The petitioner's father, John Adair, in 1892 obtained a dispensation from the Pope, declaring the marriage null and void. In 1896 it was discovered that the respondent was living in England in adultery with another woman, and the present proceedings were instituted. Evidence was given of the facts, and also that the respondent's domicil was English.

Inderwick, *Q.C.*, and *Priestley* for the petitioner.

SIR FRANCIS JEUNE, P.—I think this case is made out. I am satisfied as to the husband's domicil, and I think the adultery is clearly proved. The only remaining question is the question of desertion. The facts show that for some reason the husband determined soon after the marriage not to consort with his wife. There was, therefore, no cohabitation between the parties; and the question which I have to determine is, whether there must be cohabitation to render desertion possible. I do not think there is any necessity for cohabitation. I think the cases referred to in argument—*Fitzgerald* v. *Fitzgerald* (1) and *Buckmaster* v. *Buckmaster* (2)—merely decide that as long as there is a bargain between husband and wife to live apart the husband's neglect to consort with his wife cannot during the continuance of the bargain constitute desertion. My only doubt here is due to the statement of the wife's father to the husband. That statement might have released the husband from his obligation to consort with his wife if it had been made with her authority or assent. I am, however, satisfied that the wife herself was always ready and willing to go to the husband, and that she entered into no bargain to live apart. The statement of the father is not really inconsistent with the wife's evidence. I think the facts in this case constitute desertion, and there will be a decree nisi with costs.

Solicitors: *S. M. & G. B. Benson.*

[*Reported by* H. M. GIVEEN, ESQ., *Barrister-at-Law.*]

A

GRAND JUNCTION WATERWORKS CO. *v.* HAMPTON URBAN DISTRICT COUNCIL

[CHANCERY DIVISION (Stirling, J.), June 7, 8, 14, 1898]

B

[Reported [1898] 2 Ch. 331; 67 L.J.Ch. 603; 78 L.T. 673; 62 J.P. 566; 46 W.R. 644; 14 T.L.R. 467; 42 Sol. Jo. 571]

Street—Building line—Infringement—Pumping station of water undertaking—Penalty—Recovery by local authority before inferior court—Jurisdiction of High Court to restrain.

C

By s. 3 of the Public Health (Buildings in Streets) Act, 1888 [which is substantially re-enacted by s. 75 of the Highways Act, 1959: 39 HALSBURY'S STATUTES (2nd Edn.) 498], it was provided that, under a monetary penalty, it should not be lawful to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof. By s. 251 of the Public Health Act, 1875 [see now s. 264 (6) of the Highways Act, 1959: supra, p. 682], penalties for offences under the Public Health Acts could be recovered in a court of summary jurisdiction.

D

The plaintiffs, a waterworks company, purporting to act under their local Act, began to erect a pumping station on a piece of land abutting on a street. The defendants, the local authority, gave them notice that, as the new building would extend beyond the building line prescribed by s. 3 of the Act of 1888, they could not give their consent, they then proceeded against the company before the magistrates who found the company to be in breach of s. 3 and ordered them to pay penalties. The plaintiffs thereupon brought an action for a declaration that they were entitled to build without interference by the defendants

E

Held: while the court had jurisdiction in a proper case to restrain a public authority empowered to sue for penalties from proceeding before an inferior tribunal to recover, or to make a declaration of right regarding that matter without giving any consequential relief, that jurisdiction should only be exercised in very special circumstances; again in cases relating to the building line the legislature had provided a cheap and short mode of obtaining a decision, and it would be a matter of regret if a different and more expensive mode of obtaining that decision were to be resorted to in the absence of very special circumstances; there were no special circumstances in the present case; and, therefore, the action failed.

F

G

Notes. Considered: *St. James' Hall* v. *L.C.C.* (1900), 83 L.T. 98; *Devonport Corpn.* v. *Tozer*, [1902] 2 Ch. 182; *Elsdon* v. *Hampstead Corpn.*, [1905] 2 Ch. 633; *Russell* v. *Midhurst R.D.C.* (1908), 98 L.T. 530. Followed: *Williams* v. *Weston-super-Mare* (1909), 74 J.P. 52; *Merrick* v. *Liverpool Corpn.*, [1910] 2 Ch. 449. Distinguished: *Burghes* v. *A.-G.*, [1911] 2 Ch. 139. Considered: *Sivyer* v. *Amies*, [1940] 3 All E.R. 285. Referred to: *A.-G. and District Council* v. *Rufford* (1899), 63 J.P. 232; *A.-G.* v. *Merthyr Tydfil Union*, [1900] 1 Ch. 516; *R.* v. *Philbrick* (*County Court Judge*), *Ex parte Edwards* (1905), 53 W.R. 527; *Simmonds* v. *Newport Abercarn Black Vein Steam Coal Co.*, [1920] 3 K.B. 131; *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, [1921] All E.R. Rep. 329; *Everett* v. *Griffiths*, [1924] 1 K.B. 941; *A.-G.* v. *Ripon Cathedral* (*Dean and Chapter*), [1945] 1 All E.R. 479.

H

I

Cases referred to:

(1) *Lord Auckland* v. *Westminster Local Board of Works* (1872), 7 Ch. App. 597; 41 L.J.Ch. 723; 26 L.T. 961; 20 W.R. 845; L.JJ.; 26 Digest (Repl.) 567, *2330*.

(2) *Kerr* v. *Preston Corpn.* (1876), 6 Ch.D. 463; 46 L.J.Ch. 409; 25 W.R. 265; 26 Digest (Repl.) 629, *2777.*

(3) *Saull* v. *Browne* (1874), 10 Ch. App. 64; 44 L.J.Ch. 1; 31 L.T. 493; 39 J.P. 181; 23 W.R. 50; 13 Cox, C.C. 30, L.C. & L.JJ.; 28 Digest (Repl.) 872, *997.*

(4) *York Corpn.* v. *Pilkinton* (1742), 9 Mod. Rep. 273; 2 Atk. 302; 88 E.R. 447; sub nom. *Pilkington* v. *York* (*City*), 1 Dick. 84, L.C.; 28 Digest (Repl.) 871, *995.*

(5) *Stannard* v. *St. Giles, Camberwell, Vestry* (1882), 20 Ch.D. 190; 51 L.J.Ch. 629; 46 L.T. 243; 30 W.R. 693, C.A.; 28 Digest (Repl.) 747, *56.*

(6) *Hedley* v. *Bates* (1880), 13 Ch.D. 498; 49 L.J.Ch. 170; 42 L.T. 41; 28 W.R. 365; 28 Digest (Repl.) 742, *32.*

Also referred to in argument:

Hendon Local Board v. *Pounce* (1889), 42 Ch.D. 602; 61 L.T. 465; 38 W.R. 377; 26 Digest (Repl.) 548, *2192.*

St. George's Local Board v. *Ballard*, [1895] 1 Q.B. 702; 64 L.J.Q.B. 547; 72 L.T. 345; 59 J.P. 182; 43 W.R. 409; 11 T.L.R. 263; 14 R. 295, C.A.; 26 Digest (Repl.) 551, *2215.*

Robinson v. *Barton-Eccles Local Board* (1883), 8 App. Cas. 798; 53 L.J.Ch. 226; 50 L.T. 57; 48 J.P. 276; 32 W.R. 249, H.L.; 26 Digest (Repl.) 547, *2187.*

Barlow v. *St. Mary Abbotts, Kensington, Vestry* (1886), 11 App. Cas. 257; 55 L.J.Ch. 680; 55 L.T. 221; 50 J.P. 691; 34 W.R. 521; 2 T.L.R. 452, H.L.; 26 Digest (Repl.) 572, *2360.*

Austen v. *Collins* (1886), 54 L.T. 903; 30 Digest (Repl.) 172, *228.*

Baxter v. *L.C.C.* (1890), 63 L.T. 767; 55 J.P. 391; 7 T.L.R. 142; 30 Digest (Repl.) 175, *242.*

R. v. *Hutchings* (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A.; 26 Digest (Repl.) 603, *2584.*

Adjourned Summons for the determination of preliminary questions of law raised by the defendants, the Hampton Urban District Council, in their defence to the action.

The action was brought by the Grand Junction Waterworks Co., a company incorporated by a private Act. Under their statutory powers the company acquired land within the jurisdiction of the Hampton Urban District Council and they proposed to build on the land additional pumping accommodation to secure an adequate supply of water within the limits of their operations. The defendant council informed the company that they would not allow the proposed building to be brought forward beyond the front main wall of the building on either side thereof and that the proposed erection was a contravention of s. 3 of the Public Health (Buildings in Streets) Act, 1888. The company declined to agree with this view, and contended that under their statutory powers they had power to erect buildings on the land in question, and that such powers over-rode the provisions of the Public Health (Buildings in Streets) Act, 1888, with reference to the building line so as to admit of the company erecting their building where they found it necessary even if it be beyond the general line. The company proceeded to erect their building, and the council gave them formal notice to discontinue doing so. The plaintiffs then brought this action against the council for a declaration that they were entitled to continue with the building. The defendants put in a defence which contained among other defences the following:

"**11.** The defendants, having regard to the provisions of the Public Health (Buildings in Streets) Act, 1888, deny that upon the true construction of the plaintiff company's Act the Waterworks Clauses Act, 1847, and the other Acts incorporated with the company's said Acts the plaintiff company is entitled to erect their said engine-house or any other buildings they may think proper for the purposes of their said works upon any portion of the piece of land in the statement of claim specified without the consent of the defendants. . . .

13. The defendants object to the bringing of this action against them by the plaintiff company and submit the same is entirely without procedure, and will contend at the trial: (a) That this company has not, having regard to the matters hereinbefore mentioned and to the provisions of the Judicature Acts and the Rules of the High Court made thereunder, any jurisdiction to make the declaration prayed for herein. In the alternative (b) that the court in the exercise of its discretion ought not to make the said declaration, but that the plaintiff company should be left to establish their defence (if any) before the special tribunal entrusted with the determination of the question involved in pursuance of the statutes in that case made and provided subject to their right of appeal to a Divisional Court of the High Court of Justice, provided for by s. 45 of the Judicature Act, 1873, the decision of which said court is by s. 47 of the said statute made final and without appeal, and that by reason thereof that this action should be dismissed."

The present summons was then taken out for leave to have the questions of law raised by the defence decided before the action was further proceeded with.

Bosanquet, Q.C., *Macmorran, Q.C.*, and *R. C. Glen* for the plaintiffs.
Jenkins, Q.C., and *Courthope-Munroe* for the defendant council.

Cur. adv. vult.

June 14, 1898. **STIRLING, J.**, after stating the facts, continued:—I have to consider both points raised by para. 13 of the defence. The enactment relied on by the defendants is s. 3 of the Public Health (Buildings in Streets) Act, 1888, which repeals s. 156 of the Public Health Act, 1875, and in lieu thereof, enacts as follows:

"It shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding 40s. for every day during which the offence is continued after written notice in this behalf from the urban authority."

It is not in dispute that this building of the plaintiffs does project beyond the front main wall on either side, and when the matter was brought before the magistrates under s. 251 of the Public Health Act, 1875, they inflicted fines on the plaintiffs. The plaintiffs thereupon applied for a Special Case on which to go to the Divisional Court.

The question is: Ought I to allow this action to go on? The writ and statement of claim simply ask for a declaration and for no other relief whatever. The form of action is justified by an appeal to Ord. 25, r. 5, which provides that:

"No action of proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

The last part of that rule is expressed in the very widest terms. It is said, however, that these wide words must be read with some limitations, and it is suggested that the court has no authority, notwithstanding that rule, to make any declaration because neither before nor after the Judicature Acts could any relief be given. I am not called upon, as it seems to me, to decide whether any such limitations are to be read into the rule. I am not satisfied that in this case there is an entire absence of jurisdiction to give consequential relief, at all events in the present state of the authorities.

The material authorities appear to be three. First *Lord Auckland* v. *Westminster Local Board of Works* (1). That arose, not under this Act, upon which there appears to be no decision, but under the Metropolis Management Amendment Act, 1862. That Act contained two sections very similar in their nature to s. 3 of the Public Health (Buildings in Streets) Act, 1888. One was s. 74, which provided for what I may call rectifying the general line of the street where buildings extend beyond it. It enacts that

> "In case any building . . . which shall in any part thereof project beyond the general line of the street in which the same may be situate or beyond the front of the building wall or railing on either side thereof shall at any time be taken down to an extent exceeding one half of such building . . . or shall be destroyed by fire or other casualty or demolished, pulled down, or removed from any other cause to the extent aforesaid, it shall be lawful for the Metropolitan Board of Works to require the same to be set back to such a line and in such a manner for the improvement of any street as the said board shall direct . . ."

Section 75 says:

> "No building, structure, or erection shall without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings thereupon amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment; (b) to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard; (c) such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing, and in default of the building or erection complained of being demolished within the time limited by the said order the said vestry or board shall forthwith enter the premises to which the order relates and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same as they think fit; and all the expenses incurred by the said vestry or board in carrying out the said order, and in disposal of the said materials, may be recovered by the said vestry or board from the owner or occupier of the said premises, or the builder or person engaged in the work, either by action at law or in a summary manner before the justice of the peace at the option of the said vestry or board, in manner provided by s. 277 of the firstly recited Act as to the recovery of penalties."

The Westminster Board of Works took proceedings under s. 75. The contention of Lord Auckland, who was the owner of certain lands with respect to which the

proceedings were taken, was that the case fell, not within s. 75, but within s. 74. MALINS, V.-C., and the Court of Appeal consisting of JAMES and MELLISH, L.JJ., were of opinion that the case did not fall within s. 75, but fell within s. 74, and consequently that the magistrate before whom the summons was taken out under s. 75 had no jurisdiction to deal with the case, that section not being applicable. Both the Vice-Chancellor and the Court of Appeal granted an injunction in very wide terms which I have before me, and which does not appear in the report, including an injunction against taking any proceedings for the purpose of compelling the plaintiffs' builder to abstain from erecting buildings on the land in question and also to restrain the board, their servants, solicitors, and agents, from taking any proceedings for the purpose of recovering from the plaintiffs penalties under the Metropolis Management Amendment Act, 1862. The ground on which this is put by JAMES, L.J., in this (7 Ch. App. at p. 603):

"The plaintiff, Lord Auckland, comes to this court and complains that a public body threaten and intend under colour of certain great powers given them by Act of Parliament to take and pull down some buildings which he has a right to erect and is about to erect on his own property. He complains that by these threats they have embarrassed him in the application of his property to the purpose he desires, and have in fact prevented him from erecting his building because they tell him in plain terms that if he does build they will put in force the powers of their Act and pull down his building. This being the complaint it appears to me to be a plain case for the exercise of the jurisdiction of the court. What is the case? A man files his bill with regard to a grievous wrong which is threatened to be inflicted on him by a public body, and he has a right to see whether this body has the power to inflict this wrong upon him; or at all events to try and relieve his title from the cloud which is put upon it by this proceeding which has been taken under a public Act of Parliament by public functionaries entrusted with great and arbitrary powers. It seems to me to be the same kind of case as those well-known cases in which this court has exercised its jurisdiction by restraining railway companies from proceeding to take land, which they had power to take for one purpose, for some other purpose for which they were not entitled to take it; or to take part of a house only where the law obliged them to take the whole of it. In those cases the court has stopped them at once and granted an injunction because they were about to exercise their powers in a manner that was offensive or in a manner that was illegal. I have no doubt, therefore, that this is a case within the jurisdiction of this court, and that it is a case proper for this court to decide once for all instead of obliging Lord Auckland to go before a magistrate and discuss before him the question of jurisdiction and the difficult construction of these Acts of Parliament, and then to carry the case to the Court of Queen's Bench by certiorari, or to take some other step to get it finally decided."

MELLISH, L.J., says (ibid. at p. 607), after expressing an opinion that as regards the site it was clearly within s. 74, and there was no power to proceed under s. 75:

"That being so, I am further of opinion that this court has jurisdiction to grant relief in this case. The district board threatens that, if Lord Auckland should erect stables on this land, they will pull them down. It is true they must first go before a magistrate. If they do, he will probably tell them he has no jurisdiction; for it seems to me perfectly clear that he has no jurisdiction under this section. But I think Lord Auckland is entitled to say 'I will not wait to see whether a magistrate will decide rightly or wrongly as to his jurisdiction in this case. I will not go before a magistrate at all, but I will go into the Court of Chancery for an injunction to restrain you from pulling down my stables in a case where you have no power to pull them down.'"

That is an authority of the Court of Appeal, constituted by two very eminent judges, that the court has jurisdiction in a proper case to restrain a public authority

empowered to sue for penalties from proceedings before the magistrate to recover these penalties.

That decision was criticised by SIR GEORGE JESSEL, M.R., in *Kerr* v. *Preston Corpn.* (2). There he refused an application which was made by the plaintiffs, the owners of certain houses, to restrain the corporation from taking summary proceedings to recover penalties under the Public Heath Act on the ground that they had set forward the buildings without consent under s. 156 of that Act for which the Act of 1888 is now substituted. The Master of the Rolls said:

> "The first question is whether there is equity to restrain a proceeding of the kind now threatened. It is a criminal proceeding instituted by information in the usual way and seeking to recover a penalty for a breach of certain laws which are sanctioned by the legislature. Why ought a court of equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in *Saull* v. *Browne* (3), where I declined to interfere with criminal proceedings, or to follow LORD HARDWICKE's doubtful decision in *York Corpn.* v. *Pilkington* (4). My decision was appealed from, and the lords justices thought it a right decision. With the exception of that case before LORD HARDWICKE there is no instance in which a court of equity has interfered in criminal proceedings. I do not say tht the court might not interfere in a possible case, but as a general rule it will not. Then I come to the question whether there is any equity at all. I have been referred to *Lord Auckland* v. *Westminster Local Board of Works* (1), and speaking with all deference to the eminent judges who decided it, it appears to me that sufficient attention was not paid to the real facts of the case. The lords justices dealt with the case as if the Westminster Board of Works had threatened to pull down what they had no right to pull down, and, that being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here I should, without that decision, have granted an injunction, just as in the case of a railway company exceeding its powers. But, on reading the report, that was not the real state of the case at all. The Westminster Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such an order could not have been made except by a magistrate having jurisdiction to make it; so that the application was really to restrain the board not from pulling down—as both the lords justices treated it—but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has in fact no real application to the present case."

He goes on to say that there is nothing in the shape of acquiescence to conclude the local board in that case.

I observe that the Master of the Rolls had only the report of that case in 7 Ch. App. before him, and perhaps he was not aware of the form of order made in *Lord Auckland's Case* (1). But I confess it does seem to me that at all events the question was present to the mind of MELLISH, L.J., and I have little doubt that it was so also to JAMES, L.J. However, the criticisms are of a learned and eminent judge, of the decisions of the members of the Court of Appeal, which are entitled to great weight, and weight must be given to them in any consideration of the subject. On this the remark is to be made that SIR GEORGE JESSEL was sitting as Master of the Rolls and not in the Court of Appeal, and he, therefore, could not overrule the decision in *Lord Auckland* v. *Westminster Local Board of Works* (1).

The third case with which I have to deal is the subsequent one of *Stannard* v. *St. Giles, Camberwell, Vestry* (5). That again was a case in which there was an application of a similar character to these, though not precisely so, as it related to a question with regard to a drain. There a dispute had arisen between the local board and the builder about a drain with which buildings which the builder had erected interfered. They gave notice to enter and reinstate, and afterwards

abandoned that and took proceedings before the magistrate. The plaintiff brought an action claiming an injunction to restrain the defendants from trespassing on his land and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass, and it was there held by the Court of Appeal that, as the defendants did not so threaten and intend, there was no case and no jurisdiction to restrain the proceedings before the magistrate. I am reading from the head-note (20 Ch.D. 190), which goes perhaps a little beyond the judgment given by the Court of Appeal. The facts must be taken to be that the local authority in that case simply threatened to proceed before the magistrate, and did not threaten to take the law into their own hands and enter the plaintiff's lands, and make the necessary alteration in the drain. SIR GEORGE JESSEL, M.R., in deciding the case in the Court of Appeal, says (ibid. at p. 195):

> "There is no allegation that that is a fact, and I believe the truth was that such an allegation could not be made. I think the defendants are right when they say that they did not intend to enter upon the land. But, whatever the effect of the notice of May 17 might have been, that course of proceeding was not one the defendants ultimately intended to adopt; and indeed the notice of Oct. 24, in my opinion, shows that clearly. However, the allegation is not there, and, as I said before, though the notice of May 17 standing alone and without any further proceeding or any further explanation would have been strong evidence of intention, it does not appear to me that there is here either sufficient allegation or sufficient evidence of intention on the part of the defendants to enter upon the plaintiff's land and commit a trespass. That would dispose of the case so far as the question of trespass is concerned; but the plaintiff goes on to ask an injunction to restrain the defendants from taking any proceedings before the magistrate. Now, as a general rule, it is quite plain you cannot do that. Where the legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another court to interfere to stop that proceeding by injunction."

Then he discusses *Hedley* v. *Bates* (6), where he had himself, sitting at the Rolls, granted an injunction as he considered the magistrate had no jurisdiction. It is to be observed that in that case the proceedings before the magistrate had taken place and had been decided adversely, and thereupon he refused to interfere. On that ground both the Master of the Rolls and LORD HANNEN proceeded in that case.

That being the state of the authorities, which are really all the authorities, I do not think it would be right for me to say that there is absolutely no jurisdiction in the court to restrain proceedings before a magistrate. In this case, as in that of *Stannard* v. *St. Giles, Camberwell, Vestry* (5), there is no evidence, and, indeed, no allegation, that the defendants, the urban district council, threaten and intend to enter the lands of the plaintiff in any way. The statements in the statement of claim were admitted by counsel during the argument, and the allegations cannot go beyond showing an intention to proceed before the magistrate, as indeed is also shown by the correspondence. Therefore, there is no ground for the interference of the court, for in point of fact the defendants threaten and intend to do no illegal act. All that they threaten and intend to do, and have done, is to proceed before the magistrates in the way pointed out by s. 3 of the Act of 1888. Whether or not there be jurisdiction in the court to restrain by injunction such an application, it seems to me that to grant an injunction in such a case is a matter which requires the greatest possible caution. To adopt the language of the Master of the Rolls in the case I have cited,

> "Where the legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another court to interfere to stop that proceeding by injunction."

I desire to add that in the present case the contest is between the local authority and private owners, and it seems to me, therefore, that the rule ought to be adhered to somewhat strictly. In these matters as to building line the legislature has provided a cheap and short mode of obtaining a decision on the point in question. It appears to me that it would be matter of regret if a different and more expensive mode of obtaining that decision were to be lightly resorted to, or resorted to in the absence of very special circumstances. I confess that my experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark on costly litigation where there is no equivalent advantage to the public or others whom they represent; and I should be sorry that private individuals and such authorities, when a speedy mode of obtaining a decision can be resorted to, should resort to the more expensive mode. Therefore, in the exercise of the discretion which is vested in the court, I ought to be very slow to grant an injunction against taking proceedings before a magistrate when the legislature has pointed out that as the proper mode of proceeding. A fortiori it seems to me that, when the court is simply asked to make a declaration of right without giving any consequential relief, the court ought to be extremely cautious in granting such relief, and in making such a declaration in the absence of very special circumstances.

That brings me to the question whether any special circumstances are shown. In my judgment, there are none. I think, therefore, that this is a case where, in the exercise of discretion, the court ought not to interfere by way of injunction or to make a declaration in accordance with the prayer of the statement of claim. The matter is one which ought to be left to the decision of the tribunal pointed out by the Act of Parliament, which can adjudicate finally on the rights of the parties, and is the more proper court to decide that question. The action will be dismissed with costs.

Solicitors: *Bircham & Co.; Kent & Son.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

THE RIPON CITY

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Gorell Barnes, J.), March 29, 30, May 6, 1897]

[Reported [1897] P. 226; 66 L.J.P. 110; 77 L.T. 98; 13 T.L.R. 378; 8 Asp.M.L.C. 304]

Shipping—Maritime lien—Master's wages and disbursements—Vessel transferred to possession of prospective purchasers pending sale—Master appointed by purchasers—Sale not completed—Vessel re-taken by owners—Liability of owners to master.

In October, 1895, an agreement for the sale of the steamship *Ripon City* was entered into between the defendants, as managing owners of the vessel, and N. M. & Co., as purchasers. By the terms of that agreement it was provided that the vessel should be taken over by N. M. & Co. on completion of her then voyage, and by way of security for the payment of the purchase money that the defendants should remain registered owners of the vessel until they were in a position to transfer the whole sixty-four sixty-fourth shares of the vessel and upon such transfer take a mortgage upon the entire steamer to secure due

payment of the instalments of the purchase price. The vessel was taken over by N. M. & Co. in October, 1895, and from such time the defendants ceased to have any interest in the management or profits of the vessel. In October, 1896, eight sixty-fourth shares of the vessel were transferred to N. M. & Co., which shares were subsequently mortgaged by N. M. & Co. No further shares in the vessel were transferred to N. M. & Co. under the agreement, and in February, 1897, N. M. & Co. suspended payment, and the defendants re-took possession of the vessel. In May, 1896, the plaintiff, whom N. M. & Co. had appointed master of the ship, necessarily and properly purchased at Buenos Aires on account of the ship a quantity of bunker coals, and incurred charges for trimming the same, amounting together to £333 6s., for which sum he, on May 20, 1896, drew a bill of exchange on N. M. & Co. in favour of the suppliers of the coal, to whom the said sum was due, and payable fifty days after sight. In August, 1896, he purchased coals at La Plata, and incurred liabilities for moneys advanced to him on account of the ship, and drew a bill of exchange on N. M. & Co. for the sum of £910 8s. 6d. in favour of the coal merchants, to whom the sum was due, and payable fifty days after sight. The bills of exchange were accepted by N. M. & Co., and were duly presented for payment, but were dishonoured, and thereupon protested for non-payment, and notice of dishonour was given to the plaintiff. In January, 1897, the plaintiff drew two other bills of exchange on N. M. & Co., for coals purchased at Orkney Island and Copenhagen on account of the ship, which remained unpaid. The plaintiff claimed from the defendants £1,453 for the liabilities incurred on the bills of exchange, and, in addition, £83 for wages.

Held: a person who was allowed by the owner of a vessel to have possession of her to employ her in the ordinary manner must be presumed to have received authority from the owner to subject her to claims in respect of which maritime liens might attach arising out of matters occurring in the ordinary course of her employment; in the present case there was no evidence that the parties had so acted towards each other that the plaintiff was not entitled to rely on this presumed authority; and, therefore, his liabilities on the bills, which he had given in carrying out transactions in his capacity of master at the request of N. M. & Co., were liabilities incurred by him on account of the ship for which a maritime lien was conferred by s. 167 of the Merchant Shipping Act, 1894, and he was entitled to succeed.

Notes. Followed: *The Elmville*, [1904] P. 319; *Ceylon Coaling Co.* v. *Goodrich* (1904), 73 L.J.P. 104. Distinguished: *The Hopper No. 66*, [1906] P. 34. Considered: *Pocahontas Fuel Co. (Incorporated)* v. *Ambatielos* (1922), 27 Com. Cas. 148. Distinguished: *The Sylvan Arrow*, [1923] P. 220. Considered: *The St. George*, [1926] All E.R. Rep. 553; *The Tolten*, [1946] 2 All E.R. 372. Referred to: *The Snark*, [1899] P. 74; *The Marie Glaeser*, [1914] P. 218; *The Sarpen*, [1916-17] All E.R. Rep. 1132; *The Tervaete*, [1922] All E.R. Rep. 387; *The Colorado*, [1923] All E.R. Rep. 531; *The Stream Fisher*, [1926] All E.R. Rep. 513; *The Goulandris*, [1927] All E.R. Rep. 592; *The Zigurds* (1932), 48 T.L.R. 556; *France Fenwick Tyne and Wear Co.* v. *H.M. Procurator-General*, [1942] 2 All E.R. 453.

As to maritime liens, see 35 Halsbury's Laws (3rd Edn.) 781 et seq.; and for cases see 41 Digest 927. For Merchant Shipping Act, 1894, see 23 Halsbury's Statutes (2nd Edn.) 395.

Cases referred to:

(1) *Morgan* v. *Castlegate Steamship Co., The Castlegate*, [1893] A.C. 38; 62 L.J.P.C. 17; 68 L.T. 99; 41 W.R. 349; 9 T.L.R. 139; 7 Asp.M.L.C. 284; 1 R. 97, H.L.; 41 Digest 937, *8285*.

(2) *Scott* v. *Lifford* (1808), 1 Camp. 246; 9 East, 347; 103 E.R. 605; 6 Digest (Repl.) 245, *1753*.

A (3) *The Orienta*, [1894] P. 271; 63 L.J.P. 129; 71 L.T. 343; 7 Asp.M.L.C. 508; affirmed [1895] P. 49; 64 L.J.P. 32; 71 L.T. 711; 11 T.L.R. 116; 39 Sol. Jo. 165; 7 Asp.M.L.C. 529; 11 R. 687, C.A.; 41 Digest 938, *8297*.

(4) *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 41 Digest 931, *8213*.

(5) *Utopia* (*Owners*) v. *Primula* (*Owners and Master*), *The Utopia*, [1893] B A.C. 492; 62 L.J.P.C. 118; 70 L.T. 47; 9 T.L.R. 542; 7 Asp.M.L.C. 408; 1 R. 394, P.C.; 41 Digest 931, *8215*.

(6) *The Druid* (1842), 1 Wm. Rob. 391; 1 Notes of Cases, 444; 9 L.T. 119; 6 Jur. 441; 166 E.R. 619; 41 Digest 930, *8207*.

(7) *The Lemington* (1874), 32 L.T. 69; 23 W.R. 421; 2 Asp.M.L.C. 475; 41 Digest 931, *8209*.

C (8) *The Tasmania* (1888), 13 P.D. 110; 59 L.T. 263; 6 Asp.M.L.C. 305; on appeal (1889), 14 P.D. 53; 60 L.T. 692; 6 Asp.M.L.C. 381; reversed sub nom. *Tasmania* (*Ship Owners and Freight Owners*) v. *Smith, etc., City of Corinth* (*Owners*), *The Tasmania* (1890), 15 App. Cas. 223; 63 L.T. 1; 6 Asp.M.L.C. 517, H.L.; 41 Digest 708, *5446*.

(9) *Yeo* v. *Tatem*, *The Orient* (1871), L.R. 3 P.C. 696; 8 Moo.P.C.C.N.S. 74; D 40 L.J.Adm. 29; 24 L.T. 918; 20 W.R. 6; 1 Asp.M.L.C. 108; 17 E.R. 241, P.C.; 41 Digest 931, *8212*.

(10) *The Ida* (1860), Lush. 6; 1 L.T. 417; 167 E.R. 3; 41 Digest 789, *6490*.

(11) *The Ticonderoga* (1857), Sw. 215; 166 E.R. 1103; 41 Digest 792, *6520*.

(12) *The Ruby Queen* (1861), Lush. 266; 167 E.R. 119; 41 Digest 931, *8211*.

(13) *The Edwin* (1864), Brown. & Lush. 281; 4 New Rep. 382; 33 L.J.P.M. & A. E 197; 10 L.T. 658; 12 W.R. 992; 2 Mar.L.C. 36; 167 E.R. 365; 41 Digest 934, *8239*.

(14) *The Turgot* (1886), 11 P.D. 21; 54 L.T. 276; 34 W.R. 552; 5 Asp.M.L.C. 548; 41 Digest 938, *8295*.

(15) *The Young Mechanic* (1855), 2 Curtis' Rep. Cases, Circuit Court U.S. 404.

(16) *The Dictator*, [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563; 7 Asp.M.L.C. F 251; 1 Digest (Repl.) 121, *68*.

(17) *Harmer* v. *Bell*, *The Bold Buccleugh* (1852), 7 Moo.P.C.C. 267; 19 L.T.O.S. 235; 13 E.R. 884, P.C.; 41 Digest 927, *8168*.

(18) *Currie* v. *McKnight*, [1897] A.C. 97; 66 L.J.P.C. 19; 75 L.T. 457; 13 T.L.R. 53; 8 Asp.M.L.C. 193, H.L.; 41 Digest 928, *8182*.

(19) *The Mary Ann* (1865), L.R. 1 A. & E. 8; 35 L.J.Adm. 6; 13 L.T. 384; 12 G Jur.N.S. 31; 14 W.R. 136; 2 Mar.L.C. 294; 41 Digest 934, *8235*.

(20) *The Feronia* (1868), L.R. 2 A. & E. 65; 37 L.J.Adm. 60; 17 L.T. 619; 16 W.R. 585; 3 Mar.L.C. 54; 41 Digest 938, *8289*.

(21) *Hamilton* v. *Baker*, *The Sara* (1889), 14 App. Cas. 209; 58 L.J.P. 57; 61 L.T. 26; 38 W.R. 129; 5 T.L.R. 507; 6 Asp.M.L.C. 413, H.L.; 41 Digest 937, *8279*.

H (22) *The Fairport* (1882), 8 P.D. 48; 52 L.J.P. 21; 48 L.T. 536; 31 W.R. 616; 5 Asp.M.L.C. 62; 41 Digest 939, *8302*.

(23) *Williams* v. *Allsup* (1861), 10 C.B.N.S. 417; 30 L.J.C.P. 353; 4 L.T. 550; 8 Jur.N.S. 57; 1 Mar.L.C. 87; 142 E.R. 514; 41 Digest 944, *8358*.

(24) *The Aline* (1839), 1 Wm. Rob. 111; 166 E.R. 514; 41 Digest 928, *8178*.

I Also referred to in argument:

Scott v. *Lifford* (1808), 1 Camp. 246, N.P.; subsequent proceedings, 9 East, 347; 6 Digest (Repl.) 120, *896*.

Lloyd v. *Banks* (1868), 3 Ch. App. 488; 37 L.J.Ch. 881; 16 W.R. 988, L.C.; 8 Digest (Repl.) 597, *416*.

Action in rem brought by the master of the steamship *Ripon City* against her registered owners to recover a sum representing a balance alleged to be due for

wages and liabilities alleged to have been incurred by him for coal supplied to the ship. A

By the Merchant Shipping Act, 1894, s. 167:

"(1.) The master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages as a seaman has under this Act, or by any law or custom. (2.) The master of a ship . . . shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship as a master has for the recovery of his wages." B

Sir Walter Phillimore, *C.F. Gill*, and *F. Laing* for the plaintiff.
Walton, *Q.C.*, and *Dawson Miller* (*Balloch* with them) for the defendants.

Cur. adv. vult. C

May 6, 1897. **GORELL BARNES, J.,** read the following judgment.—This case raises questions of very considerable importance to owners and masters of ships, especially steamships, and to merchants engaged in the business of supplying vessels with necessaries. D

In October, 1895, the defendants, Furness, Withy & Co., Ltd., of Hartlepool, the managing owners of the steamship *Ripon City* and owners of nearly all the shares in her, contracted provisionally to sell that vessel to Messrs. Neil, McLean & Co., of Glasgow, for the sum of £8,000 upon certain terms as to payment by instalments and security therefor. The vessel was to be taken over on completion of her then present voyage at Antwerp. In November, 1895, the contract was definitely agreed to and modified so that the sellers were to remain registered owners until they were in a position to transfer the whole shares (eight sixty-fourths being held in the names of other owners), and upon such transfer they were to take a mortgage on the entire steamer to secure due payment of the instalments of the price. The vessel was accordingly taken over by Neil, McLean & Co. in October, 1895, and worked by them afterwards, and in October, 1896, eight sixty-fourth shares were transferred to their senior partner, and £1,000, part of the purchase money, paid. He mortgaged these shares to other persons. No more shares were transferred to Neil, McLean & Co., or payments made by them, and they afterwards, on or about Feb. 2, 1897, suspended payment and Furness, Withy & Co. re-took possession of the vessel. E F

In October, 1895, Neil, McLean & Co. appointed Captain Cormack, the plaintiff, as master of the *Ripon City*, and he took command of her at Antwerp and sailed her to the River Plate on their account. The ship's articles, dated Oct. 17, 1895, were signed by the plaintiff and described Neil, McLean & Co. as the registered managing owners. On Jan. 1, 1896, Neil, McLean & Co. entered into a contract with Cory Brothers & Co., Ltd., of London, for the supply of all coals required by the former during the year 1896 at certain ports, including Buenos Aires and La Plata, for the use of their steamers at certain specified prices. The contract contained a provision for a reduction of price in case the general market prices should fall below the agreed prices, and a clause in these terms: G H

"Payment for coals and other necessaries supplied to be by honour of captain's draft on the managing owners at fifty days' sight payable in London, and Cory Brothers & Co., Ltd., shall be entitled to cancel this contract on failure of such honour." I

Neil, McLean & Co. had other coaling contracts for 1896, and they furnished the plaintiff with a memorandum headed "Coaling Contracts for 1896," containing a list of the ports for which they had contracts, the contract prices, and the names of the firms who were to supply the coals. In May, 1896, the *Ripon City* was at Buenos Aires, and was supplied by Cory Brothers, Ltd., with 268 tons of coal under the coaling contract, for the price of which—viz., £333 6s.—the plaintiff drew a bill

of exchange dated May 20, 1896, on Neil, McLean & Co., in favour of Cory Brothers & Co., Ltd., at fifty days' sight. In August, 1896, the vessel was at La Plata, and was supplied by Cory Brothers & Co., Ltd., with 721 tons of coal under the contract for the price of which—viz., £896 4s. 6d.—and £14 4s. cash advanced to the plaintiff, he drew a bill of exchange for £910 8s. 6d., dated Aug. 10, 1896, on Neil, McLean & Co. in favour of Cory Brothers & Co., Ltd., at fifty days' sight. The bills of exchange were accepted by Neil, McLean & Co. and were duly presented for payment, but were dishonoured, and were accordingly protested for non-payment. Notice of dishonour was duly given to the plaintiff. The coals were properly supplied for the necessary purposes of the vessel in order to enable her to perform the services on which she was engaged, and the small advance was, as I gather, necessarily and properly made for the purposes of the ship. The plaintiff also drew two other small bills on Neil, McLean & Co. for coals supplied by other persons at the Orkneys and Copenhagen, which have not been paid; and he had in February, 1897, a claim for wages amounting to £83 0s. 3d.

After the suspension of Neil, McLean & Co. the plaintiff arrested the *Ripon City* in Scotland in respect of the wages and coals, and afterwards, on Feb. 13, 1897, he signed a memorandum authorising Cory Brothers & Co., Ltd., as his commissioners or mandatories, to exercise in his name, or their own, his right of lien against the *Ripon City* in respect of the two bills for £333 6s. and £910 8s. 6d., and on their recovering any money in virtue of any proceedings taken by them in his name or their own against the *Ripon City*, he thereby authorised them to apply the proceeds in extinction pro tanto of the amount of his indebtedness to them on the two bills, and declared their mandate irrevocable. The proceedings in Scotland do not appear to have been continued. Cory Brothers & Co., Ltd., were the holders of the two bills. They appear to have arranged with the plaintiff that their solicitors should act in the matter, and on Feb. 17, 1897, their solicitors accordingly issued a writ in rem in this Division in the name of the plaintiff, but really for the benefit of Messrs. Cory so far as concerns the amount of the two bills held by that firm, against the owners of the vessel (which, I presume, had come to England) for the sum of £1,900, and bail in that amount was given by the defendants.

In the statement of claim in the action a claim was made not only in respect of the amount due to Messrs. Cory Brothers & Co., Ltd., but also for the amount of the plaintiff's liability in respect of the coals supplied at the Orkneys and Copenhagen and his wages. In their defence, delivered on Mar. 22, 1897, the defendants, after stating the facts as to the ownership of the vessel, pleaded in effect that Neil, McLean & Co. were alone liable, and that the plaintiff's part in the transactions relating to the bills

> "was merely colourable and done for the purpose of attempting to give the said suppliers of the coals (for whose benefit the action is brought) a lien on the said vessel to the prejudice of the defendants,"

and that the plaintiff was not liable on the bills. The action was set down for trial on Mar. 27, and Furness, Withy & Co., Ltd., knowing that the action was really the action of Cory Brothers & Co., Ltd., endeavoured to see the plaintiff, but, being told that he could be seen at the solicitors' office, they appear to have determined to communicate direct with him, and after setting a watch for him, they ultimately found him, and on Mar. 24 in order to defeat the claim of Cory Brothers & Co., Ltd., arranged with the plaintiff a settlement of the action without the cognisance of the solicitors for Cory Brothers & Co., Ltd., or their own solicitors. The settlement was effected by Mr. Stoker, a director of Furness, Withy & Co., Ltd. assisted by Mr. Hull, a clerk, and Mr. Donald, an agent, of the firm. The plaintiff was paid £400, and a receipt was taken from him for that sum in full settlement of his claims against them in the action of *Cormack* v. *Owners of the Steamship Ripon City*, and he agreed to all proceedings in the said action being

forthwith stayed, each party to pay their own costs of the action. A summons was then taken out before me to stay the action, but I adjourned the summons to the hearing, and the case was accordingly heard on Mar. 27.

Three points were taken by the defendants' counsel: (i) that the plaintiff was not liable on the bills; (ii) that, even if he were liable, he had no maritime lien on the vessel for the amount of the bills; (iii) that the settlement effected with the plaintiff on the record was an answer to the action. The argument on the first point for the defendants was that the coals were not ordered by the plaintiff, but were supplied under the coaling contract, and he merely put his name to the bills for the convenience of the suppliers of the coal, and received no consideration for drawing the bills. I believe that formerly, more than now, masters of steamers in foreign ports themselves contracted at such ports for the supply of the coals they required and drew in their owners for the price, and do so still in certain cases; but at the present day many owners of steamers who have not coal supplies of their own in foreign ports are in the habit of entering into forward contracts with large coal suppliers who have depôts or agents at such ports for the supply of coal to any of their steamers which may visit those ports. The coal suppliers do not themselves draw on the owners for the price of the coal supplied, but, after supplying the quantity of coals required by the master, take his draft in their favour upon the owners. In this way they not only have the personal liability of the master on the bill, but by putting pressure upon him can practically force him to proceed against the vessel for their benefit, and, as I understand, this is regarded as a valuable security by the coal suppliers. They have no right of process themselves against a British steamship for coals supplied to her where any part owner is (as in this case) domiciled in England or Wales. Although, therefore, the master does not himself make the coal contract, he intervenes in it, fixes the quantity required, gives his order for that quantity, and then draws on his owners in favour of the suppliers for the price. He does not do so merely at the request and for the accommodation of the suppliers, but becomes a party to the bill in order to carry out his owners' bargain and because he cannot obtain the coals without doing so. His signature is part of the consideration for the supply of the coals, and he accepts that position by carrying out the transaction in accordance with a course of business well known to him.

This was the manner in which the parties concerned dealt with each other in this case, and, in my opinion, the plaintiff became liable to Cory Brothers & Co., Ltd., on the bills. I have examined the proceedings in *Morgan* v. *Castlegate Steamship Co., The Castlegate* (1), and will refer presently to that case. I find that the master, charterers, and coal suppliers acted in a similar manner to that adopted in the present case, and the master was sued by the suppliers of the coals, in an action which was tried in London before Day, J., and a special jury, and he was held liable on the bills drawn by him for the price of the coals: see also *Scott* v. *Lifford* (2). The argument on the second point for the defendants was that the master was not acting in his capacity as master in drawing the bills, that the case falls within the decision of *The Orienta* (3), and that, as the coals were supplied on the credit of Neil, McLean & Co., and not of Furness, Withy & Co., Ltd., he could not proceed to enforce a lien against the property of the latter. Dealing with the two earlier arguments, first, I am of opinion that in carrying out the transactions in question the master was acting within his ordinary capacity as master of the vessel, although Neil, McLean & Co. had arranged the price and terms of supply of the coals. The contract required him to go to a particular firm for his coals, and fixed the price and terms, but he intervened to put it in operation by fixing the quantity required, giving the necessary orders therefor and drawing for the prices at the rates fixed. If there had been a decline in the general market price he would have had to arrange for the lower price. He carried out the transactions in his capacity as master at the request of his employers, and his liabilities incurred in doing so are, in my opinion (and subject to the next point

A to be considered), liabilities incurred by him on account of the ship for which a maritime lien is conferred by s. 167 of the Merchant Shipping Act, 1894, which is a repetition of s. 1 of the Merchant Shipping Act, 1889 [repealed]. A contrary decision would involve immense hardship to masters of steamships, as it might deprive them of the security of the vessel to discharge liabilities which they have incurred in following a course of business which has become prevalent owing to B the exigencies of modern commerce.

The case is distinguishable from *The Orienta* (3). In that case the master had nothing whatever to do with the order for or supply of the coals. Apparently after they had been supplied to a steamer in London, a home port, and were alongside of her, he voluntarily signed a draft at the request of his owners in favour of the suppliers for the price. The contract had a clause as to the master giving a draft C somewhat similar to that in the present case. The President, in giving judgment, said that it was stated on behalf of the suppliers of the coals, that their object in stipulating for payment by the master's draft was to entitle themselves to a maritime lien by virtue of s. 1 of the Merchant Shipping Act, 1889 (the Act then in force), and that there could be no doubt that the owners intended by agreeing to confer such lien if they could, and the master gave the bills by arrangement D with his owners for that purpose, and he held that the master in lending his name at the request of the owner was not in the circumstances acting within the ordinary course of his employment as master, and he gave judgment in favour of certain mortgagees who had intervened in the suit, giving the plaintiff leave to move for such judgment as he might be advised against the owners of the vessel. This decision was affirmed in the Court of Appeal. I may observe that it was not argued E in that case that the master was not liable on the bills, possibly because he seems from the report to have drawn them at the request of his owners; though a point might, perhaps, have been made that in the perculiar facts of the case it might be inferred that he drew them as much at the request of the coal suppliers as of his owners for their joint accommodation. The distinction between that case and the present is broad. In the former the master did not properly incur liabilities on F account of the ship in the ordinary course of his employment whereas in the present case he obtained the coals in the ordinary course of his employment as master of the vessel, and by so doing pledged the credit of Neil, McLean & Co. for them and rendered himself liable on the bills drawn by him. Without doing so he could not have obtained the coals which were necessary for the purpose of the navigation of the vessel on the service on which she was engaged. So that he did incur G liabilities properly on account of the ship within the meaning of s. 167 of the Act of 1894, and, subject to the question raised by the last point taken in argument as aforesaid, in my opinion he obtained a maritime lien upon the vessel.

The last and most difficult question raised by the second point has to be considered—viz., whether the master acquired a maritime lien which can be enforced by him against a vessel legally owned by the defendants and not by Neil, McLean H & Co. The proposition maintained by counsel for the defendants was that a maritime lien can only arise and be enforced against a vessel owned by persons who are personally liable to the party seeking to enforce the lien. For this proposition only *The Parlement Belge* (4), *The Castlegate* (1), and *The Utopia* (5), were cited. But there are a number of other cases which it is necessary to examine in order to I arrive at a conclusion on the matter, and it will be convenient to deal with the cases in order of date.

In *The Druid* (6) Dr. Lushington dismissed a cause of damage on the ground that the damage was wilfully committed by the master and the owners were not responsible for it. A passage in his judgment has been supposed to support the proposition in question, but that passage has been explained by Sir Robert Phillimore in *The Lemington* (7), and by Sir James Hannen, P., in *The Tasmania* (8). *Yeo* v. *Tatem*, *The Orient* (9), was a case where an agent for sale of a ship, without any authority from her owners, and with the intention of asserting his own

rights to certain foreshore, moored her so as to cause damage to another ship, and a suit against the ship was dismissed. The damage was done in the first of these cases by a servant, and in the second by an agent acting, not only without authority, but unlawfully. *The Ida* (10) appears to have been decided on similar grounds.

In *The Ticonderoga* (11) DR. LUSHINGTON held that a vessel under the exclusive control of certain charterers might be proceeded against in rem for damage to another vessel by collision occasioned by the default of the charterers' servants. He says (Sw. at p. 217):

> "We must recollect that this is a proceeding in rem. I am not aware, where there has been any proceeding in rem, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceedings against the property itself. Supposing a vessel is chartered so that the owners have divested themselves, for a pecuniary consideration, of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew, and suppose in that case the vessel had done damage and was proceeded against in this court;—I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion upon that point;—but, still, I should here say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself. Let us see what cases there are in which the court does not hold a vessel responsible for the damage done. There is one case, and one only, that I am aware of, and that is where a pilot is taken on board by compulsion. On what principle is the owner, in that case, relieved from paying the damage done? On the principle of compulsion—the principle that the man is not the servant of the owner, but is forced upon him by Act of Parliament."

In *The Ruby Queen* (12), the same judge, in a case where a yacht of the defendant was entrusted for reward to yachting agents for sale and by their servants moored in the winter season without striking her top gear, whereby on a gale occurring, the yacht drifted and fouled another yacht, held that the yacht was liable in a proceeding in rem in the Court of Admiralty. In *The Edwin* (13) the same learned judge held that the fact that a master was employed by one who had fraudulently obtained possession of a vessel will not prevent the master having a lien on the ship for his wages and disbursements if he has discharged his duties in ignorance of the fraud. The facts are only set out in pleadings, and the answer was struck out on motion, so far as it related to the alleged fraudulent possession. The case would seem to come within the class of cases in which the owners have given up possession to someone else, though it was alleged that they were induced to do so by fraud. *The Lemington* (7) was a similar case to *The Ticonderoga* (11). SIR ROBERT PHILLIMORE referred to the passage I have quoted from *The Ticonderoga* (11), and said (32 L.T. at p. 72):

> "Vessels suffering damage from a chartered vessel are entitled prima facie to a maritime lien upon that ship, and look to the vessel as security for restitution. I cannot see how the owners of the res can take away that security by having temporarily transferred the possession to third parties."

In *The Parlement Belge* (4) it was held that an unarmed packet belonging to the Sovereign of a foreign State, and in the hands of officers commissioned by him and employed in carrying mails, is not liable to be seized in rem to recover redress for a collision, and that this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire. The decision was that the courts cannot exercise jurisdiction over the person of any Sovereign or over the public property of any State which is destined to its public use, though such Sovereign or

property is within this country. A passage from the judgment of BRETT, L.J., was relied on in the argument before me. It is as follows (5 P.D. at p. 218):

> "In a claim made in respect of a collision, the property is not treated as the delinquent per se. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property, but also on the owner through the property."

This passage occurs in a part of the judgment in which BRETT, L.J., was dealing generally with an action in rem, the liabilities of owners, and of an innocent purchaser who takes the property, subject to maritime liens which attached to it as against him who was the owner at the time the lien was attached; but the meaning of this passage, so far as concerns the present case, depends on the sense in which the term "owner" is used. It may, as SIR ROBERT PHILLIMORE points out in *The Lemington* (7), include persons who are placed in control of a vessel and hold her pro hac vice as owners. So read, there is nothing in it to affect the decisions in *The Ticonderoga* (11) and *The Lemington* (7).

In *The Tasmania* (8), a tug, while towing the plaintiffs' vessel, came into collision with and sank her. The tug was chartered by a company to work with their own tugs, and they appointed the captain. It was held that an action in rem would not be against the tug, because the owners were not personally liable for the collision, and the charterers had exempted themselves from liability by the terms of the towing contract with the plaintiff. SIR JAMES HANNEN, P., after reviewing the cases said (13 P.D. at p. 118):

> "The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a prima facie liability of the ship, which may be rebutted by showing that the injury was done by the act of someone navigating the ship not deriving his authority from the owners; and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers, who are pro hac vice owners. These propositions do not lead to the conclusion that where, as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless."

The case principally relied on by the defendants was *The Castlegate* (1). There the owners of the *Castlegate* chartered her for six months to another firm, and by the charterparty it was agreed that the charterers should provide and pay for coals, and that the captain, though appointed by the owners, should be under the orders and directions of the charterers as regards employment, agency, or other arrangements. The charterers had a contract with a firm of coaling contractors for the supply of coals at foreign ports to their vessels, which is set out in the appendix to the case in the House of Lords, and, so far as is material, was substantially similar to the coal contract in the present case. In the course of a voyage under the charter it became necessary to procure coals abroad to enable the vessel to prosecute her voyage and earn her freight. The master, who had notice of the terms of the charterparty, obtained coals under the coaling contract and drew on the charterers for the value. The bills having been dishonoured, the master was sued on them, and judgment was recovered against him in the action in London. He then instituted a cause of disbursements in the High Court of Admiralty in Ireland against the ship and freight, and it was held by the Court of Appeal in Ireland and the House of Lords that he was not entitled to a maritime lien on the ship or freight.

Counsel for the defendants in the present case contended that the language used in the opinions in the House of Lords supports his contention, but the passages

to which he referred must be read with regard to the facts dealt with and my reading of the opinions is that they were not intended to cover such a case as that now presented for my decision. The point now raised was not before the House, and the real decision was the same as that in *The Turgot* (14), viz., that a master who with knowledge of a charterparty, under which the charterers are to provide and pay for coals, orders coals on their credit and draws on them for the value, and had and knew that he had no authority, express or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals. This appears plainly from the following passage in LORD WATSON'S speech. He says ([1893] A.C. at p. 53):

> "I can find no reasons, either of equity or of policy, for enabling the master of a vessel, who is not bound to incur a liability, to relieve himself, when he does choose to incur it, out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account."

It is thus apparent that the decision in *The Castlegate* (1) does not govern the present case.

The last case which I need refer to is *The Utopia* (5). There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners and assumed the task of protecting other vessels from the wreck and neglected that duty. It was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. *The Castlegate* (1) and *The Parlement Belge* (4) are referred to in the judgment, but the ground of the decision appears to have been that the authorities had taken action within the apparent scope of their powers as port authority, and that the owners could not be made liable for their default. This decision does not, in my opinion, affect the present question.

Although at first sight it might appear difficult to reconcile these decisions and all that has been said on the important subject under discussion, I think it will appear that in reality there is little or no conflict in the cases, and that the decisions are in accordance with certain ascertainable principles. That maritime liens arise in certain well-known classes of claims is now firmly established. The principles of maritime law in relation thereto have been developed to a large extent from certain principles of the civil law: see the learned judgment of CURTIS, J., in *The Young Mechanic* (15). So far as I can trace the origin of the modern doctrines in the subject of maritime liens, it is not difficult to follow this development in cases arising out of contractual relations between the parties. But it is otherwise in cases of injuries done by vessels, and there is a diversity of opinion as to the source from which the notion of a lien for the amount of damage done is derived.

In his interesting and excellent work on the COMMON LAW, O. W. HOLMES, J., of Boston, finds this source in the ancient law of deodand, and considers that it is only by supposing the ship to have been treated as if endowed with personality that the seemingly arbitrary peculiarities of the maritime law can be made intelligible. MR. MARSDEN, in his recent work on COLLISIONS AT SEA, on the other hand, prefers the theory that the present law of maritime lien for damage has sprung from the Admiralty practice of arrest to compel appearance and security: see (3rd Edn.), p. 76. This practice was similar to that which appears to have prevailed on the continent of Europe: ibid., p. 79; and may have been deduced from, or suggested by, Roman procedure; see ORTOLAN'S INSTITUTES OF JUSTINIAN (12th Edn.), p. 586. If the former view be correct it would seem to be immaterial in a case of collision caused by the negligence of persons on board a vessel to inquire whether or not they were the servants of the owners or of persons in possession; but if the other theory is adopted the position is not quite the same.

The exhaustive judgment of the President, SIR FRANCIS JEUNE, in *The Dictator* (16) favours the latter view. He investigates the Admiralty rules on this subject, as it had been treated for the last two centuries. He states that the Admiralty

A Court did not in early times treat the action in rem as a specific and distinct form of action, and explains how the process of the court was carried into effect by the arrest of the person or any property of the defendant to compel him to appear and put in bail; how actions beginning with arrest of the person became obsolete in the last century, and arrest of property to enforce appearance and security became
B rare and obsolete; how, in later times, the arrest of property over which a lien could be enforced became more common as the idea of a pre-existing maritime lien developed, and arrest of property in order to assert for the creditor a legal nexus over the proprietary interest of his debtor; and how, if the owners do not appear, the judgment should be limited to the res in the hands of the court, but if they appear they are in the same position as if they had been brought before the court
C by personal notice. In that case he allowed execution to issue against owners who had appeared in an action in rem to recover the amount by which a decree exceeded the amount of the bail in the case. Again, Brett, L.J., in that part of his judgment in *The Parlement Belge* (4) from which the passage above quoted is taken, also expounds the nature of the process and how the owners are indirectly impleaded to answer the judgment of the court.

D But, whatever may have been the origin and process of development of a maritime lien for damage, there is no doubt that the doctrine of such a lien is now established, and the right to enforce it is different from the ancient right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against the property in the hands of an innocent purchaser. I believe that the earliest English authority which
E distinctly establishes this doctrine is *Harmer* v. *Bell*, *The Bold Buccleugh* (17), where is was held by the Privy Council that in cases of collision a maritime lien for damage arises and may be enforced against the vessel which was in fault, and that such lien travels with the vessel into whosesoever possession she may come, and when carried into effect by a proceeding in rem relates back to the period when it first attached. *The Bold Buccleugh* (17) was approved by the House of Lords in
F *Currie* v. *M'Knight* (18), where the learned Lords considered the judgment of the Judicial Committee satisfactory in its reasoning, and that it was not only consistent with the principles of general maritime law, but rested upon plain considerations of commercial expediency: see per Lord Watson.

The definition of a maritime lien as recognised by the law maritime given by Lord Tenterden has thus been adopted. It is a privileged claim upon a thing in
G respect of service done to it or injury caused by it, to be carried into effect by legal process. In the multitude of cases, both in former times and now, the dispute about a service rendered to, or damage done by, a ship arises between the claimant and the owners of the ship, so that it is not unnatural to speak in general terms of the liability of the res and of the owners as being convertible terms and of the process against the res as being a means of enforcing rights against the owners;
H but, whatever may be the exact history of maritime liens, in *The Dictator* (16) and *The Parlement Belge* (4), and in dicta which may be found in some of the other cases above mentioned to the effect that a maritime lien cannot arise and be enforced against a ship where the owners are not personally liable, I am convinced that the judges did not intend to decide that in no circumstances can a maritime lien be obtained unless the owners of the res are personally liable in
I respect of the claim. It will be found, in accordance with modern principles and authorities, that there are certain cases in which a maritime lien may exist and be enforced against the property of persons not personally liable for the claim, and who are not the persons who, or whose servants, have required the service or done the damage.

The result of my examination of these principles and authorities is as follows. The law now recognises maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage. According to the definition above given, such a lien is a

privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always co-exists with a right against the res. The right against the res may be conferred on such terms or under such circumstances that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry.

Some of the cases I have examined above show that where the owners of a ship have vested the control of the vessel in charterers the latter are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers: *The Ticonderoga* (11) and *The Lemington* (7). A similar position results in a case like that of *The Ruby Queen* (12), where the yacht was entrusted to the agent. Again, a mortgagee of a vessel is the owner of an interest in the vessel, and if he leaves the mortgagors in possession his interest will become subject to maritime liens arising in the course of the employment of the vessel, although he is not personally liable for the claims in respect of which the liens arise. In *The Mary Ann* (19) and *The Feronia* (20) decided at a time when the master was considered to have (as he now has by the statute of 1894) a lien for his disbursements and liabilities properly made or incurred on account of a ship, and before *Hamilton* v. *Baker*, *The Sara* (21) had decided that he had no such lien, it was held that the master's claim in respect of such disbursements and liabilities takes precedence over that of a mortgagee: see also *The Fairport* (22). And it is every-day practice for the interests of mortgagees in vessels to be subjected to maritime liens for damage and other claims.

It was said that the case of a mortgagee is affected by the provisions of s. 34 of the Merchant Shipping Act, 1894, which repeats the similar provisions of earlier Acts, but I believe that the foundation for the rules as to a mortgagee's position is to be found in the same principle as that upon which the judges have acted in the cases of the charterers above referred to. The mortgagee is towards an owner in possession much in the same position as an owner towards a charterer in possession. The vessel is permitted by a party interested in her to be in another's possession and employed so as to become subject to maritime liens. I may notice in passing that in the present case the eight sixty-fourth shares standing in the name of Neil, McLean & Co., though mortgaged, are, therefore, subject to the plaintiff's claims. Even at common law, if a vessel is left by a mortgagee in possession of the mortgagor the rights of the mortgagee are subject to any possessory lien which exists for work done to the ship by the orders of the mortgagor: *Williams* v. *Allsup* (23). This is on a similar principle to that which I have indicated. So also a maritime lien for damage takes precedence of the claim of a bottomry bond-holder under a bond given prior to the time when the damage is done: *The Aline* (24).

The principle upon which owners who have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her, who have allowed the owners to remain in possession, are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognised by law, persons who are allowed by those interested in a vessel to have possession of her, for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring

A in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority. In my opinion, it is right in principle, and only reasonable, in order to secure prudent navigation, that third persons whose property is damaged by negligence in the navigation of a vessel by those in charge of her should not be deprived of the security of the vessel by arrangement between the persons interested B in her and those in possession of her; and I consider that it is also right and reasonable that persons who have rendered services to a vessel, under circumstances which entitle them to treat her as owned by the persons in possession, should have the same rights against the vessel as if her real owners had been in possession. On the other hand, the persons interested in a vessel in placing her in the possession and control of other persons, to be used or employed in the ordinary way, must C contemplate that claims may arise against her in respect of rights given by the maritime law, and if they choose to place her in these circumstances may be taken to have authorised those persons to subject the vessel to those claims.

According to the principle I have stated, claims arising in cases like *The Druid* (6), *The Orient* (9), and *The Ida* (10), cannot be enforced against the vessel, because they arise out of unlawful acts done without any authority and beyond anything D which ought to be contemplated in the ordinary use of the vessel. And in cases like *The Turgot* (14) and *The Castlegate* (1) the persons dealing with the charterers have not been entitled to treat, nor have they treated, the vessel as owned by the charterers, but have dealt with them on their credit, and not upon the faith of having the security of the vessel. They have not, in fact, relied on any presumed E authority derived from the owners. But in claims arising in cases like *The Ticonderoga* (11), *The Ruby Queen* (12), and *The Lemington* (7) the claims arose from acts occurring in the ordinary employment of the vessel in the manner authorised. With regard to the wages of masters and crews, apart from statute law, the same principles should apply, but, according to what Lord Watson says in *The Castlegate* (1) the legislature has recognised the rule that the lien for them F attaches independently of any personal obligation of the owners. Upon the proposition under consideration I may further observe that a maritime lien arises in cases of bottomry and respondentia, although the owners of the property are not personally liable. This is because the master is not authorised to make the owners of the property personally liable, and the lender makes his loan on the security of the property and not on the credit of the owners.

G Lastly, as pointed out above, a maritime lien travels with the vessel into whosesoever possession it comes, so that an innocent purchaser of a ship may find his property subjected to claims which existed prior to the date of his purchase, unless the lien is lost by laches or the claim is one which may be barred by the statute of limitations. This rule is stated in *The Bold Buccleugh* (17) to be deduced from the civil law, and, although it may be hard on an innocent purchaser, if it did not H exist a person who was owner at the time a lien attached could defeat the lien by transfer if he pleased.

The facts of the present case are stronger in favour of the lien than those in the charterers' cases, and render the case very similar to those of a mortgagee. The *Ripon City* had been delivered to Neil, McLean & Co., under the contract of November, 1895. Eight sixty-fourth shares were transferred to the buyers, and I £1,000 was paid by them, but the remaining shares remained registered in the sellers' names, and when they were to be transferred a mortgage was to be given to secure the unpaid purchase money. So that practically the buyers were owners and the sellers were in a similar position to that of mortgagees in respect of the purchase-money remaining unpaid. The sellers allowed Neil, McLean & Co. to have the possession and control of the vessel, to hold themselves out to the plaintiff as managing owners of the vessel, to appoint him to command her, and to place him in a position in which he was entitled to make disbursements and incur liabilities on account of the ship. In the articles Neil, McLean & Co. were

described as the managing owners, and I think that the plaintiff was clearly entitled to treat, and did treat, them as managing owners. He had no notice of any facts which would deprive him of his right of lien, and, in my opinion, he was entitled to look to the ship as security for his claims in question. If this were not so, a master of a ship in the plaintiff's position would be subjected to great injustice. He would be deprived of the security upon the faith of which he undoubtedly acts. His position is entirely different from that of the master of the *Castlegate*, who incurred liabilities on behalf and on the credit of the charterers when he knew that the ship was not theirs, and that his owners had not authorised him to pledge their credit. I consider that the case falls within the principle I have endeavoured to arrive at, and I hold that the plaintiff had a maritime lien on the vessel for the amount of the bills.

[His Lordship said that the third point, that the settlement is an answer to the action, might be more shortly disposed of. The contention raised by the defendants was that Furness, Withy & Co. had no knowledge or notice of the document of Feb. 13, 1897, and Messrs. Cory's contention was that Furness, Withy & Co. had sufficient notice or knowledge of the arrangement between the plaintiff and Messrs. Cory so that the settlement was fraudulent and void as against them. The learned judge referred to the evidence, and said that he was of the opinion that Furness, Withy & Co. had sufficient notice or knowledge of the facts to render the settlement void as against Messrs. Cory. He would enter judgment for the plaintiff against the defendants and their bail for the sum of £1,243 14s. 6d., the amount of the two bills, with interest at 4 per cent. per annum on the amount of the bills respectively calculated from their respective due dates, and costs.]

Order accordingly.

Solicitors: *Ince, Colt & Ince; W. A. Crump & Son.*

[*Reported by* Butler Aspinall, Esq., and S. P. Satow, Esq., *Barristers-at-Law.*]

WHITE *v.* SOUTHEND HOTEL CO.

[Court of Appeal (Lindley, A. L. Smith and Rigby, L.JJ.), March 23, 1897]

[Reported [1897] 1 Ch. 767; 66 L.J.Ch. 387; 76 L.T. 273; 45 W.R. 434; 13 T.L.R. 310; 41 Sol. Jo. 384]

Landlord and Tenant—Covenant—Covenant running with the land—Covenant affecting use of demised premises—Benefit to lessor—Assigns of tenant not mentioned in covenant.

By a covenant in the lease of an hotel the lessee covenanted that he would not during the term created by the lease buy, receive, sell, or dispose of, in, upon, out of, or about the premises any wines or spirits other than should have been bona fide supplied by or through the lessor (a wine and spirit merchant), his successors or assigns. By a proviso, so long as the lessee should well and truly observe the covenant, he was to be allowed an abatement from the rent reserved.

Held: notwithstanding the omission from the covenant of any mention of assignees of the tenant the burden of the covenant ran with the land so as to bind the tenant's assignees; furthermore, the proviso enured for the benefit of the assignees.

Per Rigby, L.J.: Where you find a covenant of such a nature that it affects directly the use of the demised premises in a manner which the lessor chooses

to assume will be beneficial to him, in accordance with general principles it ought to run with the land whether the word "assigns" is mentioned or not.

Notes. Referred to: *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608; *Chapman* v. *Smith*, [1907] 2 Ch. 97; *Re Robert Stephenson & Co., Ltd., Poole* v. *The Company*, [1914-15] All E.R. Rep. 1107; *Lewin* v. *American and Colonial Distributors, Ltd.*, [1945] 1 All E.R. 592.

As to covenants running with the land, see 23 HALSBURY'S LAWS (3rd Edn.) 644-651; and for cases see 31 DIGEST (Repl.) 149-156.

Cases referred to:

(1) *Tatem* v. *Chaplin* (1793), 2 Hy. Bl. 133; 126 E.R. 470; 31 Digest (Repl.) 162, *2988.*

(2) *Clegg* v. *Hands* (1890), 44 Ch.D. 503; 59 L.J.Ch. 477; 62 L.T. 502; 55 J.P. 180; 38 W.R. 433; 6 T.L.R. 233, C.A.; 31 Digest (Repl.) 113, *2544.*

(3) *Fleetwood* v. *Hull* (1889), 23 Q.B.D. 35; 58 L.J.Q.B. 341; 60 L.T. 790; 54 J.P. 229; 37 W.R. 714; 5 T.L.R. 420; 31 Digest (Repl.) 108, *2512.*

Also referred to in argument:

Vyvyan v. *Arthur* (1823), 1 B. & C. 410; 2 Dow. & Ry. K.B. 670; 107 E.R. 152; sub nom. *Vivyan* v. *Arthur*, 1 L.J.O.S.K.B. 138; 31 Digest (Repl.) 239, *3726.*

Doe d. Calvert v. *Reid* (1830), 10 B. & C. 849; 8 L.J.O.S.K.B. 328; 109 E.R. 664; 31 Digest (Repl.) 115, *2551.*

Spencer's Case (1583), 5 Co. Rep. 16a; 77 E.R. 72; 31 Digest (Repl.) 153, *2907.*

Tulk v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774.*

Hinde v. *Gray* (1840), 1 Man. & G. 195; 1 Scott, N.R. 123; 9 L.J.C.P. 253; 4 Jur. 392; 133 E.R. 302; 31 Digest (Repl.) 114, *2548.*

Thomas v. *Hayward* (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, *3007.*

Stevens v. *Copp* (1868), L.R. 4 Exch. 20; 38 L.J.Ex. 31; 19 L.T. 454; 33 J.P. 87; 17 W.R. 166; 25 Digest (Repl.) 380, *100.*

Appeal from a decision of KEKEWICH, J., on a summons to determine the true construction of a lease.

By an indenture of lease, dated June 13, 1882, and made between Sir Thomas White, who carried on the business of a wine and spirit merchant (thereinafter called "the lessor"), of the one part, and William Reeves Fuller (thereinafter called "the lessee"), of the other part, the lessor demised an hotel and premises known as the Royal Hotel, Southend-on-Sea, Essex, together with certain other premises to all of which the lessor was entitled in fee simple, unto the lessee for the term of thirty years at the yearly rent of £1,500 payable quarterly. The lease contained the usual covenant by the lessee with the lessor for payment of rent, and also a covenant as follows:

"And the lessee doth hereby also covenant with the lessor, his heirs and assigns, that he, the lessee, shall not nor will during the term hereby granted buy, receive, sell, or dispose of, either directly or indirectly, nor suffer or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any foreign wines or any spirits, except gin, or other excisable liquors whatsoever, other than shall have been bona fide supplied by or through the lessor or his successors or successor, assigns or assign, provided the said person or persons shall be willing to supply the same, of good and proper quality, to the lessee at the fair current market price thereof."

The lease further contained the following proviso:

"Provided also, and it is hereby agreed and declared, that so long as the lessee shall well and truly observe the covenant on his part lastly hereinbefore

contained not to buy, receive, sell, or dispose of, either directly or indirectly, nor suffer or permit to be bought, received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any foreign wines or any spirits, except gin, or other excisable liquors whatsoever, other than shall have been bona fide supplied by or through the lessor or his successors or successor, assigns or assign, in manner aforesaid, then the lessor will allow to the lessee an abatement of £75 from each quarterly payment of the rent hereinbefore reserved, but immediately upon any breach of the said covenant such abatement shall cease."

On Mar. 8, 1883, Sir Thomas White died, having by his will, dated Nov. 18, 1880, devised and bequeathed all his residuary real and personal estate, including the property at Southend, unto his trustees therein named, upon certain trusts, and appointed his trustees as his executors. Under an agreement, dated July 9, 1883, the executors and trustees sold the goodwill, stock and assets of the business of a wine and spirit merchant so carried on as aforesaid by Sir Thomas White to Thomas Curtis and Joseph John Curtis. The business was subsequently carried on under the name of "White and Price." In September, 1883, W. R. Fuller assigned the lease of the Royal Hotel and premises to the Southend Hotel Co., Ltd. The company having always obtained their wines and spirits from the firm of White and Price in accordance with the terms of the covenant in the lease, claimed that they were entitled as of right to a rebate of £75 from each quarter's rent. Sir Thomas White's executors and trustees, however, contended that, upon the ownership of the wine and spirit business and the ownership of the reversion to the freehold premises being severed, the covenant to purchase wines and spirits from Sir Thomas White, his successors or assigns, ceased to be operative, and, consequently, that the company were not entitled to the benefit of the proviso, and they took out an originating summons against the company asking whether, according to the true construction of the lease, and in the events which had happened, the defendants, as lessees under the lease, were now entitled to an abatement of £75 from each quarterly payment of rent reserved by such lease under the covenants and provisos in such lease contained, or from what date they had ceased to be entitled to such abatement.

On the hearing of the summons KEKEWICH, J., made a declaration that, according to the true construction of the lease, the defendants, as lessees under the said lease, are entitled to abatement of rent. The plaintiffs appealed.

Farwell, Q.C., and *C. Lyttelton Chubb* for the plaintiffs.
Eve, Q.C., and *Martelli* for the defendants.

LINDLEY, L.J.—In this case there is some little peculiarity, but I have come to the conclusion that the decision of the learned judge which is appealed from is right, although perhaps I should not quite put it in the same way that he did in his judgment. [HIS LORDSHIP read the covenants in the lease relating to the purchase of wines and spirits and the abatement from the rent of £75 a quarter, and continued:] The object of that covenant as to the purchase of wines and spirits is plain enough. It is indirectly to compel the lessee to get all his wines and spirits from the lessor or his successors in business, or his assigns, whatever that may mean.

The first question which appears to me to arise is whether the burden of this covenant runs with the tenant's interest under the lease,—in other words, whether it runs with the land. We have now a claim for rent (which I will come to presently) by the lessor's legal personal representatives against the assignees of the lessee, and the question we have to consider is whether, notwithstanding the omission of the word "assigns," the burden of this covenant runs with the tenant's interest so as to bind the assignees, even though not named. These questions are always a little troublesome and a little difficult; but, having regard to the authorities to which our attention has been called, and especially to such cases as *Tatem* v. *Chaplin* (1), *Clegg* v. *Hands* (2), and *Fleetwood* v. *Hull* (3), it appears to me that

A it is impossible to say that the tenant's assignees are not bound by this covenant. It is a covenant restraining, in fact, the lessee and his assigns (although not named) from using this property in the particular way which is designated. In the old language which we are accustomed to with reference to this matter, that is a covenant "touching the land." I think that that is plain, not only from what was said by this court in *Clegg* v. *Hands* (2)—where we had a somewhat different B problem to solve—but also from the decision of CHARLES, J., in *Fleetwood* v. *Hull* (3), which contains a very full and careful investigation of what is meant by "touching the land." It appears to me, on those authorities, that this covenant touched the land, and that, consequently, the defendants are bound by it.

Pausing here for a moment, I should state that the assignees are being sued, not by the purchasers of the wine and spirit business, because the purchasers of that C business cannot maintain any action on this lease, but by the lessor's executors and trustees. The lessor's executors and trustees are in no worse position as regards this matter than the lessor himself, and I do not see an answer, at law or in equity, to an action brought by the executors and trustees against the defendants upon a breach of this covenant. Supposing there was, what the damages would be I do not know. I do not think it follows that they would be nominal, because, although I D had not observed it until a comparatively late stage of the argument, the covenant is not to buy wines and spirits other than shall have been supplied "by or through the lessor." It might be that the lessor might say: "It is quite worth my while to buy spirits and sell them to you (the lessee)." It does not follow, to my mind, that the damages would be necessarily nominal; but, if they were, it does not appear to me to be material. What is material to see is whether an action would lie by the E lessor and his legal personal representatives against the assignees of the lessee for breach of the covenant. I think that it would. If that is so, it throws a great deal of light upon the clause which we have to interpret, and which has given rise to this controversy.

One must bear in mind that there was a covenant to pay a rent of £1,500 in addition to the covenant to which I have already alluded; and there is this proviso: F

> "Provided also, and it is hereby agreed and declared, that so long as the lessee [which includes 'assigns,' as I have already endeavoured to show in commenting upon the provisions contained in the covenant] shall well and truly observe the covenant on his part lastly hereinbefore contained not to buy, receive, sell, or dispose of, either directly or indirectly, nor suffer or permit to be bought, G received, sold, or disposed of, either directly or indirectly, in, upon, out of, or about the said premises, or any part thereof, any foreign wines or any spirits, except gin, or other excisable liquors whatsoever, other than shall have been bona fide supplied by or through the lessor, or his successors or successor, assigns or assign, in manner aforesaid, then the lessor will allow to the lessee an abatement of £75 from each quarterly payment of the rent hereinbefore reserved, H but immediately upon any breach of the said covenant such abatement shall cease."

What does that mean? That means that this is not a proviso for a set-off—that is to say, that it is not a proviso for setting off against the rent what the tenant will buy of the landlord, but that it is a proviso for abatement from the rent. When I I come to look at the proviso, it appears to me that it enures for the benefit of the assignees, just as the burden of the covenant has to be borne by them.

Counsel, in opening the appeal, made a point which, at first sight, rather caught me. He said that such covenants as these are personal covenants. I do not think that they are, if you spell them through. Then he said that there was no covenant which the assignees could "well and truly observe," because there was no obligation thrown upon them at all. If that were so, and if it were that the present tenants of the hotel, without being bound by any covenant, merely for their own convenience happened to buy wines and spirits from the present owners of the wine and spirit

merchant's business, I should have great doubt whether this proviso for reduction of the rent did apply to those tenants. But the whole difficulty which gave rise to that argument disappears when you come to the conclusion—as I have done—that the present tenants of the hotel are bound by the covenant. Then it is manifest that the proviso applies. We are asked to say whether, inasmuch as the present tenants have bought wine and spirits from the successors in business of the lessor, they are entitled to the abatement from their rent.

The learned judge in the court below came to the conclusion that they are, although he did not rest his decision upon the ground that they were bound by the covenant, and seems to have thought that they would be entitled to the abatement whether they were bound by the covenant or not. I am not prepared to go so far as that. But, coming to the conclusion as I have, that they are bound by the covenant, and that the proviso for abatement from the rent exactly hits the case, it appears to me that the learned judge is right. Counsel for the plaintiffs has drawn our attention to various authorities, and he has suggested that, inasmuch as the title to the reversion is in one set of persons, and the title to the wine and spirit business is in another set, the covenant cannot be enforced now by the owners of the reversion. My answer is: Look at the terms of it. It appears to me that the learned judge in the court below is right, though, as I have already said, I prefer to base my decision on somewhat different grounds from those upon which he founded his decision. The appeal will, therefore, be dismissed with costs.

A. L. SMITH, L.J.—I am of the same opinion. This is an originating summons taken out by the executors and trustees of the lessor against the assignees of the lessee, asking whether the defendants are entitled to an abatement from the rent. The defendants say: "In the lease under which we are tenants of the hotel, there is a covenant which binds us, namely, a covenant not to take our wine and spirits except from the lessor of the hotel, or his successors or assigns, and if we perform that covenant our rent is not to be £1,500 a year, but is to be £1,200 a year." But it is said in answer that, though those are the terms of the lease, stated shortly, there is only a personal covenant by the lessee that he will take wines and spirits from the lessor during the term created by the lease, and that that did not bind the defendants as the assignees; that, inasmuch as the lease had been assigned by the lessee, the covenant is gone; that the covenant having gone, the proviso, which was appendant to the covenant is gone also; and that, therefore, the original contracted rent of £1,500 has now to be paid, and not the £1,200, although the assignees are willing and ready to perform the covenant and take their wines and spirits from the successors in business of the lessor.

The first point to be determined is, whether or not that construction of the lease is correct. The first question is, whether the covenant in question runs with the land. Many authorities have been cited, but I think that I may take three—which are the three most pertinent ones—to show that a covenant like that, namely, to use premises in a particular way (as here to use premises solely for selling wines and spirits obtained from the lessor or his successor or successors), attaches to the property demised so as to be a covenant running with the land, even although the word "assigns" is not to be found in the covenant by the lessee. The cases to which I allude are *Tatem* v. *Chaplin* (1), *Clegg* v. *Hands* (2), and *Fleetwood* v. *Hull* (3). The last of those cases was decided by my brother CHARLES, in which most of the authorities upon this subject are summed-up. Therefore, I have come to the conclusion—as LINDLEY, L.J., has done—that it is a covenant running with the land, the burden of which binds the assignees of the lease. When once you arrive at that, it is perfectly obvious that the proviso "that so long as the lessee shall well and truly observe the covenant on his part," is a proviso to the benefit of which the assignees of the lessee are entitled. The executors and trustees of the lessor must allow a rebate of £75 from each quarterly payment of the rent, amounting altogether to £300 a year. The appeal must be dismissed with costs.

A **RIGBY, L.J.**—In this case counsel for the plaintiffs has not, in my judgment, succeeded in displacing the authorities which have been cited against him, tending to show that a covenant of this sort, under ordinary circumstances, runs with the land so as to be binding upon an assignee. It is the nature of a covenant which determines whether it shall run with the land or not, far more than the question whether assigns are mentioned or not. There are some intermediate cases in which you do not really know, from the nature of the case, whether it is intended to extend beyond the first lessee. I think, for instance, a covenant not to assign without licence is construed differently, whether you do or do not mention the word "assigns," that is to say, if the lessee only covenants not to assign without licence. I am under the impression—and I think I am right—that, after once the licence has been given, the assignee is not subject to the original terms. But where, as here, you find a covenant of such a nature that it affects directly the use of the demised premises in a manner which the lessor chooses to assume will be beneficial to him, it seems to me that, in accordance with general principles, it ought to run with the land, whether the word "assigns" is mentioned or not.

I agree that upon this covenant relating to a wine merchant's business, the successors in business of Sir Thomas White can have no right to sue. They have no right to sue upon this covenant, nor could it be given to them. If the covenant had been assigned, in the most express manner, by the lessor or his executors and trustees, they would have got nothing by it. You cannot impose upon a lessee an obligation to a man to whom he has undertaken no obligation at all. But that is not the point. The question is: Is this an existing covenant, and an existing covenant which the executors and trustees of Sir Thomas White could enforce now against the present tenants of the premises under this lease? I think that they could; and I am inclined to think that they could do so, if for no other reason, because the covenant is that the lessee is not to sell any wines or spirits unless they are provided by or through the lessor, his successors or assigns. There is no reason why a lessor should not say to his lessee: "I will provide you with spirits, but, of course, I give you the opportunity of getting those spirits, if you like, from my successors in business." I see no reason why, if the lessee absolutely refused to comply with that covenant, there should not be an action for breach of it; and I do not say that that action would necessarily involve nominal damages only, though perhaps that is not important.

When we have got so far and turn to the proviso, we find it is, "so long as the lessee shall well and truly observe the covenant on his part lastly hereinbefore contained." For the purpose of this argument, at any rate, it is admitted that the defendants have, down to the present time, duly observed that covenant, if it be an existing covenant. They have taken their wines and spirits from the successors of the business of Sir Thomas White, and there is no allegation that they have committed a breach of the covenant. When we get over that difficulty, it seems to me that the present lessees, as they were liable for the burden of the covenant, are entitled to the advantage intended to be conferred by the proviso. It is a proviso relating to the rent of the property, and, therefore, in a very important manner, relating to the property itself. My first leaning towards the construction that has been put upon this case by the defendants arose from this, that it was apparent to me that that proviso at any rate would run with the land, and it did not require very much more to satisfy me that the covenant would run with the land also. I think that the declaration made by the learned judge in the court below was correct, and I am all the more satisfied about that because I think that the rent of £1,500 never was intended between the parties to the lease to be the rent at all. I think it is very likely that the £1,200 was the rent from the first, and that they put in the figure £1,500 with an abatement of £300 in order to make a compliance with these terms more easily secured. *Appeal dismissed.*

Solicitors: *Hewitt & Chapman; Mossop & Rolfe.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

BULLI COAL MINING CO. *v.* OSBORNE AND ANOTHER

[PRIVY COUNCIL (Lord Macnaghten, Lord Morris and Lord James of Hereford), July 27, 28, 29, 1898, March 11, 1899]

[Reported [1899] A.C. 351; 68 L.J.P.C. 49; 80 L.T. 430; 47 W.R. 545; 15 T.L.R. 257]

B

Limitation of Action—Equitable remedy—Fraud—Trespass—Coal mine—Surreptitious taking of coal from under neighbouring land.

A court of equity, though not within the words of a statute of limitation which only applies to certain legal remedies, is within its spirit and meaning, with the result that in any particular case the statute is as binding in equity as it is in law.

C

Accordingly, in an action for trespass, the cause of action being the surreptitious and fraudulent taking by the defendants of coal from under the plaintiffs' land,

Held: it had always been a principle of equity that no length of time was a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded, and, therefore, the statute of limitations did not apply to bar the plaintiffs' claim in the present case.

D

Per CURIAM: The contention that the statute was a bar unless the wrongdoer was proved to have taken active measures to prevent detection was opposed to common sense as well as to the principles of equity.

E

Notes. Explained: *Oelkers* v. *Ellis*, [1914] 2 K.B. 139. Followed: *Legh* v. *Legh*, [1930] All E.R. Rep. 565; *Lynn* v. *Bamber*, [1930] 2 K.B. 72. Applied: *Beaman* v. *A.R.T.S., Ltd.*, [1949] 1 All E.R. 465. Referred to: *Kitchen* v. *Royal Air Forces Association*, [1958] 2 All E.R. 241.

As to limitation of actions where an equitable remedy was sought and actions of tort, see 14 HALSBURY'S LAWS (3rd Edn.) 526, 527, and ibid. vol. 24, pp. 220-225. For cases see 32 DIGEST 520 et seq., 34 DIGEST 648 et seq.

F

Cases referred to:

(1) *Hunter* v. *Gibbons* (1856), 1 H. & N. 459; 28 L.T.O.S. 290; 2 Jur.N.S. 1249; 5 W.R. 91; 156 E.R. 1281; sub nom. *Hunter* v. *Gibbons*, *Dudley* v. *Gibbons*, 26 L.J.Ex. 1; 32 Digest 526, *1816*.

G

(2) *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.* (1854), 10 Exch. 39; 2 C.L.R. 1230; 23 L.J.Ex. 303; 18 Jur. 497; 2 W.R. 527; 156 E.R. 346; 32 Digest 526, *1815*.

(3) *Knox* v. *Gye* (1872), L.R. 5 H.L. 656; 42 L.J.Ch. 234; 32 Digest 511, *1702*.

(4) *Barber* v. *Houston* (1884), 14 L.R.Ir. 273; on appeal (1885), 18 L.R.Ir. 475; 32 Digest 524, *1802iv*.

H

(5) *Gibbs* v. *Guild* (1882), 9 Q.B.D. 59; 51 L.J.Q.B. 313; 46 L.T. 248; 30 W.R. 591, C.A.; 32 Digest 526, *1819*.

(6) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 28 W.R. 357, H.L.; 34 Digest 656, *556*.

(7) *Earl of Chesterfield* v. *Janssen* (1751), 2 Ves. Sen. 125; 1 Atk. 301; 1 Wils. 286; 28 E.R. 82, L.C.; 25 Digest (Repl.) 273, *823*.

I

(8) *Rolfe* v. *Gregory* (1865), 4 De G.J. & Sm. 576; 5 New Rep. 257; 34 L.J.Ch. 274; 12 L.T. 162; 11 Jur.N.S. 98; 13 W.R. 355; 46 E.R. 1042, L.C.; 32 Digest 521, *1776*.

(9) *Smith* v. *Clay* (1767), Amb. 645; 3 Bro. C.C. 639, n.; 27 E.R. 419, L.C.; 20 Digest (Repl.) 553, *2592*.

(10) *Ecclesiastical Comrs. for England* v. *North Eastern Rail. Co.* (1877), 4 Ch.D. 845; 47 L.J.Ch. 20; 36 L.T. 174; 32 Digest 524, *1801*.

(11) *Dean* v. *Thwaite* (1855), 21 Beav. 621; 52 E.R. 1000; 32 Digest 523, *1796*.

(12) *Trotter* v. *Maclean* (1879), 13 Ch.D. 574; sub nom. *Trotter* v. *Maclean*, *Trotter* v. *Vaughan*, *Trotter* v. *Fletcher*, 49 L.J.Ch. 256; 42 L.T. 118; 28 W.R. 244; 32 Digest 523, *1797*.

Also referred to in argument:

Hovenden v. *Lord Annesley* (1806), 2 Sch. & Lef. 607; 32 Digest 509, *1687*.

Booth v. *Earl of Warrington* (1714), 4 Bro. Parl. Cas. 163; 2 E.R. 111; 32 Digest 520, *1762*.

Jesus College v. *Bloom* (1745), Amb. 54; 3 Atk. 262; 27 E.R. 31; 34 Digest 631, *283*.

Dawes v. *Bagnall* (1875), 23 W.R. 690; 32 Digest 523, *1794*.

Battley v. *Faulkner* (1820), 3 B. & Ald. 288; 106 E.R. 668; 32 Digest 328, *143*.

Brooksbank v. *Smith* (1836), 2 Y. & C.Ex. 58; Donnelly, 11; 6 L.J.Ex. Eq. 34; 160 E.R. 311; 32 Digest 518, *1758*.

Appeal from a decision of the Supreme Court of New South Wales (Darley, C.J., Stephen and Manning, JJ.) affirming an order of the Chief Judge in Equity (Owen, J.): see 17 N.S.W.L.R., Eq. 242; and 18 N.S.W.L.R., Eq. 475.

The order was made on a summons by the respondents for leave to prove in the winding-up of the appellant company for £45,642 15s., the estimated value of coal wrongfully taken by the appellants from under land of the respondents. The appellants contended that the claim was barred by the statute of limitations.

Warrington, *Q.C.*, and *Sims Williams* for the appellants.

Asquith, *Q.C.*, and *Vaughan Hawkins* (*Swinfen Eady*, *Q.C.*, with them) for the respondents.

Mar. 11, 1899. **LORD JAMES OF HEREFORD.**—In this case the appellants seek to reverse a judgment or order of the Supreme Court of New South Wales, dated Sept. 10, 1897, dismissing an appeal against an order of the Hon. William Owen, Chief Judge in Equity, dated July 27, 1896, and allowing a cross-appeal on the part of the respondents against the said order and varying it in certain particulars.

The proceedings in the courts below were commenced by a summons issued by the respondents in the winding-up of the appellant company for liberty to prove for a sum of money claimed as the value of coal alleged to have been wrongfully taken by the appellants from land belonging to the respondents. Such claim was, by an order dated Dec. 20, 1895, directed to be tried before the Chief Judge in Equity, and it was accordingly heard before him in April, May, and June, 1896. On July 27, 1896, the learned judge delivered judgment in the case, and afterwards ordered that it be referred to the master in equity to inquire and certify what was the market value at the pit's mouth of all the coal worked and gotten by the appellant company from the land of the respondents, being a portion of their land known as Watt's Grant, and that the respondents should be allowed to rank as creditors of the appellant company for such aggregate amount as should be certified by the master in equity.

During the hearings in the courts below the principal defence made by the present appellants to the claim of the present respondents was based upon an alleged champertous agreement. It was proved that the respondents had on Mar. 25, 1895, made an agreement with a certain company called the Bellambi Coal Co. whereby it was agreed that the respondents should employ the solicitor of the Bellambi Coal Co. to conduct proceedings for the purpose of recovering damages from the appellant company, and that in consideration of the respondents paying to the Bellambi Coal Co. 92½ per cent. of the amount recovered that company would indemnify the respondents from all costs and expenses incurred by the taking of the proceedings. It was also found that by an indenture of May 15, 1893, the respondents had leased to the Bellambi Coal Co. the land and the coal under it, which had been entered upon and taken by the appellants, so that by their wrongful acts the Bellambi Co. had been deprived of coal which was believed by them and the respondents to be

the subject of their lease. The chief judge held that the agreement of Mar. 25, 1895, was champertous in its character, but that its existence did not preclude the respondents from enforcing their rights against the appellants. The full court overruled the judgment of the chief judge so far as it determined the agreement to be champertous, but agreed with him in holding that, if champertous, it would not preclude the respondents from enforcing their rights against the appellants. In his argument before the committee the leading counsel for the appellants intimated that he felt that he could not rely upon this defence of champerty, and virtually withdrew it. Their Lordships are, therefore, relieved from delivering any judgment upon the subject beyond saying that they see no ground for differing from the judgment delivered on this head by the full court.

Among the other grounds of defence put forward in the courts below was the plea of the statute of limitations. This plea was dealt with fully by the chief judge after he had disposed of the question of champerty in a preliminary judgment. It was raised again before the full court, but not much pressed there, and the full court simply adopted the judgment of the chief judge on this point. It formed, however, the principal subject of discussion at their Lordships' Bar, where it was presented by the learned counsel for the appellants in a most elaborate and ingenious argument. The material facts bearing on the defence of the statute appear in the findings of the chief judge, which had the entire concurrence of the full court. They were arrived at after an exhaustive inquiry lasting for eighteen days, during which much oral and documentary evidence was given. The counsel for the appellants endeavoured to some extent to contest these findings, but their arguments not only failed to show that there was manifest error in the findings of facts by the courts below, in which case alone would their Lordships differ from them, but, being called upon by arguments of counsel to consider the correctness of these findings, their Lordships are of opinion that they are in every respect correct.

It appeared that on Feb. 1, 1854, the Crown granted to John Alexander Watt fifty-one acres of land near Bulli Illawarra. By several conveyances the said fifty-one acres of land, known as Watt's Grant, became vested in Henry Osborne, whose personal representatives are the present respondents. Henry Osborne died in 1858. Early in 1873 the appellants, who were working coal in land adjoining Watt's Grant, found that their workings were approaching the boundary between the two properties, and so informed the then trustees of Henry Osborne's will, and entered into negotiations with them for the purpose of obtaining a lease of Watt's Grant. These negotiations fell through, but the appellants, proceeding secretly with their workings, entered upon Watt's claim, and between 1878 and 1880 removed the coal from under some fourteen acres of such land. The trespass was distinctly shown upon the appellants' own working plan. It was committed underground, and committed wilfully. Until the workings by the Bellambi Coal Co., under their lease of May, 1893, brought to light the fact that a trespass had been committed by the appellants, the respondents and their predecessors were ignorant of the appellants' wrongful working, and had no reason to suspect that any had occurred. Upon these facts the courts below have come to the conclusion that no laches can be attributed to the respondents in not discovering the existence of the wrongful workings by the appellants—a conclusion with which their Lordships entirely concur.

Accepting, however, for the purposes of argument the findings of the chief judge, the learned counsel for the appellants contended that the statute of limitations was an answer to the respondents' claim. Their argument was to this effect. Granted, they said, that the trespass was intentional—as indeed most trespasses were—that circumstance of itself was no answer to the plea of the statute. To use the language of ALDERSON, B. (*Hunter* v. *Gibbons* (1), 1 H. & N. at p. 465), there was "no distinction between trespasses underground and upon the surface." It constantly happened, as MARTIN, B., observed in *Imperial Gas Light and Coke Co.* v. *London Gas Light Co.* (2) (10 Exch. at p. 42), that the owner of a coal mine takes coal from an adjoining mine and by fraud prevents its being found out for more than six years.

"Yet that," adds the learned judge, "is no answer to the statute of limitations." Clearly it was no defence at law. Why then should it be a defence when the claim is put forward in a court of equity? The foundation of the claim must be the same wherever the injured party may seek redress. At law he sues for damages in an action of trespass. If he comes into a court of equity still it is in respect of the trespass that he claims compensation. There being, therefore, a concurrent jurisdiction at law and in equity in respect of the very same wrong and the very same cause of action, the statute is as binding in equity as it is at law in accordance with the views expressed by the House of Lords in the well-known case of *Knox* v. *Gye* (3) (L.R. 5 H.L. at p. 674). If, indeed, the respondents had been able to make out a case of what PALLES, C.B. (*Barber* v. *Houston* (4), 14 L.R.Ir. 273), terms "active or aggressive concealment" that might have been a different matter. Possibly relief might then have been had in accordance with the principles to be deduced from *Gibbs* v. *Guild* (5) and similar cases. But nothing of the kind was suggested here. The appellants have taken the respondents' coal. Be it so. They have done nothing more. That is the beginning and the end of their offending. It cannot be said that they have done anything actively to prevent the respondents or their predecessors in title finding out what they did.

Such was the contention of the appellants' counsel, but their Lordships are unable to accede to it. It seems to ignore the nature and character of the act of which the respondents complain, and to disregard the principles on which courts of equity proceed in dealing with fraud. It will not be out of place to cite a passage from the judgment of LORD HATHERLEY in *Livingstone* v. *Rawyards Coal Co.* (6), before the House of Lords. The House was there dealing only with the measure of damage in a case of underground trespass. But in pointing out the distinction between a case of fraud and a case of inadvertence LORD HATHERLEY uses very plain language, and his remarks may be useful in clearing the ground. He said (5 App. Cas. at p. 34):

> "There is no doubt that if a man furtively and in bad faith robs his neighbour of property, and because it is underground is probably not for some time detected, the court of equity in this country will struggle, or I should rather say will assert its authority, to punish fraud, by fixing the person with the value of the whole of the property which he has so furtively taken and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if as in the present case they had been the one working and the other permitting the working through a mistake. The courts have already made a wide distinction between that which is done by the common error of both parties and that which is done by fraud."

In the present case the coal was taken furtively. No one can deny that it is a fraud to rob your neighbour furtively of his property or that a court of equity ought to give redress for such a wrong. As LORD HARDWICKE, L.C., presiding in a court of equity observed (*Earl of Chesterfield* v. *Janssen* (7), 2 Ves. Sen. at p. 155):

> "This court has an undoubted jurisdiction to relieve against every species of fraud."

Where the remedy is given on the ground of fraud LORD WESTBURY, L.C., in *Rolfe* v. *Gregory* (8), pointed out (4 De G.J. & Sm. at p. 579) that

> "it is governed by this important principle, that the right of the party defrauded is not affected by the lapse of time or, generally speaking, by anything done or omitted to be done so long as he remains without any fault of his own in ignorance of the fraud which has been committed."

The statute of limitations has really no application to a case such as this. Courts of equity are not within the words of the statute, which only apply to certain legal

remedies, though they are, as it has been said, within its spirit and meaning. The way in which the statute came to be applied in proceedings in equity is explained by LORD CAMDEN, L.C., in his judgment in *Smith* v. *Clay* (9), which was published from his Lordship's own notes. He says (3 Bro. C.C. at p. 639, n.):

> "A court of equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands."

As, however, it had no legislative authority, it could not define exactly the time of bar. It was governed by circumstances. But as often as Parliament prescribed a limit to proceedings at law the Court of Chancery adopted that rule and applied it to similar cases in equity. He adds:

> "For when the legislature had fixed the time at law, it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period that law had been confined to by Parliament."

It has always been a principle of equity that no length of time is a bar to relief in the case of fraud in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud so long as the party defrauded remains in ignorance without any fault of his own. The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men acting independently steal a neighbour's coal. One is so clumsy in his operations or so incautious that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely and acts so warily that he can safely calculate on not being found out for many a long day. Why is the one to go scot free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing," and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote.

There is very little direct authority on the particular point which was urged with so much ingenuity at the Bar. Indeed *Ecclesiastical Comrs. for England* v. *North Eastern Rail. Co.* (10), before MALINS, V.-C., was cited as the only reported case in which the account was carried back beyond the period prescribed as a bar by the statute of limitations, and their Lordships are compelled to say that they are unable to rely on the decision in that case. It is very difficult to follow the reasoning of the learned Vice-Chancellor. His Honour said distinctly "there was no improper intention." He held that what was done "was done under a mistake." Yet the defendants were visited with all the pains and penalties of fraud. The account was carried back beyond the six years; the measure of damages was in accordance with the severest rule ever applied. The ground of the decision seems to have been that, although there was no moral fraud—no fraud in fact—yet "for the purposes of the statute the breaking of bounds into a neighbour's colliery must be considered a fraudulent act." There is no foundation for that proposition. Underground trespass may be committed in good faith without any sinister intention, or it may be committed under circumstances which would render the wrongdoer liable to a prosecution for felony. Every case must depend upon its own circumstances. There is nothing in principle, or in authority, or in the exigencies of public policy, to require that the same measure of justice or injustice should be meted out to all transgressors alike, ignorant or wilful, innocent or fraudulent.

In all or almost all the other cases cited at the Bar the court held that fraud was not established. But SIR JOHN ROMILLY, M.R., in *Dean* v. *Thwaite* (11) and FRY, J., in *Trotter* v. *Maclean* (12), expressed their opinion that fraud would or might be an answer to the plea of the statute. In *Dean* v. *Thwaite* (11), where the learned

Master of the Rolls held that the evidence of fraud was not conclusive, His Honour made these observations (21 Beav. at p. 623):

> "The case of fraud alleged, and the only fraud that I think would justify the court in coming to a conclusion that the coal gotten before [the period of limitation] ought to be accounted for, is that the defendant had intentionally taken the plaintiffs' coal and had concealed the fact, and during the process had taken steps to prevent the plaintiffs discovering it."

If those observations are to be construed to mean that in the learned judge's opinion something more was required beyond taking the coal furtively, their Lordships are unable to agree in them. But they think that is not the fair meaning of the passage cited, which must be understood as applied to the alleged facts of the case on which the learned judge was then commenting. In *Trotter* v. *Maclean* (12), FRY, J., remarks that the period of limitation imposed by the Limitation Act, 1623, ought to apply to proceedings in the Chancery Division in respect of a trespass, unless there was some equitable ground for repelling the application of the statute. He adds (13 Ch.D. at p. 584):

> "Such an equitable ground has in many cases been found in fraud. When fraud or any other equitable circumstance exists, undoubtedly the statute will not apply."

It may be observed that in *Trotter* v. *Maclean* (12) no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground, and that the plaintiffs failed to prove in that case that the trespass was wilful.

Their Lordships are, therefore, of opinion that the statute of limitations cannot be set up as a bar in the present case, and they think that this conclusion is not opposed to any authority.

Solicitors: *G. F. Hudson, Matthews & Co.; Light & Galbraith.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

R. *v.* SENIOR

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Russell of Killowen, C.J., Wills, Day, Grantham, Lawrance and Wright, JJ.), December 10, 1898]

[Reported [1899] 1 Q.B. 283; 68 L.J.Q.B. 175; 79 L.T. 562; 63 J.P. 8; 47 W.R. 367; 15 T.L.R. 102; 43 Sol. Jo. 114; 19 Cox, C.C. 219]

Criminal Law—Manslaughter—Neglect—Child—"Wilful neglect"—Failure to provide medical attendance—Failure due to religious belief.

By s. 1 of the Cruelty to Children Act, 1894 [see now Children and Young Persons Act, 1933 (12 HALSBURY'S STATUTES (2nd Edn.) 974), s. 1 (1)], it was provided that any person over 16 years of age who, having the custody, charge, or care of any child under 16 years of age, "wilfully neglected" such child in a manner likely to cause injury to the health of such child should be guilty of a misdemeanour.

The prisoner, father of a child of eight or nine months who was suffering from pneumonia, failed to procure for the child any medical aid or medicine, his

reason for failing to do so being that he belonged to a religious sect the members of which believed that sickness should be treated with prayer and that treatment by doctors and drugs was sinful. The prisoner was generally a good and kind father and a man of excellent character. The child having died, the prisoner was charged with manslaughter and convicted.

Held: "wilful" in the phrase "wilful neglect" meant done deliberately and not by inadvertence, "neglect" was the omission to do something for the benefit of the child, and so the phrase as a whole meant intentional failure to take those steps which the experience of mankind showed to be generally necessary; the prisoner had been guilty of such a failure and so was in breach of s. 1 of the Act of 1894; the fact that he was in general an affectionate parent and had acted as he did from religious motives did not avail him; and, therefore, he had been rightly convicted of manslaughter.

Per CURIAM: He could also have been convicted on an indictment for gross and culpable neglect of the child at common law.

Notes. Considered: *R.* v. *Walker* (1934), 24 Cr. App. Rep. 117. Referred to: *Oakey* v. *Jackson*, [1911-13] All E.R. Rep. 681.

As to manslaughter and neglect of children, see 10 HALSBURY'S LAWS (3rd Edn.) 715 et seq., 760; and for cases see 15 DIGEST (Repl.) 957, 958, 1033-1037.

Cases referred to:

(1) *R.* v. *Wagstaff* (1868), 32 J.P. 215; 10 Cox, C.C. 530; 15 Digest (Repl.) 958, *9275*.

(2) *R.* v. *Hines* (1874), 80 C.C. Ct. Cas. 309; 33 L.T. 676, n.; 15 Digest (Repl.) 1036, *10,181*.

Case Stated by WILLS, J.

The prisoner was indicted and tried before WILLS, J., at the Central Criminal Court on Nov. 24, 1898, for the manslaughter of his child, an infant of the age of eight or nine months. The child had died of diarrhœa and pneumonia. The prisoner had not supplied it with any medical aid or medicine, though aware that the case was of great gravity and that the child would probably die. The medical evidence was that the child's life would certainly have been prolonged and in all probability saved if medical assistance had been procured. No question was raised as to the prisoner's ability to procure and pay for medical assistance. He was shown to have been a good and kind father in all other respects, and he bore an excellent character for general good conduct. He had had twelve children, of whom seven were dead, and he had previously had experiences of the same kind as those relating to the present inquiry. The prisoner was a member of a sect called the "Peculiar People," who based their religious doctrines as to the treatment of sick people on the Epistle of James, c. 5, verses 14 and 15:

> "Is any sick among you? let him call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord. And the prayer of faith shall save the sick, and the Lord shall raise him up, and if he have committed sins, they shall be forgiven him."

They did not allege that medical aid was there expressly forbidden, but said that to make use of it was to indicate a want of faith in the Lord.

The learned judge inquired if they held that any other parts of the Scriptures, the Gospels for instance, were of Divine authority, and was answered that the Gospels certainly were so recognised. He called attention to the fact that our Lord said "they that are whole need not a physician, but they that are sick," and asked why they thought that it could be wrong to consult a physician if the sick man was pronounced on such authority to need a physician. The answer was that the sickness here alluded to was moral sickness or sin, and that the physician meant our Lord himself. The judge inquired further if they held that it was wrong to give extra food or wine or brandy to a sick person, or to put an extra blanket on his bed if the

A weather were cold or the nature of his sickness required him to be kept warm. The answer was, No, that they gave the sick every species of comfort, and it appeared that this child had had much attention paid to its food and diet, though the medical witnesses did not think the dietary altogether judicious, and that it had had brandy administered. They told the judge that they did not object to experienced nursing and that they resorted to it, and did so in the case of this child, but that the nursing B must be by one of their own people, who would not use drugs. It thus appeared distinctly that they did not object to the use of many human appliances and efforts to save the sick, but that they drew the line at doctors and drugs, and, his Lordship thought, at doctors, not on account of their superior knowledge of the human frame and its needs, as because they were likely to use or prescribe drugs.

C Wills, J., told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance; secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and, thirdly, that the prisoner's means would have enabled him to do so without an expenditure such as could not be reasonably expected from him. He then directed them that in order to make out a case of manslaughter by negligence of this kind purely at D common law the negligence must be gross and wanton, so much so as to indicate something at all events of an evil mind, and that it was impossible to say that of the prisoner, who was shown to have spared neither expense nor care, and to have taken in all respects but one every precaution to do the best for the child. But, if he had done anything which was expressly forbidden by statute, and by so doing had caused E or accelerated the child's death, he would be guilty of manslaughter, no matter what his motive or state of mind. He drew the attention of the jury to s. 1 of the Prevention of Cruelty to Children Act, 1894, which provided that any person over sixteen years of age who, having the custody, charge, or care, of any child under sixteen years of age, wilfully illtreated, neglected, abandoned, or exposed such child in a manner likely to cause injury to the health of such child should be guilty of a misdemeanour [see now Children and Young Persons Act, 1933, s. 1 (1)], and that, F therefore, if the prisoner had brought himself within that statute, and the child had died in consequence, he would have caused the death of the child by a course of conduct forbidden by statute, and, therefore, unlawful, and would be guilty of manslaughter.

The learned judge further said there could be no doubt that the prisoner had G wilfully and deliberately abstained from calling in medical assistance, though he and those about the child were aware for some considerable period before its death that it was in a state of great danger, and that, therefore, the question was narrowed down to whether his failure to procure medical aid could be called neglecting the child so as to cause some serious injury to its health. He said that "neglect" was not a word of art, but a word of ordinary English; that the standard of neglect H varied as time went on, and that many things might be legitimately looked upon as evidences of neglect in one generation which would not have been thought so in a preceding generation, and regard must be had to the habits and thoughts of the day.

It was for the jury to say whether any particular state of things which might be established came up to the description of "neglecting"—not do a specific thing, as to supply medicine, in which case it would mean very little more than omitting or I failing to do it—but to "neglecting a child," which was a very different thing, always bearing in mind that it must be to such a degree and in such a manner as to endanger its health.

The jury found the prisoner Guilty, adding that they considered medical aid and medicine to have been necessary for the child, but that they were of opinion that the prisoner had done all that he could in the best interests of the child except in not providing medical aid and medicine. The questions for the opinion of the court were whether the learned judges direction was right in law, and, if so, whether there was evidence upon which the jury could properly convict the prisoner. If both the

questions were answered in the affirmative the conviction was to stand; if either was answered in the negative the conviction was to be quashed. A

H. Sutton for the prisoner.
Horace Avory for the Crown was not called on to argue.

LORD RUSSELL OF KILLOWEN, C.J.—In this case we have to deal with a Case stated by my brother WILLS, on the trial of the defendant on a charge framed with reference to the Cruelty to Children Act, 1894. B

The first question we have to consider is whether the learned judge was right in his direction to the jury as to what constitutes wilful neglect; and the second question is whether there was evidence on which the jury could convict the defendant of wilful neglect. The charge is preferred under s. 1 of the Act, which provides C that if any person who has the custody, charge, or care of any child under the age of sixteen "wilfully neglects" such child, that person shall be guilty of a misdemeanour. It is useful to refer to the history of legislation on the subject. By s. 37 of the Poor Law Amendment Act, 1868, a statute dealing with the relief of the poor, it was enacted that any parent who wilfully neglected to provide adequate food, clothing, medical aid, or lodging for his child being in his custody under the age of D fourteen years, whereby the health of such child was seriously injured, was guilty of an offence. Therefore it became under that statute the duty of a parent to provide medical aid for his children. That statute was followed by a statute of 1889 with which it is not necessary to deal. It is important to remember that the statute of 1868 was passed after the judgment of WILLES, J., in *R.* v. *Wagstaff* (1), WILLES, J., having given judgment in January while the statute is dated August. E

We now come to the statute of 1894, and there is a great difference in the wording of the Act, for "medical aid" is dropped. It is difficult to believe that the legislature was taking a retrograde step, for the statute shows that it was passed in consequence of increased anxiety for the welfare of children. In the case we are now considering it is not disputed that the child was in a dangerous state to the knowledge of the parent. It is not disputed, and the jury have found that its life would have been F saved if medical assistance had been given, and that the parent was in a position to provide medical aid. Further, that the parent did not give medical aid, and that he did not because he believed to do so would be a want of faith in the methods which he believed to be prescribed by the Bible, and that he was otherwise an attentive parent. Lastly, that the child died. These being the facts, the learned judge charged the jury as follows : G

> "I told the jury that they must first of all be satisfied that the death of the child had been caused or accelerated by the want of medical assistance. Secondly, that medical aid and medicine were such essential things for the child that reasonably careful parents in general would have provided them; and, thirdly, that the prisoner's means would have enabled him to do so without an H expenditure as could not be reasonably expected from him."

Was that direction substantially right? I think it was. It seems to me to be the same, whether you take the words separately or conjoined. The words are, if a person "wilfully neglects." It seems to me very clear what this phrase means; "wilfully" means done deliberately and not by inadvertence, and "neglect" the I omission to do something for the benefit of the child—in other words, intentional failure to take those steps which the experience of mankind shows to be generally necessary. In these days the resources of medical science are within the reach of the humblest and the poorest. The learned counsel has argued with his invariable clearness that, because the father was an affectionate parent and because he neglected to provide nothing for the child except that which its condition urgently required, that it was impossible to say that he was guilty of wilful neglect. When a child breaks its thighbone and an operation is necessary, which is in the highest

legree dangerous while the child is in a state of consciousness, would the father be guilty of neglect if he refused to permit the administration of an anæsthetic drug? What if the child in an infantile complaint is in danger of suffocation, and it is necessary to perform a tracheotomy, would it be wilful neglect to refuse to permit the use of an anæsthetic? I think that in either of these cases the parent would properly be convicted. I dissent entirely from the view said to have been expressed by Piggott, B., in *R.* v. *Hines* (2), and I think that in this case an indictment for gross and culpable neglect could be supported at common law.

WILLS, J.— This is a case of a class which so frequently comes before the judges that I thought it well to state the Case in order that an authoritative decision might be delivered on the point.

DAY, GRANTHAM, LAWRANCE, and **WRIGHT, JJ.,** concurred.

Conviction affirmed.

Solicitor: *Solicitor to the Treasury.*

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

HORSEY ESTATE, LTD. *v.* STEIGER AND ANOTHER

[Court of Appeal (Lord Russell of Killowen, C.J., A. L. Smith and Henn Collins, L.JJ.), May 15, 1899]

[Reported [1899] 2 Q.B. 79; 68 L.J.Q.B. 743; 80 L.T. 857; 47 W.R. 644; 15 T.L.R. 367]

Landlord and Tenant—Lease—Forfeiture—Liquidation of company—Liquidation for reconstruction of company, not because of insolvency—Condition running with the land.

By a lease to J. D. and a limited company the lessees (a term which by the lease included assigns where the context so required or admitted) covenanted not to assign or underlet the premises without first obtaining the consent of the lessors, and the lease contained a proviso for re-entry if the lessees should at any time fail to perform any of their covenants, "or if they shall become bankrupt or enter into liquidation for the benefit of or compound with their creditors, or, being a company, shall enter into liquidation whether compulsory or voluntary." With the lessors' consent the lease was assigned to J. S. and a different limited company, the defendants in this action. In December, 1896, the defendant company, for the purpose merely of reconstruction with increased capital, passed a resolution for voluntary winding-up. In December, 1897, the defendants entered into an agreement for the sale by them to a new company of all their interest in the lease, and under that agreement the new company entered into possession of the premises. The lessors served a notice under the Conveyancing Act, 1881, s. 14, on both tenants alleging a forfeiture in consequence of the company's liquidation and breach of the covenant and brought an action to recover possession of the premises.

Held: (i) on the true construction of the proviso "liquidation" meant liquidation in fact and not only liquidation in consequence of insolvency, the cause which led to the liquidation, or its object, being wholly immaterial, and,

therefore, the proviso was applicable; (ii) the condition contained in the proviso ran with the land and so was capable of being effective against the defendants as assignees; but (iii) in view of its terms and the circumstances the notice given in purported compliance with s. 14 of the Act of 1881 was not a good notice, and the action failed.

Landlord and Tenant—Covenant not to sub-let without consent—Sale of interest in lease by one company to new company—Entry into possession of premises by new company.

Per CURIAM: The circumstances in which, in December, 1897, the new company entered into possession of the premises did not constitute an "under-letting" of the premises within the covenant; the new company had been let in on terms of purchase.

Notes. The relevant provisions of the Conveyancing Act, 1881, were repealed by the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 427), and replaced by s. 146 of that Act.

Considered: *Gentle* v. *Faulkner* (1899), 68 L.J.Q.B. 848; *Pannell* v. *City of London Brewery Co.*, [1900] 1 Ch. 496; *Re Riggs, Ex parte Lovell*, [1901] 2 K.B. 16. Approved: *Fryer* v. *Ewart*, [1902] A.C. 187. Considered: *Civil Service Co-operative Society* v. *McGrigor's Trustee*, [1923] All E.R. Rep. 595; *Lewin* v. *American and Colonial Distributors, Ltd.*, [1945] 1 All E.R. 592; *Hoffman* v. *Fineberg*, [1948] 1 All E.R. 592. Referred to: Jacob v. Down, [1900] 2 Ch. 156; *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Fox* v. *Jolly*, [1916] A.C. 1; *Davenport* v. *Smith* (1921), 91 L.J.Ch. 225; *Silvester* v. *Ostrowska*, [1959] 3 All E.R. 642.

As to forfeiture of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 665 et seq.; and for cases see 31 DIGEST (Repl.) 512 et seq.

Cases referred to:

(1) *Stevens* v. *Copp* (1868), L.R. 4 Exch. 20; 38 L.J.Ex. 31; 19 L.T. 454; 33 J.P. 87; 17 W.R. 166; 25 Digest (Repl.) 380, *100.*

(2) *Congleton Corpn.* v. *Pattison* (1808), 10 East, 130; 103 E.R. 725; 31 Digest (Repl.) 152, *2903.*

(3) *Roe d. Dingley* v. *Sales* (1813), 1 M. & S. 297; 105 E.R. 111; 31 Digest (Repl.) 412, *5421.*

(4) *Doe d. Bridgman* v. *David* (1834), 1 Cr.M. & R. 405; 5 Tyr.Y. 125; 149 E.R. 1137; sub nom. *Doe d. Williams* v. *Davies*, 6 C. & P. 614; 4 L.J.Ex. 10; 31 Digest (Repl.) 513, *6367.*

(5) *Doe d. Lloyd* v. *Ingleby* (1846), 15 M. & W. 465; 153 E.R. 933; 31 Digest (Repl.) 514, *6375.*

(6) *Williams* v. *Earle* (1868), L.R. 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231; 19 L.T. 238; 33 J.P. 86; 16 W.R. 1041; 31 Digest (Repl.) 410, *5399.*

(7) *Varley* v. *Coppard* (1872), L.R. 7 C.P. 505; 26 L.T. 882; 36 J.P. 694; 20 W.R. 972; 31 Digest (Repl.) 416, *5446.*

(8) *Smith* v. *Gronow*, [1891] 2 Q.B. 394; 60 L.J.Q.B. 776; 65 L.T. 117; 40 W.R. 46; 7 T.L.R. 596; 5 Digest (Repl.) 717, *6233.*

Also referred to in argument:

Re Oriental Bank Corpn., Ex parte Guillemin (1884), 28 Ch.D. 634; 54 L.J.Ch. 322; 52 L.T. 167; 1 T.L.R. 9; 10 Digest (Repl.) 905, *6145.*

Re Serle, Gregory v. *Serle*, [1898] 1 Ch. 652; 67 L.J.Ch. 344; 78 L.T. 384; 46 W.R. 440; 42 Sol. Jo. 414; 31 Digest (Repl.) 539, *6630.*

Roe d. Bamford v. *Hayley* (1810), 12 East, 464; 104 E.R. 181; 31 Digest (Repl.) 67, *2240.*

Roe d. Hunter v. *Galliers* (1787), 2 Term Rep. 133; 100 E.R. 72; 5 Digest (Repl.) 707, *6176.*

Vyvyan v. *Arthur* (1823), 1 B. & C. 410; 2 Dow. & Ry. K.B. 670; 107 E.R. 152; sub nom. *Vivyan* v. *Arthur*, 1 L.J.O.S.K.B. 138; 31 Digest (Repl.) 239, *3726.*

Vernon v. *Smith* (1821), 5 B. & Ald. 1; 106 E.R. 1094; 31 Digest (Repl.) 400, *5295*.
Doe d. Gray v. *Stanion* (1836), 1 M. & W. 695; 2 Gale, 154; Tyr. & Gr. 1065; 5 L.J.Ex. 253; 150 E.R. 614; 31 Digest (Repl.) 520, *6428*.
Doe d. Newby v. *Jackson* (1823), 1 B. & C. 448; 2 Dow. & Ry. K.B. 514; 107 E.R. 166; 31 Digest (Repl.) 39, *1953*.

Appeal from a decision of HAWKINS, J., in an action, tried by him, without a jury, in which the plaintiff company, owners of a piece of land at Blackwall, sought against their tenants to recover possession of the demised premises under a proviso for re-entry contained in the lease: see [1898] 2 Q.B. 259.

On Nov. 4, 1889, the trustees of the will of Thomas Horsey, deceased, demised the land to John Donelly and the Patent Stamped Steel Railway Axle Box Co., Ltd., for the term of twenty-one years from Michaelmas, 1889, at the rent mentioned in the deed. The lease provided that the expression "lessees," where used in the lease, should

> "include the executors, administrators, and assigns of the said John Donelly and the successors and assigns of the said company, where the context so requires and admits."

The lessees for themselves and their assigns, and as a separate covenant each of them for himself and itself respectively and his and its respective assigns, covenanted to pay the rent, to repair all buildings which thereafter might during the term be erected on the demised ground, and, further,

> "that the lessees will not at any time or times during the said term assign or underlet the said premises or any part thereof to any person or persons whomsoever without first obtaining the consent of the lessors in writing for that purpose, but it is hereby agreed that such consent shall not be unreasonably or vexatiously withheld in the case of the lessees satisfying the lessors that the proposed assignee or under-lessee is a substantial, respectable, and responsible person."

There was also a proviso for re-entry if the rent, or any part thereof, should be in arrear for twenty-one days, or if the lessees should at any time fail or neglect to observe or perform any of their covenants, or

> "if the lessees shall become bankrupt or enter into liquidation for the benefit of or compound with their creditors, or, being a company, shall enter into liquidation whether compulsory or voluntary."

On Aug. 1, 1894, the lessors conveyed all their interest in the premises to the plaintiffs. On Dec. 14, 1895, the lessees, with the written consent of the lessors, assigned the residue of the term to the defendants. The written consent of the lessors provided that

> "this consent shall not authorise any further or other assignment or demise of the said premises, or any part thereof, or prejudice or affect any of the covenants, conditions, or provisions in the said indenture of lease contained, except to the extent hereby expressed."

On Dec. 28, 1896, the shareholders in the defendant company, being desirous of increasing the capital of the company and enlarging its scope, passed a resolution for a voluntary winding-up of the company. On Jan. 26, 1897, this resolution was duly confirmed, and a liquidator was appointed to carry it out. On Sept. 27, 1897, a new company was registered under the same name. On Oct. 30, 1897, a notice of the alleged breach of covenant was served by the plaintiffs upon the original lessees and on the defendant Steiger, under the provisions of s. 14 of the Conveyancing Act, 1881. On Nov. 2, 1897, a similar notice was served on the defendant company. This notice stated that a forfeiture of the lease had occurred because the defendant company had entered into liquidation. On Nov. 4, 1897, this action was commenced.

On Dec. 2, 1897, an agreement was made between the two defendants and the new company for the sale by the defendants to the new company of all their interest in the lease. Under this agreement the new company entered into possession of the premises, though no assignment was in fact executed, nor was any application made to the plaintiffs for their consent to such assignment. To save expense the parties to the action agreed that any new forfeiture which might have been caused by this arrangement should be treated as having occurred before the action had been commenced. At the trial of the action HAWKINS, J., gave judgment for the plaintiffs on the ground that the defendant company had entered into liquidation within the meaning of the proviso for re-entry contained in the lease. The defendants appealed.

Hammond Chambers, *Q.C.*, and *Boome* (*Timins* with them) for the defendant Steiger.

Herbert Reed, *Q.C.*, and *Clarke Williams* for the defendant company.

Christopher James and *B. A. Cohen* for the plaintiffs.

Cur. adv. vult.

May 15, 1899. **LORD RUSSELL OF KILLOWEN, C.J.,** read the following judgment of the court.—The question is whether the plaintiff company has established the right to re-enter upon the demised premises upon either of the grounds of forfeiture alleged, viz., (a) that the defendant company has entered into liquidation; or (b) that the defendants have underlet the demised premises.

First, as to the liquidation. That the defendant company has entered into liquidation is not denied, but it was argued for the company (i) that upon the true construction of the lease the liquidation, within the meaning of the condition or proviso in the lease, must be a liquidation brought about by, or in consequence of, insolvency, which (it was admitted) was not the case here; (ii) that the proviso in the lease only applied in case the individual lessee was bankrupt or had liquidated with his creditors and the company had entered into liquidation in consequence of insolvency; (iii) that, if these contentions failed, the proviso or condition in question did not run with the land so as to bind the defendants, who were assigns of the original lessee; (iv) that due notice under the Conveyancing Act, 1881, s. 14, had not been given before action, and that this was a condition precedent to the right to maintain any action; and, lastly, (v) that the defendants were, all these contentions failing, entitled to apply to the court for relief.

I propose to consider these points seriatim. As to the first point, in my judgment the determining event is the entering into liquidation in fact, and the cause which led to that event, or its object, is wholly immaterial. The contention of the defendants involves the introduction into the proviso after the word "voluntary" of the words "in consequence of insolvency." It seems to me the condition or proviso must be construed according to its plain meaning and without this qualification. As to the second point, I think that the condition is carefully framed so as to make the proviso for re-entry apply if either the individual lessee became bankrupt or compounded with his creditors (which is the first clause of the condition) or if the company lessee entered into liquidation.

If, therefore, this were an action against the original lessees, the plaintiff company would, subject to the question of notice, be entitled to re-entry under the condition. But this is an action against the assigns of the original lessees. The third point, which presents the greatest difficulty, has, therefore, to be considered, viz., is this condition of re-entry in the event of the company entering into liquidation one which in the language of the common law "runs with the land"? It is to be noted that this question was not raised in the court below, and the judgment of the learned judge is silent upon it. It was put in argument that the question here turned upon a condition and not upon a covenant, and it was suggested that the cases dealing with covenants were, therefore, not authorities on the present question. I cannot assent to this view. Whether a particular covenant or condition does or does not run with

A the land is determined by the common law, and it is enough to say that the authorities uniformly treat them as governed by the same principles: *Stevens* v. *Copp* (1). Further, the statute 32 Henry 8, c. 34, s. 1 [relating to the grant of reversions: repealed by the Law of Property Act, 1925, of which see now ss. 141, 142] which gives assignees of the reversion the same benefit and remedies as lessors or grantors in respect of covenants and conditions, couples them together, and s. 2 of that Act, B which gives lessees the same remedies against assignees of the reversion which they had against the lessor or grantor, in like manner couples conditions and covenants together.

Is, then, the condition in question one the burden of which runs with the land so that its obligation binds the assignee of the lease? The answer to this question depends, in this case, upon whether it is a condition touching the thing demised or C is merely collateral. I say "in this case" because there are undoubtedly collateral covenants or conditions, which on equitable principles, but only in a restrictive sense, bind the assignee. But this principle is confined to covenants and conditions of a negative character, and depends upon notice. Apart from cases of this class the true principle is that no covenant or condition which affects merely the person and does not affect the nature, quality, or value of the thing demised or the mode of D using or enjoying the thing demised, runs with the land: see *Congleton Corpn.* v. *Pattison* (2).

Does then the condition or proviso in question "run with the land"? On the whole, and after much hesitation, I have arrived at the conclusion that it does. It must be taken as fully established that a covenant against assignment and also a E proviso for re-entry in the case of bankruptcy runs with the land: see *Roe d. Dingley* v. *Sales* (3); *Doe d. Bridgman* v. *David* (4); *Doe d. Lloyd* v. *Ingleby* (5); *Williams* v. *Earle* (6); *Varley* v. *Coppard* (7); *Smith* v. *Gronow* (8). I think that a proviso for re-entry in case of liquidation by a company or an individual falls within the principle of these cases, and indeed that the proviso as to liquidation is cognate both to a covenant against assignment and to a proviso relating to bankruptcy; it partakes of F the character of each of them. The proviso against bankruptcy was introduced into leases in consequence of the ordinary covenant against assignment being held not to apply to the involuntary assignment which is the consequence of bankruptcy: see *Doe d. Lloyd* v. *Ingleby* (5); and, like the covenant against assignment, it touches the question who shall have and occupy the premises demised, and, therefore, touches and concerns the thing demised: see *Williams* v. *Earle* (6), per Blackburn, G J. I find myself unable to draw any distinction in principle between these cases and the case of a proviso for re-entry in case the assign of the lessee should enter into liquidation.

I think the result, that covenants against assignment and provisoes for re-entry in the event of bankruptcy or liquidation stand on the same footing, is made clearer by considering what are the consequences following from a company entering into H liquidation. By s. 129 of the Companies Act, 1862, the company may be wound-up, as in this case, by a special resolution, and by s. 130 the winding-up is deemed to commence when the resolution is passed. By s. 131, the special resolution having been passed, the company ceases to carry on its business except as far as may be required for its beneficial winding-up; it is moribund, if not dead. By s. 133 its property, after payment of creditors, must be distributed among its members, and I by sub-s. (7) of s. 133 the liquidator may, without its being necessary to obtain any sanction from the court, exercise all the powers of the official liquidator, and among these powers is that given by s. 95, enabling the liquidator to sell the real or other property to any person or company or to sell the same in parcels [see now Companies Act, 1948, s. 278 et seq.]. In the present case, the original and confirmatory resolutions for winding-up having been passed, it cannot be contested that liquidation has in fact been entered upon; and, although it is true that the winding-up has not been completed within the meaning of ss. 142 and 143, I see no power in the company to undo what it has done. The winding-up must go through, and must

involve the dealing with the property of the company, including their interest in the premises in question in the manner provided in the foregoing sections. I arrive, therefore, at the conclusion that the proviso for re-entry in case of the assigns of the original lessee entering upon liquidation applies, and that unless there is some other answer the plaintiff can insist on re-entering.

I have now to consider the remaining, the fourth, point—viz., that no proper notice was given under s. 14 of the Conveyancing Act, 1881. Was any such notice necessary? The answer to that question depends upon two considerations: (i) Is the liquidation in this case equivalent to a bankruptcy within sub-s. (6) of s. 14 [now s. 146 (1) of Law of Property Act, 1925] and, if so, (ii) what is the effect of sub-s. (2) of s. 2 of the amending Act of 1892 [s. 146 (10) of Act of 1925]? As to the first, I think, looking to the wide words of the interpretation section, s. 2, of the Act of 1881 [s. 205 (1) (i) of Act of 1925] referring to bankruptcy, that liquidation is within the meaning of bankruptcy as interpreted by sub-s. (6) of s. 14 of the Act of 1881. It follows that, if the Act of 1892 has not effected a difference, the plaintiff company was not bound, as to this ground of forfeiture, to give notice at all. Has, then, the Act of 1892 made any difference? I think it has. I think the effect of s. 2 (2) of that Act, which is very difficult of construction, is to take the case of forfeiture for bankruptcy or liquidation out of the cases in which notice is not necessary for one year from the bankruptcy or liquidation.

If, then, notice is necessary, has it been given? To determine the character of the required notice, what it shall contain and when it ought to be given, it is necessary to consider the scope of s. 14 of the Act of 1881 as a whole. The object seems to be to require in the defined cases (i) that a notice shall precede any proceeding to enforce a forfeiture; (ii) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him; and (iii) that a reasonable time shall after notice be allowed the tenant to act before any action is brought. The reason is clear. He ought to have the opportunity of considering whether he can admit the breach alleged, whether it is capable of remedy, whether he ought to offer any, and, if so, what compensation, and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him. The notice in question is dated Oct. 29, 1897, and alleges that the defendants, the company, had entered into liquidation, and, further, that they had broken the covenant to repair. [The latter allegation was abandoned.] It then proceeds to demand compensation, and gives notice that, if the defendants fail to remedy the breaches within a reasonable time, the plaintiffs will re-enter. To the notice is annexed a schedule requiring very extensive repairs to be done, which would require a considerable time to accomplish. This notice was served on Nov. 2, and the writ in the action was served on Nov. 4. It is now admitted that the plaintiffs were not in a position to rely upon the alleged breach for non-repair.

In these circumstances can this be said to be a proper notice within the Act? On the whole, I think not. In the first place, if the entering upon liquidation had alone been put forward, the defendants would have had the opportunity of considering whether they had any answer, and, if not, whether they could make terms with the plaintiffs, but this was impracticable so long as the claim for breach of covenant to repair was made. Again, if non-repair was alone relied on, the defendants might possibly, by offer of compensation accompanied by undertaking to repair, have made terms with the plaintiffs. Further, the statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action. Can two days' notice be said, in all the circumstances, to be a reasonable notice? I think not. On the whole, therefore, I am of opinion that the notice was bad and did not comply with the condition precedent to action within s. 14 of the Act of 1881.

In the view which I have expressed it becomes unnecessary to discuss whether the plaintiff company has established a right to re-enter on the ground that the

defendants have underlet; but as it has been discussed in argument, it may perhaps be better to notice it. It is admitted that there has been no assignment within the meaning of the covenant against assignment. What has taken place is this. The defendants, having agreed to sell to the new company, have let them into possession pending the completion of the purchase, the new company undertaking to pay all rents, rates, and outgoings in connection with the premises or the business there carried on. There is a provision for redelivery of possession to the defendants if the contract should be rescinded. It is contended that this makes the new company the defendants' under-tenants. But on what terms? The new company pay no rent to the defendants; they have undertaken no obligation to the defendants except those mentioned, which are not necessarily obligations of tenancy. But it is said the proper inference from these facts is that a tenancy at will has been created. Whether this may be technically so or not, the practical answer to this contention seems to be that the defendants could not by the exercise of their will turn the new company out. The effective answer of the new company would be: We have come in as purchasers and we are willing to carry out our terms of purchase. In plain sense and according to the ordinary understanding of men, this is not a case of underletting at all, but merely a case in which the new company has been let in on terms of purchase. Had the covenant been (as is of late years often the case) against parting with possession without licence of the landlord, the plaintiff company would have proved a breach of such a covenant, but they have not established a breach of the covenant in question, which is against underletting only. My learned brethren agree with this judgment. The appeal will, therefore, be allowed with costs.

Appeal allowed.

Solicitors: *Druces & Attlee; J. H. Durant; H. E. Warner.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

R. *v.* PAYNE AND ANOTHER

[Queen's Bench Division (Lord Russell of Killowen, C.J., and Wright, J.), April 14, 1896]

[Reported [1896] 1 Q.B. 577; 65 L.J.Q.B. 426; 74 L.T. 351; 44 W.R. 605; 12 T.L.R. 321; 40 Sol. Jo. 416]

Contempt of Court—Attachment—Summary powers—Exercise only where clear interference with administration of justice.

In order to justify the court in exercising its summary power to commit for contempt a person who has published matter referring to a charge pending against some other person, the matter published must have been intended or clearly calculated to prejudice the fair trial of the charge and so interfere with the administration of justice. It is an arbitrary power, and so should be used only in cases where the needs of justice call for its exercise.

Re O'Malley, Hunt v. *Clarke* (1) (1889), 61 L.T. 343, and *Costa Rica Republic* v. *Erlanger* (2) (1877), 36 L.T. 332, approved and applied.

Notes. Considered: *Re New Gold Coast Exploration Co.*, [1901] 1 Ch. 860; *R.* v. *Parke, Ex parte Dougal*, [1900-3] All E.R. Rep. 721; *R.* v. *Daily Mail Proprietors* (1907), Times, Jan. 15. Applied: *R.* v. *Wealdstone News and Harrow News, Harley* v. *Sholl* (1925), 41 T.L.R. 508. Considered: *Re William Thomas Shipping Co., H. W. Dillon & Sons, Ltd.* v. *The Co., Re Sir Robert Thomas*, [1930] 2 Ch. 368; *R.* v. *Daily Herald, Ex parte Rouse* (1931), 75 Sol. Jo. 119. Applied:

R. v. *News of the World, Editor, Printers and Publishers, Ex parte Kitchen* (1932), 48 T.L.R. 234; *R.* v. *Daily Worker (Proprietor, Printer and Publishers), Ex parte Goulding, R.* v. *Star, Daily Telegraph and New Leader (Proprietor, Printer and Publishers), Ex parte Goulding* (1934), 78 Sol. Jo. 860. Considered: *Gaskell and Chambers, Ltd.* v. *Hudson, Dodsworth & Co., R.* v. *Hudson, Ex parte Gaskell and Chambers, Ltd.*, [1936] 2 K.B. 595; *R.* v. *Associated Newspapers, Ltd., Ex parte Beyers, R.* v. *Co-operative Press, Ltd., Ex parte Beyers, R.* v. *Daily Sketch and Sunday Graphic, Ex parte Beyers* (1936), 80 Sol. Jo. 247. Applied: *R.* v. *Davies, Ex parte Delbert-Evans*, [1945] K.B. 435. Considered: *R.* v. *Evening Standard Co., Ex parte A.-G.*, [1954] 1 All E.R. 1026; *Alliance Perpetual Building Society* v. *Belrum Investments, Ltd.*, [1957] 1 All E.R. 635; *R.* v. *Duffy*, [1960] 2 All E.R. 891. Referred to: *R.* v. *Evening Standard, Ex parte D.P.P., R.* v. *Manchester Guardian, Ex parte Same, R.* v. *Daily Express, Ex parte Same* (1924) 40 T.L.R. 833; *R.* v. *People, Ex parte Hobbs* (1925), 69 Sol. Jo. 494; *R.* v. *Daily Mirror (Editor and Proprietors), Ex parte Smith*, [1927] All E.R. Rep. 503; *R.* v. *Daily Mail, Ex parte Factor* (1928), 44 T.L.R. 303; *R.* v. *Barry, Ex parte Grey* (1939), 83 Sol. Jo. 872; *Carl-Zeiss-Stiftung* v. *Rayner and Keeler*, [1960] 3 All E.R. 289.

As to contempt by publications tending to defeat the ends of justice and attachment and committal, see 8 HALSBURY'S LAWS (3rd Edn.) 6-12, 30 et seq.; and for cases see 16 DIGEST (Repl.) 21 et seq., 57 et seq.

Cases referred to:

(1) *Hunt* v. *Clarke* (1889), 58 L.J.Q.B. 490; sub nom. *Re O'Malley, Hunt* v. *Clarke*, 61 L.T. 343; 37 W.R. 724; 5 T.L.R. 650, C.A.; 16 Digest (Repl.) 29, *224.*

(2) *Re Clements and Costa Rica Republic* v. *Erlanger* (1877), 46 L.J.Ch. 375; sub nom. *Costa Rica Republic* v. *Erlanger*, 36 L.T. 332, C.A.; 16 Digest (Repl.) 16, *97.*

Also referred to in argument:

Re Crown Bank, Re O'Malley (1890), 44 Ch.D. 649; 59 L.J.Ch. 767; 63 L.T. 304; 39 W.R. 45; 16 Digest (Repl.) 26, *196.*

J. & P. Coats v. *Chadwick*, [1894] 1 Ch. 347; 63 L.J.Ch. 328; 70 L.T. 228; 42 W.R. 328; 10 T.L.R. 226; 38 Sol. Jo. 217; 8 R. 159; 16 Digest (Repl.) 32, *265.*

Rule Nisi calling on the respondents, Payne and Cooper, to show cause why a writ of attachment should not issue against them for contempt of court in publishing matter calculated to interfere with the fair trial of the applicant on a charge upon which he had been committed by the justices for trial at the approaching assizes.

The applicant was the secretary of a limited company in Huntingdonshire which owned a newspaper called the "Huntingdonshire Post." Early in November, 1885, the applicant was arrested on a charge of attempting to commit arson on the premises of the newspaper. While the charge was still pending the directors of the company noticed in another newspaper an advertisement to the effect that the sheriff of the county was about to sell the "Huntingdonshire Post." As the directors knew nothing of the circumstances which led up to this advertisement they made inquiries. The result of these was, in their opinion, to show that the applicant had been guilty of misconduct in his post of secretary to the company. To explain to the readers of the newspaper how matters stood, Payne, one of the directors, wrote and published an article in the issue of Nov. 30, 1895, recounting the investigations that had taken place, and denouncing the conduct of the applicant. In due course the charge of attempted arson against the applicant was dismissed by the magistrates, and he was then prosecuted on charges arising out of his conduct as secretary of the company. While these charges were pending, Cooper—who up till this time was not connected with the "Huntingdonshire Post"—bought the paper, and on Feb. 15, 1896, he pub-

lished an article in it explaining the circumstances under which he bought it, and referring therein to the previous article upon the applicant's conduct. On Mar. 7, 1896, a meeting of the joint committee of the county council and the magistrates was held, at which there was a discussion which was open to the public, whether the county should pay for legal help for the police in the prosecution. In this discussion Cooper took part, and afterwards a verbatim report of it was published in the "Huntingdonshire Post." A somewhat reduced report appeared in the other local newspapers. At this time the applicant had been returned for trial. On Mar. 25, 1896, the applicant obtained a rule nisi, which now came on for hearing.

Shearman, for Payne, and *Dickens*, *Q.C.*, and *Brooke Little*, for Cooper, showed cause against the rule.

Poyser in support of the rule.

LORD RUSSELL, C.J.—A rule has been obtained calling on Payne and Cooper to show cause why a writ of attachment should not issue against them for contempt. In my opinion, the application is unfounded, and the rule must be discharged. I want to take this opportunity of expressing a further opinion, and that is that applications such as this—applications to the court to exercise its summary power to commit for contempt—have of late been far too numerous. That this summary power is most salutary no one can doubt, and it is a power which the court will not hesitate to use where there is any attempt to interfere with the administration of justice. But it is an arbitrary power, and, therefore, it ought to be used only in cases where the needs of justice call for its exercise. The learned counsel seems to think that every libel upon a person under trial is a contempt, but this is not necessarily so. To justify the exercise of this summary power something must have been published which was intended or clearly calculated to prejudice the fair trial of the charge or action. The facts in this case support no such suggestions.

In some cases, more especially in the Chancery courts, the decisions of the courts have gone, in my opinion, too far. The true rule to be observed in dealing with these applications is that laid down by Cotton, L.J., in *Re O'Malley*, *Hunt* v. *Clarke* (1). He there says (61 L.T. at p. 344):

> "If a thing is done wilfully which really will prejudice the parties to the cause before it comes on, I should not hesitate to commit to prison anyone who so offended. But of course that jurisdiction is one which is only to be exercised by the court in extreme cases, and it would be most unfortunate if this court, or any court, readily took upon itself to interfere in such a summary way, and in such an extraordinary way, unless there were really something which required the interference of the court in that way in order to ensure the due conduct of business."

Farther on Cotton, L.J., cites with approval the language used by Sir George Jessel, M.R., in *Costa Rica Republic* v. *Erlanger* (2) (36 L.T. at p. 333). That language is:

> "Therefore, it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most zealously and carefully watched, and exercised if I may say so, with the greatest reluctance and the greatest anxiety on the part of the judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found."

This case, in my opinion, puts the law as to committals for contempt upon its proper basis. I adopted the judgment of COTTON, L.J., and that of SIR GEORGE JESSEL, M.R., therein referred to, as my judgment in this case. The rule must be discharged.

WRIGHT, J.—I agree entirely in what the Lord Chief Justice has said. As is pointed out by COTTON, L.J., in *Re O'Malley, Hunt* v. *Clarke* (1), in all cases of this kind there are two questions involved. The first is: Is the publication of such a nature as to be calculated to interfere with a fair trial? If it is not so calculated, we have nothing to do with it. But even if it is calculated to interfere with a fair trial there is a second question. Is it a proper case for such an application? The rule laid down in *Re O'Malley, Hunt* v. *Clarke* (1) for answering this is that such an application should not be made except in serious cases. *Re O'Malley, Hunt* v. *Clarke* (1) does not appear in the LAW REPORTS, and so possibly some of the cases cited before us today may have been decided without its being taken into consideration by the court.

Rule discharged.

Solicitors: *A. G. Watts* for *W. A. Watts*, St. Ives; *Shearman & Rayner; Peacock & Goddard*, for *Maule*, Huntingdon.

[*Reported by* J. A. STRAHAN, ESQ., *Barrister-at-Law.*]

NOBEL'S EXPLOSIVES CO. *v.* JENKINS & CO.

[QUEEN'S BENCH DIVISION (Mathew, J.), July, 10, 13, 14, 1896]

[Reported [1896] 2 Q.B. 326; 65 L.J.Q.B. 638; 75 L.T. 163; 12 T.L.R. 522; 8 Asp.M.L.C. 181; 1 Com. Cas. 346]

Shipping—Bill of lading—Exception—Restraint of princes—Cargo of explosives—Fear of seizure by foreign belligerents—Power of master to land goods at "nearest safe and convenient port" if normal port considered unsafe—Duty of master.

Under a bill of lading the plaintiffs shipped on board the defendants' steamer a quantity of explosives to be carried from London to Yokohama, and to be delivered at Yokohama, or "so near thereto as the vessel may safely get." The bill of lading contained the usual exception of "restraint of rulers, princes, or people," and a special clause that, "if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port." The vessel, which had other goods on board belonging to other owners, arrived in the course of her voyage at Hong Kong after war had been declared between China and Japan. As she had explosives on board which were admitted to be contraband of war she was compelled to anchor and fly a red flag. There were in the port several Chinese cruisers, and within sight were two Chinese war-vessels, and the master, in the well-founded belief that, if he proceeded with the explosives on board, the vessel would be stopped and the explosives confiscated, landed the explosives at Hong Kong, and proceeded on his voyage to Yokohama. In an action by the plaintiffs to recover the expenses of the storage and subsequent forwarding of their goods from Hong Kong to Yokohama:

Held: (i) the well-founded fear that the goods would be seized amounted to a "restraint of princes or rulers" within the meaning of the exception in the bill of lading; (ii) the fear of seizure justified the master in landing the goods at Hong Kong, which, under the circumstances, was the "nearest safe and convenient port" within the meaning of the special clause; (iii) apart from the clauses in the bill of lading the master had a duty to take reasonable care of the goods entrusted to him and he had carried out that duty in discharging the explosives at Hong Kong; and, therefore, the action failed.

Notes. Referred to: *The Knight of St. Michael*, [1898] P. 30; *Brunner* v. *Webster and Barraclough* (1900), 16 T.L.R. 217; *Embiricos* v. *Sydney Reid & Co.*, [1914-15] All E.R. Rep. 185; *Sanday* v. *British and Foreign Marine Insurance*, [1915] 2 K.B. 781; *Palace Shipping Co.* v. *Gans Steamship Line*, [1914-15] All E.R. Rep. 912; *The Svorono* (1917), 33 T.L.R. 415; *Watts, Watts & Co.* v. *Mitsui & Co., Ltd.*, [1916-17] All E.R. Rep. 501; *Becker, Gray & Co.* v. *London Assurance Corpn.*, [1916-17] All E.R. Rep. 146; *Atlantic Maritime Co., Inc.* v. *Gibbon*, [1953] 2 All E.R. 1086.

As to exception of restraints of princes or rulers, see 35 HALSBURY'S LAWS (3rd Edn.) 290-292; and for cases see 41 DIGEST 409 et seq. As to unloading in a safe port, see 35 HALSBURY'S LAWS (3rd Edn.) 439 et seq., and for cases see 41 DIGEST 521 et seq.

Cases referred to:

(1) *Geipel* v. *Smith* (1872), L.R. 7 Q.B. 404; 41 L.J.Q.B. 153; 26 L.T. 361; 20 W.R. 332; 1 Asp.M.L.C. 268; 41 Digest 411, *2558*.

(2) *Rodoconachi* v. *Elliott* (1874), L.R. 9 C.P. 518; 43 L.J.C.P. 255; 31 L.T. 239; 2 Asp.M.L.C. 399, Ex. Ch.; 29 Digest (Repl.) 253, *1903*.

(3) *Notara* v. *Henderson* (1872), L.R. 7 Q.B. 255; 41 L.J.Q.B. 158; 26 L.T. 442; 20 W.R. 443; 1 Asp.M.L.C. 278, Ex. Ch.; 41 Digest 495, *3237*.

Also referred to in argument:

Re Grazebrook, Ex parte Chavasse (1865), 4 De G.J. & Sm. 655; 6 New Rep. 6; 34 L.J.Bcy. 17; 12 L.T. 249; 11 Jur.N.S. 400; 13 W.R. 627; 2 Mar.L.C. 197; 46 E.R. 1072, L.C.; 37 Digest 628, *780*.

Atkinson v. *Ritchie* (1809), 10 East, 530; 103 E.R. 877; 41 Digest 464, *2955*.

Duncan v. *Köster, The Teutonia* (1872), L.R. 4 P.C. 171; 8 Moo. P.C.C.N.S. 411; 41 L.J.Adm. 57; 26 L.T. 48; 20 W.R. 421; 1 Asp.M.L.C. 214; 17 E.R. 366, P.C.; 41 Digest 484, *3165*.

Anderson, Anderson & Co. v. *San Roman (Owners), The San Roman* (1873), L.R. 5 P.C. 301; 42 L.J.Adm. 46; 28 L.T. 381; 21 W.R. 393; 1 Asp.M.L.C. 603, P.C.; 1 Digest (Repl.) 176, *611*.

Jackson v. *Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; 23 W.R. 169; 2 Asp.M.L.C. 435, Ex. Ch.; 41 Digest 330, *1859*.

Dahl v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471*.

Action in the Commercial List tried by MATHEW, J., and brought by the plaintiffs, manufacturers of dynamite, claiming the sum of £818 3s. for damages for breach of contract in the carriage of goods in the steamship *Denbighshire*, of which the defendants were owners.

Joseph Walton, Q.C., and *H. F. Boyd* for the plaintiffs.
Lawson Walton, Q.C., and *L. Noad* for the defendants.

July 14, 1896. **MATHEW, J.**, read the following judgment.—This was an action brought to recover damages for the non-delivery at Yokohama of explosives, admitted to be contraband of war, after war had been declared between China and

Japan. The goods were shipped by the defendants' steamer, the *Denbighshire*, under a bill of lading by which the goods were to be delivered "at Yokohama or so near thereunto as she may safely get." The bill of lading contained the usual exception of "restraint of princes, rulers, or people" and also a special clause to which I will refer presently.

The steamer arrived in the course of her voyage at Hong Kong, on Aug. 1, 1894, when war had been declared. By the regulations of the port of Hong Kong, the vessel, having explosives on board, was anchored off the government magazine at Hong Kong, and was compelled to fly a red flag. There were in the port numerous revenue cruisers of the Chinese government manned by European officers, and within sight from where she lay were two Chinese war-vessels. Hong Kong is near the naval station of the Southern Chinese Squadron, and there were other war-vessels about the port.

The fact that the *Denbighshire* had explosives on board was generally known, and the captain, in the reasonable and well-founded belief that the vessel, if she sailed with the plaintiffs' goods on board, would be stopped, and the goods confiscated, telegraphed to his owners for orders, and received from them a reply directing him to land the goods. The defendants at once informed the plaintiffs, who protested against the course proposed to be taken, on the ground that the goods were not contraband of war. The goods were discharged and placed in safe custody, the vessel proceeded on her voyage on Aug. 4, and she arrived safely at Yokohama. For the defendants reliance was placed on the terms of the bill of lading that the steamer should proceed to Yokohama, or as near thereto as she could safely get. It was argued that at Hong Kong she was as near as she could safely get to Yokohama within the meaning of the bill of lading; that the contract was not to carry to the nearest place to which the goods could safely get, but to deliver the goods at Yokohama, or as near thereunto as the vessel could safely get. The vessel did get to Yokohama, and the obligation to deliver the goods under the clause in question thereupon became complete. This ground of defence seems to me untenable.

The main ground of defence was the exception in the bill of lading, namely, a restraint of princes, rulers, or people. A large body of evidence was laid before me to show that if the vessel sailed with the goods on board she would in all probability be stopped and boarded. It was certain in that case that the goods would have been confiscated, and quite uncertain what course the captors would take with the ship and rest of the cargo. I am satisfied that if the master had continued the voyage with the goods on board he would have acted recklessly and imprudently.

It was argued for the plaintiffs that the clause did not apply unless there was a direct and specific action upon the goods by sovereign authority. It was said that fear of seizure, however well founded, was not a restraint; something in the nature of a seizure was necessary. But this argument is disposed of by *Geipel* v. *Smith* (1) and *Rodoconachi* v. *Elliott* (2). The goods were as effectively stopped at Hong Kong as if there had been an express order from the Chinese government that contraband of war should be landed. The analogy of a restraint by blockage or embargo seems to me sufficiently close. The warships of the Chinese government were in such a position as to render the sailing of the steamer with contraband of war on board a matter of great danger, though she might have got away safely. The restraint was not temporary as was contended by the plaintiffs' counsel. There was no reason to expect that the obstacles in the way of the vessel would have been removed in any reasonable time; and I find that the captain in refusing to carry the goods farther acted reasonably and prudently, and that the delivery of the goods at Yokohama was frustrated by restraint of princes or rulers within the meaning of the exception.

There was a further clause in the bill of lading upon which the defendants relied, and which seems to me to afford a further answer to the plaintiffs' claim, which clause is as follows:

A "If the entering of or discharging in the port of discharge shall be considered by the master to be unsafe by reason of war or disturbances the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods."

It was said that this clause was only intended to apply where difficulties arose B upon the vessel's arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination.

But, apart from the terms of the bill of lading, it seems to me that the conduct C of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship and her cargo would be detained, and the goods of the plaintiffs confiscated. In the words of WILLES, J., in delivering the considered judgment of the Exchequer Chamber, D in *Notara* v. *Henderson* (3) (L.R. 7 Q.B. at p. 237):

"A fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and E inconvenience must be taken into account."

I am of opinion that the course taken by the captain in landing the goods and leaving them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers because they had protested against the discharge of these goods. But even if this information had reached the captain, F it would not have divested him of his original authority and his right to act in any emergency as agent for the owners of ship and the other owners of cargo. I, therefore, give judgment for the defendants with costs.

Solicitors: *Thomas Cooper & Co.; W. A. Crump & Son.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

G

Re GRAYDON. Ex parte OFFICIAL RECEIVER

[QUEEN'S BENCH DIVISION (Vaughan Williams, J.), February 3, 11, 17, 1896]

[Reported [1896] 1 Q.B. 417; 65 L.J.Q.B. 328; 74 L.T. 175; 44 W.R. 495; 12 T.L.R. 208; 40 Sol. Jo. 420; 3 Mans. 5]

Bankruptcy—Property available for distribution—After-acquired property—Personal earnings—Royalties from patents—Right of trustee in bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 53.

Estoppel—Estoppel by record—Decision of county court judge that royalties on patents personal earnings of bankrupt—Effect on future payments.

The right to work an invention patented by an undischarged bankrupt was sold by him to a company for £500 and the payment of a royalty of £10 a week. Instalments amounting to £20 became due, and in an interpleader issue between the company and the official receiver the county court judge decided that the £20 amounted to personal earnings of the bankrupt and must be paid by the company to him. Further sums became payable under the agreement, and the official receiver claimed these and any future royalties falling due on the ground that they were after-acquired property and should be available for the benefit of creditors. The bankrupt's solicitor also claimed costs incurred in relation to the patents under a charge given him by the bankrupt on the patents and royalties. The bankrupt contended that the sums payable were in the nature of personal earnings and as such did not pass to the trustees, and that the trustee was estopped by the decision in the interpleader proceedings from asserting the contrary.

Held: the trustee was estopped by the decision of the county court judge from denying that the sums in question, when made, were in the nature of personal earnings, but the bankrupt could only retain £5 a week of this as reasonable maintenance for himself and his family, the residue, after the solicitor's costs of the creation of the fund had been deducted, passing to the trustee in bankruptcy.

Notes. Section 53 (2) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 51 (2) of the Bankruptcy Act, 1914.

Considered: *Hoystead* v. *Taxation Comrs.*, [1925] All E.R. Rep. 56. Referred to: *Mercer* v. *Vans Colina* (1897), [1900] 1 Q.B. 130, n.; *Shoolbred* v. *Roberts*, [1899] 2 Q.B. 560; *Re Roberts*, [1900] 1 Q.B. 122; *Re Hancock*, [1904] 1 K.B. 585; *Affleck* v. *Hammond* [1912] 3 K.B. 162; *Marginson* v. *Blackburn Borough Council*, [1939] 1 All E.R. 273.

As to property available for distribution among creditors, see 2 HALSBURY'S LAWS (3rd Edn.) 404 et seq.; and for cases see 5 DIGEST (Repl.) 779 et seq. For the Bankruptcy Act, 1914, s. 51 (2), see 2 HALSBURY'S STATUTES (2nd Edn.) 387.

Case referred to:

(1) *Wadling* v. *Oliphant* (1875), 1 Q.B.D. 145; 45 L.J.Q.B. 173; 33 L.T. 837; 24 W.R. 246; 5 Digest (Repl.) 784, *6654*.

Also referred to in argument:

Flitters v. *Allfrey* (1874), L.R. 10 C.P. 29; 44 L.J.C.P. 73; 31 L.T. 878; 23 W.R. 442; 21 Digest (Repl.) 232, *253*.

Re Wilson, Ex parte Vine (1878), 8 Ch.D. 364; 47 L.J.Bcy. 116; 38 L.T. 730; 26 W.R. 582, C.A.; 5 Digest (Repl.) 727, *6296*.

Re Hutton, Ex parte Benwell (1884), 14 Q.B.D. 301; 54 L.J.Q.B. 53; 51 L.T. 677; 33 W.R. 242; sub nom. *Ex parte Hutton*, 1 T.L.R. 148, C.A.; 5 Digest (Repl.) 995, *8025*.

Re Shine, Ex parte Shine, [1892] 1 Q.B. 522; 61 L.J.Q.B. 253; 66 L.T. 146; 40 W.R. 386; 8 T.L.R. 279; 36 Sol. Jo. 295; 9 Morr. 40, C.A.; 5 Digest (Repl.) 994, *8020*.

Re Rogers, Ex parte Collins, [1894] 1 Q.B. 425; 63 L.J.Q.B. 178; 70 L.T. 107; 10 T.L.R. 24; 1 Mans. 387; 10 R. 469; 5 Digest (Repl.) 784, *6656*.

Cohen v. *Mitchell* (1890), 25 Q.B.D. 262; 59 L.J.Q.B. 409; 63 L.T. 206; 38 W.R. 551; 6 T.L.R. 326; 7 Morr. 207, C.A.; 5 Digest (Repl.) 787, *6675*.

Application by the official receiver, as trustee in the bankruptcy of Graydon, for a declaration that certain moneys due and to become due to the bankrupt under an agreement made since the bankruptcy belonged to the trustee.

On Aug. 12, 1892, a receiving order was made against the bankrupt on which he was adjudicated on Aug. 16, 1892. On April 14, 1894, the bankrupt while undischarged entered into an agreement with the Great Wheel Co., by which he gave them the exclusive right to erect and work a great wheel at Earl's Court which he had invented, and for which he had taken out letters patent on Sept. 26, 1893. Under the agreement the bankrupt was to receive a sum of £500 in cash and a royalty of £10 a week so long as the wheel was running. Shortly afterwards the official receiver gave the company notice that he claimed all the bankrupt's interest under the agreement.

In 1895 the great wheel was erected at the Earl's Court Exhibition, and in August there became payable in royalties to the bankrupt from the company a sum of £20, which the official receiver claimed, and which, after the receipt of the notice, the company declined to pay over to the bankrupt. On Oct. 21, 1895, an order was made in the Brompton County Court on an interpleader summons remitted there, to which the official receiver and the company were parties, for the payment of the £20 to the bankrupt by the company, as these royalties were the personal earnings of the bankrupt, and leave to appeal was refused. Further royalties became payable under the agreement, and the official receiver claimed these as well as any further royalties that might become due for the benefit of the creditors. The bankrupt's solicitor also put in a claim for his costs incurred in relation to the patents under a charge given to him in March, 1895, by the bankrupt on the patents and the royalties under them.

By the Bankruptcy Act, 1883:

"Section 53.—(2.) Where a bankrupt is in the receipt of a salary or income other than as aforesaid [i.e., the pay or salary of an officer or civil service clerk], or is entitled to any half-pay or pension, or to any compensation granted by the Treasury, the court on the application of the trustee shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

H. Reed, Q.C., and *Muir Mackenzie* for the official receiver.
J. B. Butcher for the bankrupt and Mr. Kimber the solicitor.

Cur. adv. vult.

February 17, 1896. **VAUGHAN WILLIAMS, J.**—The question in this case is, whether the trustee is entitled to a declaration that certain payments in the nature of royalties for the licence to use a patented article, that is to say, a great wheel for the carriage of passengers erected at the Earl's Court Exhibition, under letters patent taken out by the bankrupt since the making of the receiving order in August, 1892, and payable to the bankrupt under an agreement also made since the date of the receiving order between him and the Great Wheel Co., Ltd., pass to the trustee. The bankrupt says that the trustee is not entitled to this declaration, first, because the sums payable are in the nature of personal earnings and as such do not pass to the trustee; secondly, the bankrupt says that, in prior litigation between him and the trustee, namely, on the trial of an interpleader issue remitted from the High Court to the county court, it was decided that the sums thus payable to the bankrupt were in the nature of personal earnings, and did not pass to the trustee, and that the trustee is estopped by that decision from asserting the contrary.

I will deal first with the point of estoppel. In my judgment, if this question was in issue between the bankrupt and the trustee in the county court, and was decided between the parties, the trustee would be estopped by the decision; but I do not think that it was proved that the point was decided in the county court. The sum of money as to which the interpleader issue was raised was a sum of £20, two early instalments of the sums payable to the bankrupt. It seems to me on the authorities that it is not true to say that no personal earnings of the bankrupt after the bankruptcy pass to his trustee. The authorities are not very clear, but I think that, on the balance of the authorities (see *Wadling* v. *Oliphant* (1), and the cases there cited), that it is only personal earnings necessary for the maintenance of the bankrupt and his family which do not pass to the trustee. This is in accordance with the principles which underlie s. 53 of the Bankruptcy Act, 1883, with regard to appropriation of a portion of salary.

This being so, it seems to me that the county court judge did not decide anything more than that the £20 in question was not more than was necessary for the reasonable maintenance of the bankrupt—that is to say, that, even assuming the county court judge to have decided that the sums payable were in the nature of personal earnings, no estoppel arises as to the question of future earnings necessary for the maintenance of the bankrupt. That the decision of the county court judge was given in reference only to the amount in issue seems to me the fair inference from his observations when asked for leave to appeal. I also think that the fair inference from his judgment is that he did decide the sums in question were in the nature of personal earnings, and that the trustee is estopped from denying this to be the nature of the payments when made. I shall not, therefore, go into this question, but merely consider the question of quantum.

I think that £5 a week is a fitting sum for the bankrupt to retain as reasonable maintenance for himself and family. There must, however, be first deducted from the sums payable the amounts due to Mr. Kimber for costs of the creation of the fund. Then will come the bankrupt's £5, and the residue will pass to the trustee.

Solicitors: *R. Davies; E. Kimber; Hasties.*

[*Reported by* W. B. Yates, Esq., *Barrister-at-Law.*]

Re ROUNDWOOD COLLIERY CO., LTD. LEE *v.* ROUNDWOOD COLLIERY CO., LTD., AND OTHERS

[Court of Appeal (Lindley, A. L. Smith and Rigby, L.JJ.), January 11, 12, 30, 1897]

[Reported [1897] 1 Ch. 373; 66 L.J.Ch. 186; 75 L.T. 641; 45 W.R. 324; 13 T.L.R. 175; 41 Sol. Jo. 240]

Bill of Sale—Lease—Mining lease—Power to distrain for rent "in or about any of the premises hereby demised or any adjoining or neighbouring collieries."
Company—Debenture—Floating charge—Distress for rent—Seizure of goods subject to charge—Subsequent order for winding-up—Validity of distress.

By a lease dated Nov. 20, 1891, by which the defendant demised to a company a seam of coal adjoining the mine then being worked by the company, it was provided that the defendant should have power in case of non-payment of the rent to distrain on and sell the goods and chattels of the company "in or about any of the premises hereby demised or any adjoining or neighbouring collieries." The lease was not registered as a bill of sale under the Bills of Sale Acts.

On Sept. 24 the company resolved to wind-up voluntarily. On Oct. 1 an action was begun by debenture holders having a floating charge on the property of the company. On Oct. 12 the defendant distrained for rent and seized goods and chattels of the company subject to the charge. On Oct. 13 the resolution to wind-up was confirmed and a liquidator was appointed. On Oct. 15 a receiver was appointed in the debenture holders' action and he took possession of the property of the company.

Held: (i) if the provision in the lease was to be regarded as a power of distress for rent, it was not a "licence to take possession of personal chattels as security for a debt" within s. 4 of the Bills of Sale Act, 1878; if it was to be regarded as a power of distress for a debt so as to fall within s. 6 of the Act, then, it being a common provision in a mining lease, it fell within the exception "agreement not being a mining lease" in s. 6; therefore, the lease was not a bill of sale which was void for lack of registration;

(ii) the distress, having been made before the commencement of the winding-up on Oct. 13 and before a receiver was appointed, was valid as against the debenture-holders.

Notes. Referred to: *Venner's Electrical Cooking and Heating Appliances* v. *Thorpe*, [1915] 2 Ch. 404; *Re Winterbottom (Leeds), Ltd.*, [1937] 2 All E.R. 232.

As to power to distrain constituting a document a bill of sale, see 3 HALSBURY'S LAWS (3rd Edn.) 263 et seq.; and for cases see 7 DIGEST (Repl.) 26, 27. For Bills of Sale Act, 1878, see 2 HALSBURY'S STATUTES (2nd Edn.) 557. As to debentures generally, see 6 HALSBURY'S LAWS (3rd Edn.) 466 et seq., and for cases see 10 DIGEST (Repl.) 763 et seq.

Cases referred to:

(1) *Daniel* v. *Gracie* (1844), 6 Q.B. 145; 13 L.J.Q.B. 309; 8 Jur. 708; 115 E.R. 56; 18 Digest (Repl.) 260, *104.*

(2) *Morton* v. *Woods* (1869), L.R. 4 Q.B. 293; 9 B. & S. 632; 38 L.J.Q.B. 81; 17 W.R. 414, Ex. Ch.; 7 Digest (Repl.) 14, *60.*

(3) *Daniel* v. *Stepney* (1872), L.R. 7 Exch. 327; 27 L.T. 380; 21 W.R. 17; reversed (1874), L.R. 9 Exch. 185; 22 W.R. 662, Ex. Ch.; 18 Digest (Repl.) 305, *511.*

(4) *Re Willis, Ex parte Kennedy* (1888), 21 Q.B.D. 384; 57 L.J.Q.B. 634; 59 L.T. 749; 36 W.R. 793; 4 T.L.R. 637; sub nom. *Re Willis, Ex parte Lady Willoughby de Eresby*, 5 Morr. 189, C.A.; 7 Digest (Repl.) 26, *124.*

(5) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L.J.Ch. 292; 64 L.T. 487; 39 W.R. 369; 7 T.L.R. 282; 2 Meg. 418, C.A.; 1 Digest (Repl.) 32, *163.*

(6) *Pulbrook* v. *Ashby & Co.* (1887), 56 L.J.Q.B. 376; 35 W.R. 779; 7 Digest (Repl.) 15, *63.*

(7) *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, *Howard* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93; 65 L.J.Ch. 536; 74 L.T. 473; 44 W.R. 536, C.A.; 10 Digest (Repl.) 782, *5081.*

(8) *Re Opera, Ltd.*, [1891] 3 Ch. 260; 60 L.J.Ch. 839; 65 L.T. 371; 39 W.R. 705; 7 T.L.R. 655, C.A.; 10 Digest (Repl.) 783, *5091.*

Also referred to in argument:

Re Bowes, Ex parte Jackson (1880), 14 Ch.D. 725; 43 L.T. 272; 29 W.R. 253, C.A.; 5 Digest (Repl.) 1032, *8343.*

Re Stockton Iron Furnace Co. (1879), 10 Ch.D. 335; 48 L.J.Ch. 417; 27 W.R. 433, C.A.; 7 Digest (Repl.) 15, *61.*

Coltess Iron Co. v. *Black* (1881), 6 App. Cas. 315; 51 L.J.Q.B. 626; 45 L.T. 145; 46 J.P. 20; 29 W.R. 717; 1 Tax Cas. 287, H.L.; 28 Digest (Repl.) 143, *546.*

Re Marriage, Neave & Co., North of England Trustee, Debenture and Assets Corpn. v. *Marriage, Neave & Co.*, ante p. 393; [1896] 2 Ch. 663; 65 L.J.Ch. 839; 75 L.T. 169; 60 J.P. 805; 45 W.R. 42; 12 T.L.R. 603; 40 Sol. Jo. 701, C.A.; 10 Digest (Repl.) 830, *5429.*

Wheatley v. *Silkstone and Haigh Moor Coal Co.* (1885), 29 Ch.D. 715; 54 L.J.Ch. 778; 52 L.T. 798; 33 W.R. 797; 10 Digest (Repl.) 770, *5009.*

Krehl v. *Great Central Gas Co.* (1870), L.R. 5 Exch. 289; 39 L.J.Ex. 197; 23 L.T. 72; 19 W.R. 1035; 5 Digest (Repl.) 977, *7884.*

Appeal by the defendant, the Earl of Effingham, from a decision of STIRLING, J., on a motion by the liquidator of the Roundwood Colliery Co., Ltd., who was also the receiver and manager of the assets of the company for an injunction to restrain one Foljambe and Lord Effingham from selling any of the chattels and effects of the company seized by them under distresses for rent accrued under leases by them to the company of certain seams of coal. STIRLING, J., granted the injunction and Lord Effingham appealed.

Graham Hastings, Q.C., and *Upjohn* for Lord Effingham.

Buckley, Q.C., *Younger*, and *Eustace Smith* for the liquidator.

Cur. adv. vult.

Jan. 30, 1897. The following judgments were read.

LINDLEY, L.J.—This is an appeal from an order of STIRLING, J., restraining a lessor of a seam of coal in Yorkshire from selling under a distress for rent goods of his lessee, but which goods were seized on lands not comprised in the lease. STIRLING, J., held that the power to distrain for rent off the premises demised was a bill of sale within s. 4 of the Bills of Sale Act, 1878, and that, as the lease was not registered as a bill of sale, the distress was invalid. Another question was raised before us, which was that, assuming the power of distress to be valid, it was exercised too late to prevail against the debenture-holders of the company which was the lessee. This latter question turns upon circumstances which have no bearing on the decision on the Bills of Sale Act, and for the present it will be convenient to consider those facts only which are material to the extremely important question to which that Act gives rise.

The Roundwood Colliery Co., Ltd., is a company which at the date of the lease under which the distress was made was working a colliery at Rotherham, in Yorkshire, under a lease from a gentleman named Foljambe. This colliery had a shaft of its own through which the coal was raised; and which, of course, could be used for working any adjoining minerals which the company might acquire and properly work through Foljambe's colliery. By a lease dated Nov. 20, 1891, the Earl of Effingham demised to the company a seam of coal adjoining Foljambe's colliery at rents varying with the acreage worked. Although these rents were in the nature of royalties payable for the coal won, they were rents which could be distrained for at common law on the property demised without any express power of distress. This point was settled in *Daniel* v. *Gracie* (1). The lease, however, contained a power in case of non-payment of the rent to distrain upon and sell the goods and chattels of the company "in or about any of the premises hereby demised or any adjoining or neighbouring collieries." These last words give rise to the difficulty which has arisen. The seam of coal demised by the Effingham lease has always, in fact, been worked through the adjoining mine held by the company under Mr. Foljambe. It is plain, moreover, that this was always contemplated. The lease contained no demise of any surface lands; no provision was made for sinking any pit or shaft, and only one seam of coal was comprised in the lease.

The words "neighbouring colliery" are large enough to apply to collieries in the neighbourhood not worked with the seam of coal demised. I am, however, of opinion that to construe those words in that wide sense would be unreasonable and extravagant. The power of distress must, in my opinion, be construed to apply to those neighbouring mines only which, though not actually adjoining the seam of coal demised, might be or become connected with it by underground workings. This is a matter of some importance; for, if the power of distraining off the property demised extended to any goods and chattels of the lessee on any mines

in the neighbourhood wholly unconnected with the property demised, the power would be very unusual, and might well be regarded as a licence to seize and sell chattels as distinguished from a power of distress for rent. If, however, the power is read as I read it, that is, as confined to the goods of the lessee on adjoining or neighbouring mines worked with the seam of coal demised, the power is one which is very common in mining leases where the minerals demised are to be worked through and with other mines worked by the same lessee. The precedent referred to by counsel for Lord Effingham from DAVIDSON'S, and KEY AND ELPHINSTONE'S well-known collections, and other precedents which are to be found in BAINBRIDGE ON MINES (4th Edn.), p. 825, and in 3 BLYTHEWOOD'S PRECEDENTS BY ROBBINS (4th Edn.), p. 598, show that such a power is by no means uncommon in mineral leases. I do not say it is a usual clause which would be inserted if parties differed, but it is a clause very commonly inserted in such cases as I have mentioned.

Passing now to the Bills of Sale Acts, and speaking of them generally, it is impossible to read the preamble of the Act of 1854, which is the first of the series, without seeing that those Acts are not Acts to amend the law of real property, or the law relating to leases. The object of the Acts is to prevent secret pledges of chattels for money lent. It was not their object to interfere with leases or powers of distress for rents, although provision is made by s. 6 of the Act of 1878 for attornments and leases and powers of distress created to secure the repayment of money lent on the security of chattels. I will return to this section presently. *Morton v. Woods* (2) went far to show that the Act of 1854 did not apply to ordinary leases. In *Daniel* v. *Stepney* (3) the power of distress in a mining lease was extended to chattels off the land demised. The case was decided on demurrer. The pleadings might have raised, but did not raise, the point that the power was invalid under the Act of 1854 as against the plaintiffs, who were trustees for the lessee's creditors. The probable explanation of this is that, having regard to *Morton* v. *Woods* (2), the point was not considered worth raising. Other cases, especially *Re Willis* (4) and *Re Standard Manufacturing Co.* (5), may also be referred to as showing that distresses for rent, not reserved to secure some other debt, are outside the Bills of Sale Acts altogether.

As, however, the exact point which has to be determined has not yet been actually decided, it is necessary to examine more closely ss. 4 and 6 of the Bills of Sale Act, 1878, on which the case really turns. Section 4 provides that a bill of sale shall include

> "powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt."

Section 6 provides as follows:

> "Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress: Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent."

It is plain that s. 6 was inserted in order to extend the operation of s. 4. Section 4 says what a bill of sale shall include. Powers of distress for rent are not mentioned.

The only words used in s. 4 which are material for the present purpose are "licences to take possession of personal chattels as security for any debt." Those words are the same as those used in the previous Act of 1854, see s. 7. But s. 6 is evidently based upon the supposition that powers of distress for rent are not within s. 4. Section 6 expressly deals with powers of distress, and says that such powers, if conferred by way of security for any debt or advance, are to be "deemed to be bills of sale"—language which plainly does not include an ordinary lease or distress for rent, which is not itself a security for some other debt. But then s. 6, while enacting that powers of distress if conferred by way of security for a debt or advance are to be deemed bills of sale, contains two exceptions, viz. (i) mining leases, and (ii) leases at fair and reasonable rents by mortgagees in possession to their mortgagors. Why mining leases were excepted from s. 6 I cannot say. Possibly it was to prevent any doubt arising as to the validity of powers of distress for payments which cannot be distrained for at common law, especially in those so-called mining leases which are mere licences to win and remove minerals. Anyhow, s. 6 cannot invalidate any mining lease, nor any power of distress which is commonly inserted in such a document.

The case, therefore, stands thus. If the power of distress in the present case is to be regarded as a power of distress for rent, it is out of the Bills of Sale Act altogether, and is neither within s. 4 nor within s. 6 of the Act of 1878. If, on the other hand, the power of distress in the present case is not to be regarded as a power of distress for rent, but as a power of distress for a debt, so as to fall within s. 6, then, being a common provision in a mining lease, it falls within the exception contained in the same section. Either way, therefore, it appears to me that this power is not invalidated by the Act of 1878. If, indeed, powers of distress for rent were "licences to take possession of personal chattels as security for a debt" within the meaning of s. 4 the case would be very different, for it is reasonably plain that the object and effect of s. 6 are to extend and not to curtail the operation of s. 4. *Pulbrook v. Ashby & Co.* (6), on which STIRLING, J., relied, appears to me quite consistent with the above view. The power of distress there was not for rent, but for the price of goods sold. Such a power clearly falls within s. 4. The decision was quite right. I have no doubt that a power of distress for rent off property demised might be so unusual and suspicious as to justify the inference that a lease containing such a power was being used as a cloak for a transaction which really fell within s. 4. But no such inference is possible in the present case. For these reasons I am unable to concur in the view taken by STIRLING, J., that the power of distress in this lease is invalid by reason of the Bills of Sale Act.

There remains the other point, to which the learned judge did not allude, viz., the right to distrain as against the debenture-holders of the company. The company had issued debentures in the ordinary form, and those debentures created what is called a floating charge on the goods and chattels of the company. On Sept. 24, 1896, the company resolved to wind-up voluntarily, and on Oct. 1, 1896, an ordinary debenture-holders' action was commenced. On Oct. 7, 1896, an order appointing a receiver was made, subject to his giving security. This order, however, was not drawn up, and there is no proof that the lessor [Lord Effingham] had notice of it. On Oct. 12, 1896, the lessor distrained and seized goods and chattels of the company which were off the property demised, viz., on Mr. Foljambe's adjoining colliery. On Oct. 13, 1896, the resolution to wind-up was confirmed, and a liquidator was appointed. The winding-up of the company commenced on this day. On Oct. 15, 1896, judgment was given in the debenture-holders' action, and the receiver, having given security, was appointed, and he proceeded to take possession of the property of the company. Shortly afterwards applications were made by the liquidator and by the plaintiff in the debenture-holders' action to stay a sale of the goods distrained, and on Nov. 28, 1896, an order staying the sale was made, on the ground that the distress was invalid under the Bills of Sale Act.

A This ground being, in my opinion, erroneous, it becomes necessary to consider the respective rights of the landlord and of the debenture-holders to the goods seized. These rights depend upon the question whether the landlord distrained while the debentures were still a floating security, or whether the debentures are to be regarded as having definitely attached to the goods seized, so that, as between the landlord and the debenture-holders, those goods had become the B property of the latter before the landlord seized them. It is not contended that the landlord could distrain off the property demised on goods which were not the goods of the company, both at law and in equity. The debenture-holders contend that the goods seized were not the goods of the company, except subject to the equitable charge created by the debentures. As between the debenture-holders and the company this proposition is true, but it does not decide the respective C rights of the lessor and the debenture-holders, which is what we have to consider. The goods seized by the lessor were seized under a power conferred either before the debentures were issued or while they were clearly a floating security, and in either case that power could be exercised before the debentures ceased to be floating securities. They did not cease to be so before the distress was put in. The winding-up did not commence until after that date, nor was any effectual order D for a receiver made until after the same date. The order of Oct. 7 was never really effective. It was never drawn up, the lessor had no notice of it, and before the receiver could take possession he had to give security.

The distress, having been made before the commencement of the winding-up of the company, and before a receiver was effectively appointed, was, in my opinion, valid E as against the debenture-holders. This conclusion is in accordance with the decision in *Biggerstaffe* v. *Rowatt's Wharf, Ltd.* (7)—the set-off case—and is not at all inconsistent with *Re Opera, Ltd.* (8), in which it was held that the sheriff could only seize the goods of a company subject to the equitable rights of the debenture-holders. The right of the sheriff to seize was not conferred by the debtor either before the debentures were issued or afterwards with the implied authority of their F holders. For these reasons I am of opinion that the appeal should be allowed, and the order appealed from should be reversed, with costs both here and below. If the goods seized have been sold by the receiver he must pay over the proceeds of sale to the lessor or so much of them as may be necessary to cover the rent distrained for and the costs of the distress.

G **A. L. SMITH, L.J.**—In this case this court is asked to hold that a mining lease, granted by the Earl of Effingham for the purpose of enabling his lessees to work the demised coal, reserving therefor an acreage rent, is a bill of sale within the meaning of the Bills of Sale Acts, and, consequently, that the lease is void, it not having been registered pursuant to those Acts.

It appears that in the years 1890 and 1891 the Earl of Effingham and Mr. H Foljambe were respectively owners of seams of coal lying adjacent to each other in the county of York. The shaft whereby these coals would be brought to bank was situated upon the lands of Mr. Foljambe. In these circumstances, in the year 1890 a mining lease was granted to a limited company by Mr. Foljambe, which contained the usual covenants to be found in mining leases, as also the covenant by the lessees to pay the rent reserved. It also contained the following power of I distress:

> "Provided always, and it is hereby agreed and declared, that if, and whenever any of the rents shall be in arrear for twenty-one days, the lessor, his heirs, or assigns may enter and seize, distrain, sell, and dispose of in the same manner as landlords may for rent in arrear, any engines, machinery, implements, tools, chattels, or effects then belonging to the lessees or their assigns, in or about any of the premises hereby demised, or any adjoining or neighbouring collieries."

In 1891 the Earl of Effingham granted a similar lease of his seams of coal to the same lessees, and this lease contained an identical power of distress as that contained in the lease granted by Mr. Foljambe. In due course of working, the coal won by the lessees from the Earl of Effingham's seams was taken by them through the workings in Mr. Foljambe's land, and was brought to bank up the shaft constructed thereon, the coal from the two properties being thus worked together.

The question is: Is this lease by the Earl of Effingham a bill of sale? I should have thought off-hand that the answer would be "No." But STIRLING, J., has held the contrary, and as in argument it has been strongly insisted by counsel for the liquidator that he is right, the matter obviously requires serious examination. In the first place, I cannot doubt that, had the express power of distress in default of payment of the contracted rent contained in this lease by Lord Effingham been confined to seizing, distraining, selling, and disposing of the lessee's chattels in or about the demised premises, it could not have been maintained that the power caused the lease to be a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878; for, though such a power might be said to be within the words "licences to take possession of personal chattels as security for a debt," yet, in my judgment, such a power is not within either the object of, or the mischief aimed at by, the Bills of Sale Acts, which apply to dealings between creditors and debtors and not to leases between landlords and tenants.

The object of the Bills of Sale Acts was not to bring bona fide leases within the provisions of those Acts. Such leases are outside those Acts altogether. In *Re Willis* (4) LINDLEY, L.J., sets forth the true view of the provisions of the Bills of Sale Acts, 1854 and 1878. He points out that if those Acts are looked at it will be seen that what the legislature was aiming at was not the case of leases between landlords and tenants, but the rendering of it compulsory on lenders of money on the security of goods and chattels to register their securities, and that, if money be lent on the security of chattels, this must be done by a registered bill of sale, and in that I entirely agree. BOWEN, L.J., also, when delivering the judgment of this court in *Re Standard Manufacturing Co.* (5), showed that, until the passing of the Act of 1882, the express and avowed design of the legislature was to strike at frauds perpetrated upon creditors by secret bills of sale; and that, although the general words in the Act—the question before the court there was whether debentures of a joint-stock company were bills of sale—were large enough to include debentures, yet they could not, considering the manifest objects of the Acts, be brought within their meaning. I cannot think that, though in a mining lease, or indeed in any other lease, there be an express power to distrain upon the demised premises, such a power comes within the true meaning of the words "licence to take possession of personal chattels as security for a debt," and thus render the lease a bill of sale, and I have no doubt that it does not. Indeed this was not disputed at the Bar; but why not, if such a power is within the actual words of s. 4 of the Act of 1878?

It was said that such an express power in a lease was merely the expression of the right that every landlord possessed at common law—namely, a right of distress upon the demised premises, and was not, therefore, within the meaning of the words of the section. But I think that the true answer to be given is, because real leases with real rents reserved are not within the scope of the Bills of Sale Acts at all. I do not doubt that there may be provisions inserted in a lease which would bring the instrument, although principally a lease, within the provisions of the Bills of Sale Acts, and *Pulbrook* v. *Ashby & Co.* (6) is an instance of this. There, by the lease, the landlord took an express power to distrain upon the demised premises for money due for goods sold and delivered by him to the tenant, and this power of distress was held to be a "licence to take possession of personal chattels as security for a debt" within s. 4, and in this I agree. It was a power having no relation whatever to rent due from a tenant to his landlord; it was altogether outside the relationship of landlord and tenant, and had reference

A to that of debtor and creditor. To get a lease within s. 4 of the Act of 1878 there must be in the lease something in addition to and dehors the lease which sins against the provisions of the Bills of Sale Acts.

STIRLING, J., said the present case was

"on all fours with that of a lessor granting an ordinary lease of a house, but reserving to himself a power to distrain on goods of the lessee found in another B house not comprised in the lease;"

and he thought that "such a power would be 'a licence to take possession of personal chattels as security for a debt.'" Such a power, I apprehend, would be wholly exceptional if not unique. I never saw the like. If the power to distrain in the present case gave power to distrain upon the goods of the lessee, say in Grosvenor C Square, as was put in argument, I should have thought that such an exceptional and peculiar power might legitimately give rise to the inference that it was not really a power whereby to enforce the landlord's usual and ordinary rights against his tenant, but inserted for some other purpose foreign to the relationship of landlord and tenant, in which case the instrument might well be held to be a lease and something more, which something more might then come within the words of s. 4 as a "licence to take possession of personal chattels as security for a debt," D and thus be a bill of sale, and require to be registered. But that case is not this case. In the present case the power to distrain upon "any adjoining or neighbouring colliery" is by no means unique or exceptional in mining leases. It is a power inserted in mining leases when it is intended that two collieries are to be worked together as in the present case, and so we find a like power was inserted in the lease by Mr. Foljambe. Similar forms of powers are to be found in the E recognised and well-known precedents of forms of mining leases. To these LINDLEY, L.J., has referred.

The true construction of this power to distrain upon "any adjoining or neighbouring collieries" is not, in my opinion, a power that the lessor may distrain upon the lessees' chattels upon any collieries in the neighbourhood, no matter F where situated upon which the lessees might happen to have chattels. The power is expressly confined to adjoining or neighbouring collieries, and it would be a most unreasonable, and not the true construction of the power, to hold that it extended to collieries wholly unconnected with the demised seams of coal. It is a power limited by the subject-matter to which it was applied, viz., a power to distrain upon an adjoining or neighbouring colliery worked as in this case in connection with the G demised premises. I cannot bring myself to think that the present lease is a mining lease and something more, for, in my judgment, it is a mining lease and nothing more, and, therefore, not a bill of sale within the true intent and meaning of s. 4 of the Act of 1878.

As regards the argument of counsel for Lord Effingham founded upon s. 6, viz., that this section comprises real bona fide transactions between real landlords and H real tenants in which are reserved real rentals, and consequently as leases are within s. 6, they are not within s. 4, I am by no means convinced that s. 6 applies in any way to what I will call real bona fide leases between landlords and tenants with real rents, and, in my opinion, it does not. In my view, s. 6 was intended to defeat the schemes of lenders of money who had resort to forms embracing ostensibly the relation of landlords and tenants for the purpose of securing their I advances and the accruing interest thereon, and that it does not embrace the case of real bona fide leases with actual rents. But if I am wrong as to this, and s. 6 does include such leases, though I think it does not, then it is obvious it does not include the present case, for mining leases are expressly excepted from the section. As regards the further point which was taken by counsel for the liquidator that, if the power to distrain be held valid, and the lease not a bill of sale, in that case the distress could not be made effective against the debenture-holders, I have nothing to add to what my brother LINDLEY has said thereon, and I agree with him. For these reasons I think this appeal must be allowed.

RIGBY, L.J.—Concurring as I do in the judgments already given, I will only say, out of respect for the learned judge from whose judgment we are differing, so much as will explain my view of the true construction of the Bills of Sale Act, 1878. By s. 3 the Act is to apply to

> "every bill of sale . . . whereby the holder or grantee has power . . . to seize or take possession of any personal chattels comprised in or made subject to such bill of sale."

The definition of "bill of sale," which is contained in s. 4, comprises "licences to take possession of personal chattels as security for any debt," words which were found in the previous Act of 1854.

Having regard to the purview of the Bills of Sale Act, 1878, I am satisfied that it never was intended to include powers of distress contained in mining leases, or others which are reserved or incident by the common law to landlords in any usual and well-known form of lease. I think that this was clearly established before the passing of the Act of 1878, and, indeed, there were decisions which seem to me to have gone much further—namely, those which held that, where in mortgages there was an attornment at what is called a "rent," and what technically is a rent, but which was not a rent incident to any ordinary agreement between landlord and tenant, but a mere security for money, it was nevertheless outside the Act. By reason of those decisions it was thought necessary to insert the provision included in the Act of 1878, s. 6. The effect of that section is, to my mind, that, with the express exception therein contained of mining leases and leases made by mortgagees who have actually entered into possession and actually made a demise to their mortgagors, artificial rents created by attornment and also by powers of distress are not to be treated as arrangements between landlord and tenant, but that the existence of them will be treated as nothing more than giving licences to seize chattels as security for a debt, and that consequently they are within the Bills of Sale Act.

Therefore, for my part I do not doubt that the power of distress, even though it be contained and included in the lease, may be of such a nature as to be entirely outside the scope of ordinary agreements between landlord and tenant; and I should accept such a case as that of a brewer's lease as one of those cases. I think that if in a lease you take a power of distress over property entirely unconnected with the demised premises, that would be outside; as for instance, where there is a demise of one house—as in the case put by the learned judge in the court below—with a power of distress over the chattels in another. That is because no one could suppose that in the ordinary course of events the owner of a town house had in any way pledged his furniture for the rent of a property which might be situated far away in the country, and with which there was no apparent connection at all. Such a power of distress, it appears to me, would really be a licence to seize whatever chattels there might be in the house at the time when it was exercised; and with regard to those chattels in that house the rent would not be rent at all; it would be a debt, and nothing else.

That being so, we have to consider whether we can distinguish the present case from cases of that description. I think that we can, and on this plain ground. Here we have a mining lease containing provisions which, construed as they have been by LINDLEY, L.J.—a construction from which I do not differ—are, I will not say "usual," because I have no means of knowing whether they are usual or not, but at any rate not uncommon and not unreasonable terms in a mining lease, where the minerals are of necessity worked through an adjoining or neighbouring mine in the sense which we give to the words in this lease, and where the chattels may or may not be at the moment when a distress is being put in on the very mine which is the subject of the lease, or on the mine through which the minerals are being carried. The reasonableness of that view is made more clear by the fact that there may be mining leases in which powers of distress

A are given, although there be no absolute interest in any land or in any minerals demised. Though a well-known incidence of the mining industry, they are not in any way, according to my view, within the meaning of the Bills of Sale Act. I think, therefore, that this power of distress is fairly within what is understood to be an arrangement between the owners of a mine and the person who works under a lease from him, or a licence from him through a neighbouring mine. With B regard to the other question about debenture-holders, since the learned judge in the court below did not deal with that, I have nothing to add, except that I agree with what has been said on that point.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray*, for *Parker Rhodes & Co.*, Rotherham; *J.* C *& R. Gole*, for *Pashley & Hodgkinson*, Rotherham.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

D

COBURN *v.* COLLEDGE

E [COURT OF APPEAL (Lord Esher, M.R., Lopes and Chitty, L.JJ.), April 2, 1897]

[Reported [1897] 1 Q.B. 702; 66 L.J.Q.B. 462; 76 L.T. 608; 45 W.R. 488; 13 T.L.R. 321; 41 Sol. Jo. 408]

Solicitor—Costs—Recovery—Limitation of action—Time to run from date of completion of work—Effect of Solicitors Act, 1843 (*6 & 7 Vict., c.* 73), *s.* 37.

F By s. 37 of the Solicitors Act, 1843 [now Solicitors Act, 1957, s. 68] no solicitor shall commence an action for the recovery of fees until the expiration of one month after he has delivered a bill of costs to the client.

Held: this section did not affect the date when the cause of action arose, but dealt only with the procedure by which the solicitor's right might be enforced, and, therefore, the period of limitation for the action ran from the G date of the completion of the work for which the solicitor had been retained and not from the expiration of one month from the delivery of the bill.

Notes. As to limitation of actions of contract see now s. 2 (1) of the Limitation Act, 1939, which provides that such actions shall not be brought after the expiration of six years from "the date on which the cause of action accrued." For the provision that an action to recover solicitors' costs cannot be brought until one H month after delivery of the bill of costs, see now s. 68 of the Solicitors Act, 1957.

Considered: *O'Connor* v. *Isaacs*, [1956] 2 All E.R. 417. Approved: *Central Electricity Generating Board* v. *Halifax Corpn.*, [1962] 3 All E.R. 915. Referred to: *Bradford Old Bank* v. *Sutcliffe*, [1918] 2 K.B. 833; *Wild* v. *Simpson*, [1918-19] All E.R. Rep. 682; *Cheshire County Council* v. *Hopley* (1923), 130 L.T. 123; *Cayzer, Irvine & Co.* v. *Board of Trade* (1926), 95 L.J.K.B. 1054; *Dennerley* v. *Prestwich* I *U.D.C.*, [1929] All E.R. Rep. 647.

As to limitation of actions to recover solicitors' costs, see 24 HALSBURY'S LAWS (3rd Edn.) 218, para. 398, and 36 HALSBURY'S LAWS (3rd Edn.) 171, para. 233. For cases see 32 DIGEST 338. For the Solicitors Act, 1957, s. 68, see 37 HALSBURY'S STATUTES (2nd Edn.) 1109.

Cases referred to:

(1) *Read* v. *Brown* (1888), 22 Q.B.D. 128; 58 L.J.Q.B. 120; 60 L.T. 250; 37 W.R. 131; 5 T.L.R. 97, C.A.; 34 Digest 530, *33*.

(2) *Cooke* v. *Gill* (1873), L.R. 8 C.P. 107; 42 L.J.C.P. 98; 28 L.T. 32; 21 W.R. 334; 34 Digest 527, *9*.

(3) *Reeves* v. *Butcher*, [1891] 2 Q.B. 509; 60 L.J.Q.B. 619; 65 L.T. 329; 39 W.R. 626, C.A.; 32 Digest 337, *210*.

(4) *Hemp* v. *Garland* (1843), 4 Q.B. 519; 3 Gal. & Dav. 402; 12 L.J.Q.B. 134; 7 Jur. 302; 114 E.R. 994; 32 Digest 337, *209*.

Also referred to in argument:

Re Kensington Station Act (1875), L.R. 20 Eq. 197; 32 L.T. 183; 23 W.R. 463; 32 Digest 340, *235*.

Murray v. *East India Co.* (1821), 5 B. & Ald. 204; 106 E.R. 1167; 32 Digest 315, *1*.

Re Crosley, Munns v. *Burn* (1887), 35 Ch.D. 266; 57 L.T. 298; 35 W.R. 790, C.A.; 32 Digest 525, *1812*.

Ingle v. *McCutchan* (1884), 12 Q.B.D. 518; 53 L.J.Q.B. 311, D.C.; 42 Digest 148, *1472*.

Appeal from a decision of CHARLES, J., in an action brought by a solicitor against his client on a bill of costs.

On May 30, 1889, the work for which the defendant had retained the plaintiff was completed. On June 7 the defendant left the United Kingdom and remained beyond the seas until 1896. On June 12 the plaintiff posted a letter, containing a signed bill of costs, to the defendant at his place of address. On June 12, 1896, the present action was commenced, the defendant having returned to England a few weeks previously. Under these circumstances, the defendant pleaded the Statute of Limitations.

At the trial of the action without a jury CHARLES, J., held that the six years' limitation began to run under the Limitation Act, 1623, on May 30, 1889, when the work was completed, and that the plaintiff's right of action was, therefore, barred, and he gave judgment for the defendant. The plaintiff appealed.

By the Limitation Act, 1623, s. 3, it was provided that all actions of debt grounded on any lending or contract without specialty should be commenced within six years "next after the cause of such actions or suit and not after." By the Administration of Justice Act, 1705, s. 19, time did not begin to run during the absence of the defendant beyond the seas.

By the Solicitors Act, 1843, s. 37, it was provided:

> "No attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor until the expiration of one month after such attorney or solicitor . . . shall have delivered unto the party to be charged therewith . . ."

a bill of costs.

Atherley Jones, *Q.C.*, and *H. M. Sturges* for the plaintiff.
Jelf, *Q.C.*, and *F. M. Abrahams* for the defendant.

LORD ESHER, M.R.—I think that this appeal fails. It is admitted by the plaintiff that his appeal must fail if his cause of action arose on his completion of the work which he was retained to do, and it is also admitted by the defendant that the plaintiff is entitled to judgment if the cause of action did not arise until one month had elapsed after the delivery of the signed bill of costs.

No question arises as to the construction of any Statute of Limitations. In order to succeed, the plaintiff must have commenced the action within six years of his cause of action, and the only question is as to the moment when that cause of action came into existence. The action is to recover payment for work done by the plaintiff in his profession of solicitor. In an ordinary case in which a man has agreed to do work for reward, and has made no agreement with the person

for whom the work is to be done as to the date when payment is to be made, he has a right to demand payment the moment he has completed the work which he had agreed to perform, and if he has not been paid, he may commence an action to recover the money due to him directly he has completed the work. Before the passing of any legislation affecting a solicitor's right of action on a bill of costs, the solicitor was in exactly the same position as anyone else with regard to suing for payment for work done by him at another's request. There was no necessity for him to deliver to the defendant a bill of costs before issuing a writ. Therefore, the question we have to consider is whether the cause of action, which formerly arose the moment that the agreed work was completed, has been taken away or in any way altered by legislation.

It is clear that no Act of Parliament has absolutely taken away from solicitors the right to sue for payment for work done, but it has been contended that the right to sue immediately on the completion of the work has been taken away. The Limitation Act, 1623, only affects the procedure by which a right may be enforced, in a case where the person having the right neglects for six years to enforce it. Does the Solicitors Act, 1843, deal with a cause of action, or merely with the procedure by which that cause of action can be enforced? Section 37 provides that no solicitor shall "commence or maintain any action or suit for the recovery of any fees, charges, or disbursements" except under certain conditions. The section assumes that the solicitor has a right to be paid the fees and charges, and provides that that right shall not be enforced by an action until after a certain time has elapsed. The section only deals with the right to bring an action. If a solicitor is in a position to enforce his claim by any other method than an action, he is apparently not affected by the statute. For instance, if a solicitor has in his possession money belonging to his client, that is to say, money not deposited with him for any specific purpose, there is nothing in this section, so far as I can see, that would prevent the solicitor from retaining the money in payment for work done by him for his client, though the solicitor should not have previously delivered to the client a signed bill of costs. If that be the true construction of the Act, it is clear that the solicitor's cause of action is not affected by s. 37, which only touches one of the remedies by which that cause of action may be enforced.

The meaning of the expression "cause of action" was discussed in the course of the argument, and reference was made to my judgment, in *Read* v. *Brown* (1), which was decided in 1888. I there said (22 Q.B.D. at p. 131):

> "What is the real meaning of the phrase, 'a cause of action arising in the City.'? It has been defined in *Cooke* v. *Gill* (2) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

The reference there to the traversing of the facts which the plaintiff must prove was intended to make it clear that the facts referred to were the facts which the plaintiff must allege in his statement of claim. Formerly, if a plaintiff failed to aver in his declaration the facts necessary to support his claim, the defendant might have demurred. If he asserted those facts and they were traversed, it lay upon him to prove them. If they were not traversed, he was relieved from the necessity of proving them. Therefore, I think that what I said in *Read* v. *Brown* (1) was perfectly correct.

But then it was argued that what I there said was inconsistent with what was laid down in a later case in 1891, namely, *Reeves* v. *Butcher* (3), by LINDLEY, L.J., in which FRY and LOPES, L.JJ., concurred. LINDLEY, L.J., said ([1891] 2 Q.B. at p. 511):

> "This expression, 'cause of action,' has been repeatedly the subject of decision, and it has been held, particularly in *Hemp* v. *Garland* (4), decided

in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events, but it has always been held that the statute runs from the earliest time at which an action could be brought."

With deference, I do not think that what LINDLEY, L.J., there laid down differs in any way from the judgment I gave in *Read* v. *Brown* (1), and I take it to be perfectly correct. If the plaintiff alleges facts which, if not traversed, would prima facie entitle him to recover, then he shows a good cause of action.

Taking the present case, the plaintiff might have commenced the action as soon as the work was completed. If the defendant made no answer to the claim, the plaintiff would have recovered. The defendant could not formerly have demurred to such a claim, which showed a good cause of action. The claim would have been good in form unless the defendant did something to defeat it. The defendant could only have put forward the Solicitors Act by way of answer to what was on the face of it a good claim by the plaintiff. For these reasons, therefore, I think the cause of action in the present case was "given or accrued, fallen or come," as soon as the plaintiff had completed the work. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The question really is whether the time within which such an action as the present must be brought runs from the date of the completion of the work or from the expiration of one month after the delivery of the signed bill of costs under s. 37 of the Solicitors Act, 1843. In the one case the defendant will succeed; in the other he will fail. Under the Statute of Limitations this action must be brought within six years after the cause of action arose, and that is subject to the proviso that time will not begin to run during the absence of the defendant beyond the seas. Therefore, the question is when the cause of action arose. For the defendant it is contended that it arose in 1889, as soon as the work was completed which the plaintiff was retained to do, and it seems to me that that contention is correct. Before any special legislation with regard to solicitors' bills of costs, there is no doubt that an action would lie as soon as the work was done, without any bill of costs being previously delivered. What were the rules of pleading before the Judicature Act in such a case? The solicitor would have sued in indebitatus assumpsit for work and labour done. If the defendant simply pleaded never indebted, the cause of action would clearly be admitted to have arisen, if at all, when the work was done. If the defendant wished to rely upon the statutory defence of non-delivery of a bill of costs he would have pleaded it specially. The proof of delivery of a bill was not part of the plaintiff's case. That point was one put forward by the defendant in support of his own case. How, then, can it be said that the plaintiff's cause of action was not complete until the bill of costs had been delivered? If that contention were correct the plaintiff could not have declared in indebitatus assumpsit, he must have used a special count framed under the Solicitors Act. No such form as that was ever used. I think that that clearly shows that the cause of action in such a case as the present accrues when the work is completed.

The Limitation Act, 1623, only bars the remedy, it does not destroy the right. Section 37 of the Solicitors Act, 1843, seems to me to assume that there is a cause of action, and merely postpones the bringing of the action upon it until the expiration of one month after the delivery of a bill of costs. I see nothing in the section which in any way contradicts the view that the cause of action arose as soon as the work was completed. Then in answer to that it was urged that, if so, a solicitor would have less time, by one month, than anyone else in which he might commence an action for work and labour. That may be so; but on the other hand, if that argument of the plaintiff is right, a solicitor could, by refraining from delivering his bill, keep his right of action alive as long as he liked. That would be a most undesirable result. Sundry cases were referred to in which attempts

have been made to define what is "a cause of action." I agreed, and I still agree, with the view expressed by the Master of the Rolls in *Read* v. *Brown* (1), and I do not think the opinion of LINDLEY, L.J., in *Reeves* v. *Butcher* (3) in any way militates against it. I may add that LINDLEY, L.J., tells me that what he said in that case was not intended to have reference to a case like the present.

CHITTY, L.J.—I agree that this appeal must fail. The Limitation Act, 1623, was passed with the object of affording a certain amount of protection, not an absolute protection, against stale demands. The statute does not bar the debt, it only takes away the remedy by action. It also, like the Administration of Justice Act, 1705, draws a distinction between "action," and "cause of action," and for the present purpose there appears to me to be no substantial difference between the two Acts. The question in this case is when the cause of action arose? For the plaintiff it is said to have arisen only one month after the delivery of the bill, and reliance was placed upon s. 37 of the Solicitors Act, 1843. That section, I think, only creates a limitation with regard to the remedy, and does not affect the cause of action. It postpones the right of action but does not touch the cause of action which is the doing of the work. My brother LOPES has referred to BULLEN AND LEAKE ON PLEADING, and I should like to refer to an older work, CHITTY ON PLEADING. On looking at the seventh edition, published in 1844, that is to say after the passing of the Solicitors Act, 1843, it is plain that the pleaders of those days did not think it necessary to aver delivery of a bill and the subsequent lapse of one month, as part of the plaintiff's cause of action, and pleaders in those days had to be most careful in ascertaining exactly what was the cause of action and averring the necessary facts.

It is, therefore, material, I think, to see what they did in such a case as the present. I accept the definition of "cause of action" given by the Master of the Rolls in *Read* v. *Brown* (1), and I am satisfied that nothing was said by LINDLEY, L.J., in *Reeves* v. *Butcher* (3) which was meant to alter that definition. It is true that one result of our decision will be that a solicitor has only five years and eleven months in which he can begin an action on his bill of costs. I do not shrink from that result. It is to be observed, on the other hand, that, if this appeal had succeeded, a solicitor could, by not delivering his bill, postpone for any length of time, so far as I can see, his power of bringing an action. Then again it was urged that the court might say that the solicitor would be bound to deliver his bill within a reasonable time after the work was done. That suggestion does not seem to me to be satisfactory, because it is entirely contrary to the whole principles of Statutes of Limitations, the object of which is to fix a period beyond which actions shall not be brought, instead of leaving it to the court in each case to decide what is an unreasonable delay. Moreover I do not see how to extract from the language of the Solicitors' Act any such proposition as that, that a solicitor is to deliver his bill within a reasonable time.

There is one matter which I will allude to, though the argument from analogies is a dangerous one. An author whose copyright is infringed has an immediate right of action, but by s. 24 of the Copyright Act, 1842, it is provided that no proprietor of copyright in any book published after the passing of the Act shall maintain any action or suit in respect of any infringement of such copyright, unless he shall before commencing such action or suit, have caused an entry to be made in the register of the Stationers' Company of such book pursuant to the Act. I cannot see, if the plaintiff's argument here is correct, why an author should not, if he likes, delay registering his copyright for twenty years and so postpone the commencement of an action for infringement.

Appeal dismissed.

Solicitors: *Henry J. Coburn; Blair & W. B. Girling.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

DAWSON AND OTHERS *v.* AFRICAN CONSOLIDATED LAND AND TRADING CO.

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Chitty and Vaughan Williams, L.JJ.), November 10, 1897]

[Reported [1898] 1 Ch. 6; 67 L.J.Ch. 47; 77 L.T. 392; 46 W.R. 132; 14 T.L.R. 30; 42 Sol. Jo. 45; 4 Mans. 372]

Company—Director—Defect in appointment—Article providing that acts valid notwithstanding defect—Application to transactions between company and shareholders—Resolution making call on shareholders—Director who had ceased to hold qualification shares for short period not formally re-appointed—Director undischarged bankrupt when appointed.

Article 114 of a company provided that "all acts done at any meeting of the directors . . . or by any person acting as director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors . . . or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director." Article 96 provided that the office of director should be vacated "if he became bankrupt," or if he ceased to hold the qualification shares. Of the three directors of the company, T., N. and S., N., who had originally held qualification shares, unknown to the other directors had ceased to hold them for the period June 17 to June 23, 1897, and was never formally re-elected director when he again acquired qualification shares, while T. was an undischarged bankrupt at the time of his appointment. On June 23, 1897, T., N. and S. passed a resolution making calls on the plaintiffs in respect of shares held by them. The plaintiffs brought an action against the company claiming that the resolution was invalid on the ground that T. and N. had vacated their directorships before the date of the resolution. Pending the trial of the action the plaintiffs were granted an interlocutory injunction restraining the company from forfeiting, selling or re-allotting their shares and from taking proceedings to recover the amount of the call.

Held: (i) art. 114 applied to transactions between the company and the shareholders, such as calls made by the company on a shareholder, as well as to transactions between the company and strangers, and, therefore, the irregularity in N.'s appointment caused by failure of his co-directors to re-appoint him, was cured by art. 114 and the resolution was valid (*Howbeach Coal Co., Ltd.* v. *Teague* (1) (1860), 5 H. & N. 151, distinguished); (ii) with regard to T., art. 96 did not apply to the facts of the case for it did not prevent the appointment of a bankrupt as a director; accordingly, the order for an injunction would be set aside.

Notes. As to the validity of acts of directors see now s. 180 of the Companies Act, 1948. By virtue of s. 187 of the Companies Act, 1948, an undischarged bankrupt cannot now act as director except with the leave of the court by which he was adjudged bankrupt.

As to defect in the appointment of a director, see 6 HALSBURY'S LAWS (3rd Edn.) 276, para. 571; and as to an undischarged bankrupt acting as director, see ibid., 283, para. 581. For cases on the appointment of directors, see 9 DIGEST (Repl.) 451 et seq. For the Bankruptcy Act, 1914, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Howbeach Coal Co., Ltd.* v. *Teague* (1860), 5 H. & N. 151; 2 L.T. 187; 6 Jur.N.S. 275; 8 W.R. 264; 157 E.R. 1136; sub nom. *Howbeach Coal Co.* v. *Teague*, *Howbeach Coal Co.* v. *Bennett*, 29 L.J.Ex. 137; 9 Digest (Repl.) 452, *2971*.

A Also referred to in argument:

Briton Medical General and Life Association v. *Jones* (2) (1889), 61 L.T. 384; 9 Digest (Repl.) 459, *3007*.

Newhaven Local Board v. *Newhaven School Board* (1885), 30 Ch.D. 350; 53 L.T. 571; 34 W.R. 172; 1 T.L.R. 626, C.A.; 33 Digest 17, *64*.

Re London and Southern Counties Freehold Land Co. (1885), 31 Ch.D. 228; B 55 L.J.Ch. 224; 54 L.T. 44; 34 W.R. 163; 2 T.L.R. 148; 9 Digest (Repl.) 453, *2972*.

Re Alma Spinning Co., Bottomley's Case (1880), 16 Ch.D. 681; 50 L.J.Ch. 167; 43 L.T. 620; 29 W.R. 133; 9 Digest (Repl.) 546, *3593*.

York Tramways Co. v. *Willows* (1882), 8 Q.B.D. 685; 51 L.J.Q.B. 257; 46 L.T. 296; 30 W.R. 624, C.A.; 9 Digest (Repl.) 453, *2973*.

C **Appeal** from an order of RIDLEY, J., on a motion by the plaintiffs, shareholders in the defendant company, for an interlocutory injunction restraining the defendants, until judgment in the action or further order, from forfeiting shares held by the plaintiffs, selling, allotting or otherwise disposing of the shares and from taking proceedings to recover the amount of calls made on the plaintiffs.

The articles of association of the company contained the following provisions:— D By art. 41 shares might for nonpayment of calls after notice "be forfeited by a resolution of the directors to that effect." Article 90 provided that the number of the directors "shall not be less than three nor more than seven." Article 93 provided that no person other than the first directors should be qualified to be a director who was not "the holder of shares of the company of the nominal value E of £200." Article 96 provided that the office of a director should be vacated (inter alia) "if he became bankrupt, . . . or if he cease to hold the required amount of shares to qualify him for office." Article 105 provided that until otherwise determined two directors should be a quorum.

Article 114 provided:

> "All acts done at any meeting of the directors, or of a committee of directors, F or by any person acting as a director, shall, notwithstanding that it shall be afterward discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they, or any of them, were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

There were three directors of the company, Thomas Thompson, A. B. Neilson, G and E. G. Sanders. They made a call on the shareholders, and threatened to forfeit their shares for nonpayment of the calls. The plaintiffs alleged that the resolution making the call, which purported to be a resolution of the directors, was invalid, because Neilson who had been a director had ceased to be such by reason of his having for a short period lost his qualification. Neilson had originally held qualification shares but for a short period—from June 17 until June 23, 1897—he H had ceased to hold any shares, and had been off the register of shareholders and he had never been formally re-elected after he had again acquired his qualification. Thompson was also objected to by the plaintiffs on the ground that he was an undischarged bankrupt at the time of his appointment, and it was said that he, therefore, vacated his directorship immediately on his appointment.

The plaintiffs accordingly brought an action against the company and Thompson, I Neilson, and Sanders, and then moved before RIDLEY, J., sitting as vacation judge, for an interlocutory injunction. HIS LORDSHIP granted the injunction. From that decision the defendants appealed.

Alexander, Q.C., and *W. Higgins* for the defendants.

Bramwell Davis, Q.C., and *Stewart Smith* for the plaintiffs.

SIR NATHANIEL LINDLEY, M.R.—This appeal is against an order of RIDLEY, J., granting an interlocutory injunction restraining the defendants from

forfeiting certain shares, and from selling or re-allotting such shares, and from taking proceedings to recover money raised by a call on those shares. The ground upon which the motion was made before him was simply that there had been certain alleged irregularities in the appointment of the directors who had made the call. Before us, other grounds have been urged to which I will allude presently.

The various suggested irregularities, when they come to be examined, are nothing more or less than small irregularities. There is no radical defect in any one of them. I take the best. I do not propose to allude to any of the others, because I think that they are really beneath notice; but I take the best of them, which is the case of Mr. Neilson. It appears that there were originally three directors appointed by the proper parties, that is to say, as I understand it, by the subscribers to the memorandum of association. Those three were Messrs. Bradford, Sanders, and Griffiths. Nobody quarrels with their appointment. Mr. Bradford died on April 13, 1887, and a Mr. Thompson was appointed a director in his place under an article which clearly authorised that appointment, subject to the point that he was an undischarged bankrupt. What I mean is this: that it was a casual vacancy which the other two directors had power to fill, and they filled it by appointing him. There was a meeting afterwards of the shareholders, and Mr. Thompson then retired and was re-elected. It was said that the shareholders did not know that he was an undischarged bankrupt, and our attention is called to a clause in the articles of association, that a director vacates his appointment if he becomes bankrupt. But that clause does not apply to the facts with which we have to deal; and it appears to me to have been perfectly competent for the shareholders, if they chose to do so, to appoint Mr. Thompson.

Mr. Neilson was appointed in succession to the other gentlemen, Mr. Griffiths, who died in December, 1896. That was all right, and Mr. Neilson was a competent man, and Mr. Neilson remained a competent man, and a properly qualified director, till June 17, 1897, when it appears that he transferred all his shares, and for five or six days from June 17 to June 23 he had no shares. So under one of the clauses of the articles of association he vacated his office. On June 23 he acquired other shares and again became qualified. There was a meeting of the directors on June 24, at which he was present, and he acted as a director. Then, again, there was a casual vacancy which the other two directors had power to fill up, and, although it is true that they did not go through the form of passing a resolution appointing him a director, they accepted him as a director, and they allowed him to act as one; and when this call, which is impeached, was made—namely, on June 23, 1897—it was made by Mr. Thompson, Mr. Sanders, and Mr. Neilson. Mr. Neilson was then a properly qualified director, so that this irregularity, which is supposed to upset everything that was done, is reduced to this—that two of the directors who might have passed the resolution appointing Mr. Neilson did not go through the form of passing a resolution to appoint him, but acted with him as a duly appointed director. If that is not an irregularity in his appointment such as is attempted to be cured by the article which I will allude to presently, I cannot conceive what is. The objections raised are to my mind trivial and unbusinesslike, and have not a shadow of substance in them. But they are technical defects which have been laid hold of for the purpose of upsetting what has been done.

I pass to article 114, which is that

> "all acts done at any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director."

It is reducing that clause to a nullity to say that it does not apply to such trivial defects and irregularities as those with which we have to deal here. But then it

A is said that there is authority on the point, and we are told that we must, under the stress of *Howbeach Coal Co., Ltd.* v. *Teague* (1), hold that this article does not apply to such irregularities as these. I do not understand how *Howbeach Coal Co., Ltd.* v. *Teague* (1) can be cited as an authority to the effect that such an article as art. 114 only applies to outsiders dealing bona fide with the company without B notice. Of course it applies to and covers all such transactions. But there is nothing that I can discover in the judgments in *Howbeach Coal Co., Ltd.* v. *Teague* (1) which warrants the contention that this clause does not apply to calls and matters of that kind as between the company on the one side and the shareholders on the other side. *Howbeach Coal Co., Ltd.* v. *Teague* (1) is intelligible up to a certain point, and as to the rest of it, it is so reported in 5 H. & N. that I confess C that I do not thoroughly understand it. But the defect which the court put their finger down upon in *Howbeach Coal Co., Ltd.* v. *Teague* (1) was this: It was said that the persons there who made the call had been improperly appointed by three out of seven of the subscribers to the memorandum of association, which was all wrong. It was all wrong, and the validating clause there, namely, cl. 60, which was similar in its terms to art. 114 here, did not cure that radical defect in their D appointment. The court having so held, upset the call, and declared that the call was invalid. So far it is plain enough, and that was the ratio decidendi, and that I follow perfectly well.

Then comes a part of the case which I do not follow with equal ease. Granting that the appointment of the gentlemen as directors was altogether wrong, as it obviously was, and granting that the validating clause there did not apply, I do not E see myself that it necessarily follows that what they did, although they had been improperly appointed, would not be validated. I do not see that any of the judges, in giving judgment in that case, addressed himself to that point. There may be very good grounds for it. It may be that the clause did not apply even to that, because there was no subsequent discovery about it. The whole thing was above board, and the defect was taken to be known to everybody. I do not know how F that may be, but it is no authority to my mind for the proposition for which it was put forward in the present case, and which will alone assist the respondents here, namely, that art. 114 does not apply to such matters as forfeiture of shares for nonpayment of calls, that is to say, to matters between the company on the one side and the shareholders on the other. I cannot conceive why we should cut down such general language as that, and say that it applies only to outsiders. I G think that that is wrong. It appears to me, therefore, that these objections, whatever they might be worth but for this clause—and I do not think that they would be worth much without this clause—are absolutely nothing at all with it.

There is another point taken before us which is perhaps a much more serious one, or, rather, would be a much more serious one, if there were any evidence to support it. We are asked to restrain this proceeding of making calls and forfeiting H shares and so on, because the calls had been made for an improper purpose, not for the purpose of bona fide carrying on the business of the company, but for the purpose of recouping the people who have paid off the promoters under agreements which are sought to be rescinded. When you look at the writ, the writ impeaches the agreement. This is a point which might have become important, What we are told is this, that the agreement has been carried out and everything I done under it, and it is a little difficult for one shareholder to sue on behalf of himself and others to rescind an agreement between the company on the one side and the promoters on the other, which the company might have chosen to carry out in form. That form of action has to be justified, and there is no justification that I can see, even for suggesting it. But, apart from that, there is no evidence to support such an objection as this. It is a difficult case to prove, and it must be proved, if at all, at the trial. This is a mere suggestion of fraud and misconduct —a mere suggestion as to which we have nothing reliable to act upon. This part of the case was not dealt with by the learned judge in the court below at all, and

we are left to deal with it as best we can. We have heard counsel for the plaintiffs describe what took place in the court below, and it is far from sufficient to enable us to grant an interlocutory injunction. The appeal must, therefore, be allowed, and the order discharged with costs here and below.

CHITTY, L.J.—I agree. One word as to the 114th article in the articles of association. That article is not framed so as to render valid a resolution passed by any persons who assumed to act as directors of a company. The case was put by counsel during the argument that it necessarily follows that where any three or four persons went into the board-room and said: "Here we are directors," and then passed a resolution that the clause would, according to the contention on the other side, support their acts and make them valid. The mere reading, however, of the clause disposes of that. The clause is addressed, as is shown by the words "notwithstanding some defect in the appointment of the directors or persons acting as aforesaid, or that they or any of them were disqualified," to cases of that kind.

The point arose on the facts with reference to Neilson. Neilson was six days without the necessary qualification shares, namely, from June 17 to June 23. There is no evidence whatever to show that the other two directors were aware that he had parted with all his shares so as no longer to hold his qualification shares. It is said, and rightly said upon reading the articles, that he ceased to be a director because he ceased to hold the qualification shares. But on June 23 he held the qualification shares, and he went on acting as director with the other directors; and on the material date, June 23, when the resolution for the call was passed, they treated him as a director. There cannot be the slightest question that, if their attention had been drawn to the defect, they would have appointed him then and there to fill the vacancy. The exact point here is the defect in the appointment of Neilson. There is no defect in the appointment if you treat him as appointed originally. The defect was that he had become disqualified. It was agreed that there was no distinction between the defect in the appointment and the words relating to disqualification; but the words are "disqualification," and not "non-qualification at the time of appointment," which plainly refers to subsequent loss of the qualification which is required in order to enable a person to act as director. That is exactly within the words of the article. It is just one of these defects, irregularities, or whatever name of that kind one ought to call them by, which is protected by the clause.

It is then said that the article is not to operate as between the company on the one hand and the members of the company on the other; but that it is only to be applied to outsiders. The answer to that objection is, that on the face of the clause itself no such distinction is made. Whether in any case a distinction might be taken is quite another matter. It cannot be taken upon the facts of this case, and I am quite satisfied that the article does apply as between the company on the one hand and the member who is being sued for a call in the present case on the other. It is hardly necessary to add any words about *Howbeach Coal Co., Ltd.* v. *Teague* (1). There it was quite plain that the directors who were purporting to act, and whose appointment was derived from the acts of the signatories, were not well appointed; and it may well be in that case, having regard to cl. 60, the court considered that that was not a defect within the meaning of cl. 60. The reasons are not given by the learned judges why they said that cl. 60 in that case did not apply. It is quite open to say that in that particular case the appointment was so radically bad that it did not fall within the protection. For these reasons, and in conformity with what has fallen from the Master of the Rolls, I think that all these points with reference to irregularity and the like fall to the ground and are abortive; and I think it is quite unnecessary to go through somewhat similar matters which have been mentioned. This seems to me to be the only one that requires anything like a formal judgment.

Then there is the other point which was put forward at the bar before us on this

A appeal, that the call was made for a fraudulent or improper purpose; that the directors made the call in the interests of some one of them; and that the call on that ground could not be supported. Having regard to the position of the company, as well as other matters, it would require a strong case on the motion to justify us in saying that in such circumstances the call was fraudulently made. The simple answer that we have to give is, that the evidence has not proved in any B material degree the kind of case that was shadowed out by counsel for the plaintiffs. I reserve to myself the full power of considering whether three shareholders can sue effectively on any such materials as have been presented to us for the rescission of the company's contract. But really the point does not arise, because there is no case brought forward to show a preponderating control over the company's affairs by those who now have the direction of them. Nothing of C the sort has been presented to us which would justify some of the shareholders, two or three of the shareholders, in instituting this action against the company, and asking that the company's contract should be rescinded.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I only wish to say that it is not necessary to decide anything about the true meaning of the words "afterwards D discovered," because, as the Master of the Rolls has already pointed out, in this case there is no evidence whatever that the directors did know of this defect at the time of the passing of the resolution in question.

Appeal allowed.

Solicitors: *Burgoyne Watts & Co.; Wyatt Digby & Co.*

E [*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

F

BONNER AND ANOTHER *v.* TOTTENHAM AND EDMONTON PERMANENT INVESTMENT BUILDING SOCIETY

[COURT OF APPEAL (A. L. Smith, Rigby and Vaughan Williams, L.JJ.), November 30, 1898]

G [Reported [1899] 1 Q.B. 161; 68 L.J.Q.B. 114; 79 L.T. 611; 47 W.R. 161; 15 T.L.R. 76; 43 Sol. Jo. 95]

Landlord and Tenant—Lease—Assignment—Mortgage by assignee by sub-demise—Mortgagee in possession of demised lands—Payment of rent by lessee under covenant in principal lease—Lessee's right to recover from mortgagee.

H An under-lessee, who is a mortgagee by way of demise from an assignee of the lessee and is in possession of the demised lands, cannot be sued for money paid by the lessee when the lessee has been compelled, according to his covenant, to pay the rent reserved by the principal lease, for such an under-lessee is not liable to the original lessor for the rent, there being between him and the original lessor neither contract nor privity of estate, and he has not, within either the I equitable or the common law principle of common liability with the lessee, such an interest in the lease that it can be said that the payment by the lessee of the rent reserved by the lease was a payment for his benefit or relief.

Moule v. *Garrett* (1) (1870), L.R. 7 Ex. 101, distinguished.

Notes. Applied: *Metropolitan Police District Receiver* v. *Croydon Corpn.*, [1956] 2 All E.R. 785. Considered: *Monmouthshire County Council* v. *Smith*, [1956] 2 All E.R. 800. Referred to: *Brooks Wharf and Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 3 All E.R. 696; *Whitham* v. *Bullock*, [1939] 2 All E.R. 310.

As to the liability for rent of tenant and assignee on the assignment of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 651-658; and for cases see 31 DIGEST (Repl.) 443 et seq.

Cases referred to :

(1) *Moule* v. *Garrett* (1870), L.R. 5 Exch. 132; 39 L.J.Ex. 69; 22 L.T. 343; 18 W.R. 697; affirmed (1872), L.R. 7 Exch. 101; 41 L.J.Ex. 62; 26 L.T. 367; 20 W.R. 416, Ex. Ch.; 31 Digest (Repl.) 458, *5846*.

(2) *Roberts* v. *Crowe* (1872), L.R. 7 C.P. 629; 41 L.J.C.P. 198; 27 L.T. 238; 12 Digest (Repl.) 592, *4582*.

(3) *Lampleigh* v. *Brathwait* (1615), Hob. 105; 1 Brownl. 7; Moore, K.B. 866; 80 E.R. 255; 12 Digest (Repl.) 587, *4538*.

(4) *Penley* v. *Watts* (1841), 7 M. & W. 601; 10 L.J.Ex. 229; 151 E.R. 907; 30 Digest (Repl.) 519, *1583*.

(5) *Jones* v. *Morris* (1849), 3 Exch. 742; 18 L.J.Ex. 477; 154 E.R. 1044; sub nom. *Morris* v. *Jones*, 14 L.T.O.S. 41; 31 Digest (Repl.) 271, *4040*.

(6) *Hunter* v. *Hunt* (1845), 1 C.B. 300; 14 L.J.C.P. 113; 4 L.T.O.S. 374; 9 Jur. 375; 135 E.R. 555; 30 Digest (Repl.) 522, *1610*.

(7) *Dering* v. *Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270; 20 Digest (Repl.) 268, *140*.

(8) *Leigh* v. *Dickeson* (1884), 15 Q.B.D. 60; 54 L.J.Q.B. 18; 52 L.T. 790; 33 W.R. 538, C.A.; 31 Digest (Repl.) 448, *5760*.

(9) *Lewis* v. *Campbell* (1849), 8 C.B. 541; 19 L.J.C.P. 130; 14 L.T.O.S. 202; 14 Jur. 396; 137 E.R. 620; 12 Digest (Repl.) 600, *4645*.

(10) *Hyde* v. *Dean and Canons of Windsor* (1597), Cro. Eliz. 552; 78 E.R. 798; sub nom. *Hide* v. *Dean and Canons of Windsor*, Moore, K.B. 399; sub nom. *Dean and Chapter of Windsor's Case*, 5 Co. Rep. 24 a.; 40 Digest (Repl.) 342, *2773*.

(11) *Tremeere* v. *Morison* (1834), 1 Bing. N.C. 89; 4 Moo. & S. 603; 3 L.J.C.P. 260; 131 E.R. 1051; 24 Digest (Repl.) 696, *6812*.

(12) *Sapsford* v. *Fletcher* (1792), 4 Term Rep. 511; 100 E.R. 1147; 31 Digest (Repl.) 271, *4038*.

(13) *Taylor* v. *Zamira* (1816), 6 Taunt. 524; 2 Marsh. 220; 128 E.R. 1138; 31 Digest (Repl.) 269, *4029*.

(14) *Dawson* v. *Linton* (1822), 5 B. & Ald. 521; 1 Dow. & Ry. K.B. 117; 106 E.R. 1281; 31 Digest (Repl.) 337, *4707*.

(15) *Exall* v. *Partridge* (1799), 8 Term Rep. 308; 3 Esp. 8; 101 E.R. 1405; 31 Digest (Repl.) 447, *5741*.

Appeal from a decision of CHANNELL, J., at the trial without a jury of an action brought by the lessees of certain premises against the defendants, mortgagees by way of sub-demise from the assignee of the lessees, to recover the sum of £97, the amount of rent which the plaintiffs had been compelled, under their lease, to pay to the landlord in respect of a period during which the defendants had been in possession of the demised premises.

By indenture of lease dated April 3, 1882, Henry Moore demised certain houses to the plaintiffs for the term of 99 years at the yearly rent of £20 payable quarterly. The lease contained a covenant by the plaintiffs to pay the rent reserved and also a proviso for re-entry for non-payment of rent. On April 5, 1889, the plaintiffs assigned the residue of the term to Edward Price who covenanted to pay the rent reserved by the lease and to indemnify the plaintiffs with regard thereto. On Oct. 18, 1889, Price mortgaged the premises by way of sub-demise to the defendants, for the whole of the remainder of the term, less one day. The mortgage deed contained a covenant by the mortgagees that, if they should enter into possession of the mortgaged premises and receive the rents and profits, they would out of moneys so received by them in the first place pay the rent reserved by the lease of April 3, 1882. On Nov.

A 13, 1881, Price was adjudicated bankrupt. The defendants entered into possession of the premises and received the rents and profits, but did not pay the yearly rent of £20 reserved by the lease of April 3, 1882. Accordingly, the plaintiffs were compelled to pay the rent which became due while the defendants were in possession and brought the present action to recover £97, the amount paid by them. At the trial of the action by CHANNELL, J., without a jury, the learned judge gave judgment for the B defendants. The plaintiffs appealed.

Bray, *Q.C.*, and *H. Tindal Atkinson* for the plaintiffs.
Jelf, *Q.C.*, and *Grimwood Mears* (*G. Spencer Bower* with them) for the defendants.

Cur. adv. vult.

Nov. 30, 1898. The following judgments were read.

C

A. L. SMITH, L.J.—This is an action by plaintiffs who are lessees of premises for a long term to recover from the defendants £97, being rent they have had to pay to their lessor under a covenant in their lease, which rent accrued during the time the defendants were in possession of the premises as mortgagees by way of demise from an assignee of the term. Between the plaintiffs and the defendants there exists D neither contract nor privity of estate; the defendants were not liable to pay to the plaintiffs the rent in question, nor were they liable to pay it to the plaintiffs' lessor. In these circumstances my brother CHANNELL gave judgment for the defendants, being of opinion that the action was not maintainable, and that the principle of the decision in *Moule* v. *Garrett* (1) did not apply, the defendants being under-lessees and not assignees of the term as in the case cited. My brother CHANNELL held, as I E read his judgment, that no request by the defendants to the plaintiffs to pay their lessor the rent in question on their behalf could be implied whereon to maintain the action, and I am of opinion that he was right.

It is clear that no contract or privity of estate exists between the plaintiffs and the defendants, or between the original lessor, Moore, and the defendants; and, unless there be circumstances from which a request to pay can be implied, or, in F other words, a contract can be implied between the defendants and the plaintiffs that the defendants would indemnify the plaintiffs if they paid to their landlord the rent accruing while they, the defendants, were in possession, there are no circumstances which will support an action by the plaintiffs against the defendants to recover the amount so paid. It is true that Moore could sue the plaintiffs, his lessees, upon their covenant with him in the lease. It is also true that the plain- G tiffs, the lessees, could sue their assignee, Price, upon his covenant with them. It is also true that Price could sue the defendants, his under-lessees, upon their covenant with him. But how can the plaintiffs sue the defendants? I omit Price's trustee in bankruptcy, for he, in my opinion, does not affect this case.

It is said that *Moule* v. *Garrett* (1) shows that the plaintiffs can sue the defendants to recover what they have been compelled to pay to their lessor, and that this case H falls within the principle of that case. What was the case of *Moule* v. *Garrett* (1)? It was a case in which there had been two assignments of the term, the defendants being the second assignees thereof. First of all there was, as here, a lease from a lessor to the lessee, Moule, the plaintiff in the action, containing the usual covenants by a lessee. Moule afterwards assigned the term to Bartley, who afterwards assigned the term to the defendants, Garrett & Co., who then committed breaches of I covenants in the lease. Moule, having been compelled under his covenant with his lessor to pay to him damages for these breaches committed by the defendants, Garrett & Co., the assignees of Bartley, sued Garrett & Co., to recover the amount so paid by him, Moule, to his lessor. It was held that, inasmuch as both the plaintiff and the defendants were compellable to pay to the original lessor the damages accruing to him from the breaches of covenants by the defendants while assignees of the term, the former by reason of his covenant with the original lessor and the latter by reason of their being assignees of the term and having committed the breaches

while assignees, and inasmuch as the plaintiff had been compelled to pay damages to his lessor for these breaches of covenant by the defendants, for which the defendants were also compellable under privity of estate to pay to the lessor, they, the defendants, were liable to indemnify the plaintiff in respect of these payments of which the defendants had had the benefit. For, as WILLES, J., puts it in *Roberts* v. *Crowe* (2), the lessee is liable for breaches of covenant committed by the assignee, but being only secondarily liable he has his remedy over against the person primarily liable—that is, the assignee.

The ratio decidendi of *Moule* v. *Garrett* (1) is this. If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his ease. In other words, A. can call upon C. to indemnify him: see the notes to *Lampleigh* v. *Brathwait* (3), 1 Smith, L.C. (9th Edn.), p. 160, and cases there cited. To raise this implied request, both A. and C. must, in my judgment, be compellable to pay B.; otherwise, as it seems to me, the payment by A. to B. so far as regards C. is a voluntary payment, which raises no implication of a request by C. to A. to pay. If COCKBURN, C.J., in his alternative reason in *Moule* v. *Garrett* (1) for holding the defendants liable meant this by the expression "by the legal default of another," I agree; but, if it means by a default for which they were not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what COCKBURN, C.J., then said, and, indeed, WILLES, J., expressly points out that the obligation of the contract must be common to the plaintiff and the defendant, and that the whole benefit was taken by the defendants.

In the present case the defendants are under-lessees of an assignee of the term, and are not liable at all to the original lessor for rent whenever it accrued, there being between them and the original lessor neither contract nor privity of estate, and there is no suggestion that there were goods upon the demised premises available for distress other than the goods of the mortgagor Price, even if this would have sufficed to maintain the action, about which I say nothing, for it is not before me. The above, in my judgment, is what was decided in *Moule* v. *Garrett* (1), and the present case, as it appears to me, is an attempt to stretch the decision of that case, and to say that the principle therein laid down applies equally to the case of an under-lessee of an assignee who is not compellable to pay the original lessor as to the case of an assignee who is compellable to pay the original lessor. It will be seen upon looking at *Penley* v. *Watts* (4) that PARKE, B., deals with this exact point. He says (7 M. & W. at p. 608):

> "The lessee and his assignee are liable to precisely the same extent, and the assignee is a surety for the lessee, but that is not the case in a sub-lease."

Again, in *Moule* v. *Garrett* (1), in the Exchequer Chamber, when it was suggested that the case of an under-lessee of an assignee and an assignee of an assignee were the same, BLACKBURN, J., said (L.R. 7 Exch. at p. 102):

> "No, because the under-lessee has never come under any obligation to the lessor, but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation."

This is the foundation of the judgment of the Court of Exchequer delivered by CHANNELL, B., and the ground upon which the judgment was upheld in the Exchequer Chamber. The fact that in this case the defendants covenanted with Price, the assignee, that if they, the defendants, became mortgagees in possession they would pay the rent, gives Price a remedy against them subject to any set-off which may exist between him and them, and does not give the present plaintiffs a right of action against them.

In my judgment, for the reasons above, this action is not maintainable. I agree in the judgment of my brother CHANNELL, and think that this appeal must be dismissed with costs.

RIGBY, L.J.—The only question in this case is as to the liability of the defendants, who are mortgagees by sub-lease of an assignee of a lease originally granted to the plaintiffs, to indemnify the plaintiffs in respect of rent recovered by the lessor against them on their covenant in the lease. The mortgagees entered into possession of the leasehold property by virtue of their sub-term in 1890, and the assignee became bankrupt in 1891. Prima facie a sub-lessee of a lessee or assignee of a term comes under no liability to the original lessor either for payment of rent or performance of covenants in the original lease. This is true whether the sub-lease be by way of sale or by way of mortgage, and entry into possession of the sub-term does not make the sub-lessee liable to the lessor. But it is said that the present case is distinguishable from the ordinary case by the fact that the mortgagees expressly covenanted with their mortgagor (assignee of the lease) that, if they entered into possession, they would out of the rents and profits received by them (among other things) pay the rent, and that they have been, as they have, in possession during the whole time during which the rents recovered by the lessor against the plaintiffs, original lessees, have been accruing.

The argument is that they are thus placed in the position of the defendants in *Moule* v. *Garrett* (1), who were held liable to repay to the plaintiff money which the latter had been compelled to pay to the original lessors for breach of covenant in the original lease. In that case the plaintiff, like the plaintiffs here, was an original lessee who had assigned the term before the breach on which he was sued; but the defendants were not, like the defendants here, holders of a sub-term, but were the actual holders at the time of the breach by puisne assignment of the whole of the original term, and in that capacity liable by privity of estate to the original lessors for the very damages which had been recovered by them against the original lessee, who in the action was seeking to recover them over. Both plaintiff and defendants were under a direct obligation to pay the rent to the lessors; but the defendants reaped all the benefit of the payment. It was treated as plain that as between the plaintiff and the defendants, the liability of the defendants to the original lessors by privity of estate was in the nature of a primary liability, that of the plaintiff by privity of contract being secondary; and on this ground the plaintiff was held entitled to recover over against the defendants, as though he were in a manner surety for them for payment of their debt.

Here there is no privity either of estate or contract between the defendants and either the original lessor or the plaintiffs in this action, so that there can be nothing analogous to the relation of principal and surety between them. The reasoning in *Moule* v. *Garrett* (1), therefore, has no application. If the assignee had been solvent, the plaintiffs would have had a sufficient remedy in recourse to him. The fact of his having become bankrupt can give no right of action against the defendants on the principle of *Moule* v. *Garrett* (1) which did not otherwise exist. The legislature has made provision in the Bankruptcy Acts for the adjustment of rights of bankrupt holders of leases and other parties interested; and it is in bankruptcy, if anywhere, that the plaintiffs must find their remedy.

VAUGHAN WILLIAMS, L.J., stated the facts and continued: The question raised in this case, namely, whether an under-lessee, who is a mortgagee by way of demise from an assignee of the lessee, and is in possession of the demised lands, can be sued for money paid by the lessee, who has been compelled, according to his covenant, to pay the rent reserved by the principal lease, has not, so far as I know, been directly determined until now. It is plain that, generally speaking, an under-lessee, whether holding of the lessee or of the assignee of the lessee, cannot be under any obligation to indemnify the lessee against the claim of the lessor for the rent

reserved by the lease, because the under-lessor generally is presumed to indemnify the under-lessee against the rent payable by the principal lease; see *Jones* v. *Morris* (5) and the payment of the rent would not, therefore, be for his relief.

Moule v. *Garrett* (1) does not determine the question, although it goes far to define the principles upon which the question must be decided. In *Moule* v. *Garrett* (1) the defendants were not under-lessees, but assignees of the term, and the ground upon which they were held to be liable was that, the lessee and the defendants both being liable to the lessor upon all the covenants in the lease, which ran with the land, the former by contract and the latter by privity of estate, the defendants, having had the whole benefit for which the covenant was entered into by the plaintiff as lessee, were liable to recoup to the plaintiff the amount which he had been compelled to pay the lessor for breaches of covenant occurring during the defendants' possession. CHANNELL, B., in delivering the judgment of the majority of the court, says (L.R. 5 Exch. at p. 138):

> "It is true that there is no express covenant between the parties, but they are each liable to the lessor for the performance of the covenants. They are each directly liable, and the lessor may sue either at his option, but the assignee having at the time the estate which has been the consideration for the covenants ought, as between himself and the lessee, to perform them."

In *Moule* v. *Garrett* (1), in the Exchequer Chamber, BLACKBURN, J., says (41 L.J.Ex. at p. 64):

> "I express my entire concurrence in what fell from CHANNELL, B."

WILLES, J., says (ibid.):

> "I concur upon the ground that where two parties have become bound, the one by contract and the other by estate, to perform the same covenant, the former is entitled to indemnity against the latter to the extent of his interest, although there is no immediate privity of contract beween them; and I think the defendants are liable in this action by reason of their having had the whole benefit for which the covenant was entered into by the plaintiff as lessee. The principle of the decision in *Deering* v. *Earl of Winchelsea* (7) appears to govern the case."

COCKBURN, C.J., bases his judgment on precisely the same ground, but adds:

> "there is another ground upon which the judgment of the court below may be upheld, namely, that the premises, the subject-matter of this lease, being in the possession of the defendants, they were the parties whose duty it was to perform the covenants to be performed upon and in respect of those premises, and whose immediate duty it was to keep those premises in repair. By reason of their default the plaintiff, the original lessee, became liable (although he had parted with the estate) by the terms of his covenant to make good to his lessor the damage which had arisen from the default of the defendants; and I take it to be a general proposition applicable to such a case as this, that, where one man is compelled to pay damages by reason of the default of another, he is entitled to recover compensation from the person through whose default that damage is occasioned. The reason for this rule appears to be well stated in MR. LEAKE'S excellent work on CONTRACTS."

The passage referred to runs thus ((1st. Edn.), p. 41):

> "Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount."

A What (according to the judgments of CHANNELL, B., BLACKBURN, J., and WILLES, J.) were the conditions upon which the liability of the defendants to the plaintiff was based? First, that the plaintiff and defendants were both liable to be sued by the lessor for the same breaches of the same covenant. Secondly, that the defendants had had at the date of those breaches the whole benefit of the land the subject of the lease containing that covenant. These being the conditions upon which the B defendants in *Moule* v. *Garrett* (1), the sub-assignees of the lease, were held liable, it is necessary to consider whether one finds these conditions in principle present in a case in which lessees, who have been compelled to pay the rent reserved by the lease, are seeking to get recoupment from under-lessees of an assignee of the lease who are in possession as mortgagees. First, as to the common liability of the lessee and under-lessee, they clearly are not both liable to be sued by the lessor for rent. C The lessee alone can be sued, and the under-lessee is only liable to the lessor in the sense that the lessor has a remedy in rem by distress on goods on the property demised and by the power of re-entry for non-payment of rent or breach of covenant. It is in this sense only that the under-lessee can be said to be liable to the lessor for the rent, and, so far as distress is concerned, his direct liability is limited to cases in D which he happens to have goods on the land although he may have an indirect liability to indemnify against distress those who by his licence having goods on the land have been compelled to redeem their goods from distraint.

Is this a common liability within the reason upon which the condition is based? I think it is not. I am now dealing only with the principle upon which the common law liability is based. There is a common law principle of liability, and also a E principle of liability in equity, and these two principles differ. The common law principle requires a common liability to be sued for that which the plaintiff had to pay, and an interest of the defendant in the payment in the sense that he gets the benefit of the payment, either entirely, as in the case of the assignee of a lease, or pro tanto, as in the case of a surety who has paid, and has his action for contribution against his co-surety. The principle in equity seems wide enough to F include cases in which there is community of interest in the subject-matter to which the burden is attached, which has been enforced against the plaintiff alone, coupled with benefit to the defendant, even though there is no common liability to be sued. In such a case it seems to me a plaintiff may recover in equity, although there is no common liability to be sued.

The two principles are well illustrated by *Hunter* v. *Hunt* (6) and the observations G of EYRE, C.B., in *Deering* v. *Earl of Winchelsea* (7). The former was a case in which one under-lessee of a separate portion of premises, the whole of which were held under one original lease at an entire rent, who had paid the whole rent under threat of distress, brought an action against an under-lessee to recover from him a proportion of the money which he had so paid as money paid to his use, and it was held that at law he had no right of action. In the latter case, the Lord Chief H Baron, in dealing with the principle in equity, takes as an illustration of the equitable principle a series of cases, in some of which the defendant seems to have been under no liability to be sued, but in which the goods of one had been legally taken or sacrificed for the benefit, not of himself alone, but of himself and others, and says, that

I "the reason is that they are all in æquali jure, and, as the law requires equality, they shall equally bear the burden. This is considered as founded in equity. The principle operates more clearly in a court of equity than at law. At law the party is driven to an audita querela or scire facias to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law."

The audita querela, which is a defendant's writ, and the scire facias both assume a legal liability to judgment or execution in some person other than him against whom judgment has been obtained.

Leigh v. *Dickeson* (8), in which it was held that one tenant in common of a house who expends money upon repairs of the house has no right of action against his co-tenant in common for contribution in respect of money so expended, is also based upon the consideration that there is no common liability to repair, and seems further to show that in equity as well as at law there must at least be a legal liability on the plaintiff to pay the sum or bear the burden in respect of which he seeks recoupment or contribution from the defendant. This seems to me to account for the common law condition that the defendant cannot be liable to be sued for money paid unless he is personally liable to be sued for the money which the plaintiff claims to have paid to his use. The common law condition may also be explained by reference to the form of action, "money paid to the use of the defendant at his request," for it seems that, unless the defendant is under a personal liability to pay the money which the plaintiff has assumed to pay for him, one cannot imply the authority from the defendant to the plaintiff to make the payment on his behalf. This proposition does not of course extend to cases where the contractual relation of the parties, whether by express contract or by contract to be implied from their dealings with one another, raises a request or authority to pay, but otherwise I believe it of universal application in an action for money paid: see *Lewis* v. *Campbell* (9).

For these reasons I think that the right of the lessor to distrain or re-enter does not constitute a liability in the under-lessee to the lessor within the meaning of the condition of the common law principle. But the plaintiff may be entitled to recover within the equitable principle, if he has been compelled to pay or bear the burden, and can establish that the defendant has such an interest or benefit as to make the maxim apply qui sentit commodum sentire debet et onus; but, in my judgment, an under-lessee has no such interest in the lease or benefit from the payment of the rent as to make that maxim apply or to bring him within the equitable principle. The equitable principle seems to me based upon natural justice requiring that equity should neutralise inter se the accident that the burden has been borne by one for the benefit of others associated with him in interest, whether such incidence of burden is the result of election of a plaintiff who might have sued all those interested, or whether it is the result of the requirements of the law as to the parties to actions, or whether it is the result of what may be more properly called "accident," like the "jettison" of a part of a cargo severally owned, or the seizure of wines on behalf of the Crown in right of prisage.

In each of these cases the application of the equitable principle depends on community of interest in something in respect of which one has borne a burden for the benefit of another or others. The covenant in accordance with which a lessee pays rent or expends money in repairs is a covenant in a lease in which the under-lessee has no interest. He has no contractual interest, and no estate is vested in him; the only sense in which it can be said that he has an interest in the lease is that the lessee or assignee of the lease who has granted the under-lease cannot defeat his own grant by a collusive surrender of the lease to the original lessor; and it does not seem to me that this fact constitutes such an interest in him that he can within the equitable principle be said to have an interest in the lease containing the covenant under which the lessee is compellable to do the act alleged to have been done for the benefit of the under-lessee. The case of the assignee of a lease on the contrary does show the necessary interest, as is well illustrated in the judgment of POPHAM, C.J., and the whole court, in the *Dean and Chapter of Windsor's Case* (10), quoted by TINDAL, C.J., in *Tremeere* v. *Morison* (11) (1 Bing. N.C. at p. 98),

> "that the action of covenant did lie, although the lessee had not covenanted for him and his assigns; for such covenant which extends to the support of the thing demised is quodam-modo, appurtenant to it and goes with it. And in respect the lessee hath taken upon him to bear the charges of the reparations the yearly rent was the less, which goes to the benefit of the assignee, and qui sentit commodum sentire debet et onus."

A It may be remarked on this passage that the rent payable by the under-lessee has no necessary relation to the rent reserved by the lease.

In conclusion, in my judgment the defendants have not, within either the equitable or the common law principle, such an interest in the lease that it can be said that the payment by the lessees of the rent reserved by the lease was a payment for their benefit or relief, and I do not think that it makes any difference that the B under-lease was in fact a mortgage by demise.

The only other question with which I have to deal is the question whether there is anything in the provision in the under-lease or mortgage by demise, for the application of the rents and profits to the payment of the rent reserved by the lease in case the mortgagees go into possession, which will enable the plaintiffs to maintain this action. I think not. It is plain that, apart from the provision for the C application of rents and profits, an under-lessee who has bought an interest by way of under-lease from an assignee of the lease by the payment of a lump sum cannot, according to any principle, be called on to pay again for that for which he has already once paid, by indemnifying the lessee against the periodical rent as it accrues from time to time.

So far as the clause for the application of the rents and profits is concerned: first, D it is plain that the lessee cannot at law take advantage of a contract to which he is not a party. It may be true that the trustee in Price's bankruptcy, who does not seem to have disclaimed, may be entitled to compel application of the rents, profits, and proceeds to the payment of the paramount rent, as being a fund held by the defendants in trust for that purpose, and the plaintiffs are, I think, entitled to insist upon the trustee in Price's bankruptcy on proper terms taking proceedings to E enforce the application of the fund; but I do not think that the lessees can, at all events in this action, as framed and with these parties, enforce that trust. It is not as if the defendant society was in course of liquidation, and the lessees were attempting to carry in a proof to enforce the indemnity due from the estate to their debtor. It is sufficient, however, to say that the judgment of CHANNELL, J., in the F action before him was quite right, and that the plaintiffs cannot in it recover any indemnity from the defendants.

With regard to the second ground upon which COCKBURN, C.J., based his judgment in *Moule* v. *Garrett* (1), I do not think that it is anything more than a statement of the principle of *Deering* v. *Earl of Winchelsea* (7), which principle is the foundation of all the cases in which the assignee has been held liable to recoup a G lessee who has been compelled to pay rent as it were as surety for the assignee. It seems to me that no injustice is done to the plaintiffs by holding that they must fail in this action, for I am of opinion that, if they take proper steps against the trustee in bankruptcy, they can in effect recover this rent from the defendants, provided the state of things is such that the trustee can compel the defendants to apply moneys received to the payment of these rents in arrear; and moreover, as the H trustee has not disclaimed, they have, it seems, a remedy against the trustee personally as an assignee of the lease in respect of such rents as have accrued since the bankruptcy, unless and until the trustee assigns over. I have only to add with regard to *Sapsford* v. *Fletcher* (12), *Taylor* v. *Zamira* (13), *Dawson* v. *Linton* (14), and *Exall* v. *Partridge* (15), which were cited to us, that each of these cases turned really on the contractual relations of the parties.

I *Appeal dismissed.*

Solicitors: *Albert Saunders; Howard & Shelton*, for *C. E. Burrows*, Tottenham.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

HUNTER *v.* ATTORNEY-GENERAL

[House of Lords (The Earl of Halsbury, L.C., Lord Watson, Lord Shand and Lord Davey), November 17, 21, 22, 1898, May 18, 1899]

B

[Reported [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530]

Charity—Charitable bequest—Fund for purchase of advowsons and presentations —No trust imposed as to exercise of right of patronage.

By his will a testator gave so much of his residuary personal estate as should be applicable to charitable purposes to trustees upon trust to invest the same, and "apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations, or in erecting or contributing to the erection, improvement, or endowment of churches, chapels, or schools, or in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers, but upon the following conditions. . . ." The specified conditions were in effect that no churches, schools, clergy, or teachers should receive any benefit unless they belonged to the Evangelical party in the Church of England. The will contained no trust imposed upon the holders of the advowsons or presentations when purchased.

C

D

Held: there being no provision in the will that the advowsons or presentations for or towards the purchase of which grants could be given should be affected by a charitable trust, e.g., a trust imposed on the holders of the advowsons or presentations, when purchased, as to the manner in which the right of patronage was to be exercised, there was apparent no clear intention on the part of the testator that the property should be devoted to charitable purposes, and, therefore, the gift was not a charitable bequest.

E

Notes. Doubted and Distinguished: *Re Church Patronage Trust, Laurie* v. *A.-G.*, [1904] 2 Ch. 643. Considered: *Re Allen, Hargreaves* v. *Taylor*, [1905] 2 Ch. 400; *Re Sidney, Hingeston* v. *Sidney*, [1908] 1 Ch. 126. Applied: *Re Davidson, Minty* v. *Bourne*, [1908-10] All E.R. Rep. 140. Considered: *Re Clarke, Bracey* v. *Royal National Lifeboat Institution*, [1923] All E.R. Rep. 607; *Re Davis, Thomas* v. *Davis*, [1923] 1 Ch. 225. Referred to: *Higgins* v. *Dawson*, [1902] A.C. 1; *Re Pardoe, M'Laughlin* v. *A.-G.*, [1906] 2 Ch. 184; *Re Tetley, National Provincial and Union Bank of England* v. *Tetley*, [1923] 1 Ch. 258; *Re Grove-Grady, Plowden* v. *Lawrence*, [1929] All E.R. Rep. 158; *Re Hood, Public Trustee* v. *Hood*, [1930] All E.R. Rep. 215; *Re James, Grenfell* v. *Hamilton*, [1932] All E.R. Rep. 452; *Re Horrocks, Taylor* v. *Kershaw*, [1939] 1 All E.R. 579; *Chichester Diocesan Fund and Board of Finance (Incorporated)* v. *Simpson*, [1944] 2 All E.R. 60.

F

G

As to gifts for church purposes and the requisites of creation of charitable trusts, see 4 Halsbury's Laws (3rd Edn.) 223-226, 267-272; and for cases see 8 Digest (Repl.) 332 et seq., 387 et seq.

H

Cases referred to:

(1) *Doe d. Toone* v. *Copestake* (1805), 6 East, 328; 2 Smith, K.B. 495; 102 E.R. 1313; 8 Digest (Repl.) 391, *837*.

(2) *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (1888), 39 Ch.D. 492; 57 L.J.Ch. 917; 59 L.T. 393; 36 W.R. 837; 8 Digest (Repl.) 343, *243*.

(3) *Morice* v. *Bishop of Durham* (1804), 9 Ves. 399; on appeal (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

(4) *Re Macduff, Macduff* v. *Macduff*, [1896] 2 Ch. 451; 65 L.J.Ch. 700; 74 L.T. 706; 45 W.R. 154; 12 T.L.R. 452; 40 Sol. Jo. 651, C.A.; 8 Digest (Repl.) 395, *879*.

I

A (5) *Vezey* v. *Jamson* (1822), 1 Sim. & St. 69; 57 E.R. 27; 8 Digest (Repl.) 394, *864.*

(6) *Doyley* v. *Doyley*, *A.-G.* v. *Doyley* (1735), 7 Ves. 58, n.; 2 Eq. Cas. Abr. 194; 32 E.R. 35; 8 Digest (Repl.) 404, *952.*

(7) *Salusbury* v. *Denton* (1857), 3 K. & J. 529; 26 L.J.Ch. 851; 30 L.T.O.S. 63; 21 J.P. 726; 3 Jur.N.S. 740; 5 W.R. 865; 69 E.R. 1219; 8 Digest (Repl.)
B 404, *953.*

(8) *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232; 41 L.J.Ch. 388; 26 L.T. 7; 36 J.P. 516; 20 W.R. 270, L.C.; 8 Digest (Repl.) 380, *731.*

(9) *Re Douglas*, *Obert* v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 399, *906.*

C Also referred to in argument:

James v. *Allen* (1817), 3 Mer. 17; 36 E.R. 7; 8 Digest (Repl.) 391, *839.*

Ommanney v. *Butcher* (1823), Turn. & R. 260; 37 E.R. 1098; 8 Digest (Repl.) 389, *823.*

Williams v. *Williams*, *Williams* v. *Kershaw* (1835), 5 Cl. & Fin. 111, n.; 1 Keen, 274, n.; 5 L.J.Ch. 84; 7 E.R. 346; 8 Digest (Repl.) 398, *899.*

D *Towns* v. *Wentworth* (1858), 11 Moo. P.C.C. 526; 31 L.T.O.S. 274; 6 W.R. 397; 14 E.R. 794, P.C.; 44 Digest 553, *3706.*

Bruce v. *Deer Presbytery* (1867), L.R. 1 Sc. & Div. 96, H.L.; 8 Digest (Repl.) 406, *975.*

Re Hedgman, *Morley* v. *Croxon* (1878), 8 Ch.D. 156; 26 W.R. 674; 8 Digest (Repl.) 372, *590.*

E *Ellis* v. *Selby* (1836), 1 My. & Cr. 286; 5 L.J.Ch. 214; 40 E.R. 384, L.C.; 8 Digest (Repl.) 395, *871.*

Re Sutton, *Stone* v. *A.-G.* (1885), 28 Ch.D. 464; 54 L.J.Ch. 613; 33 W.R. 519; 8 Digest (Repl.) 399, *905.*

Pocock v. *A.-G.* (1876), 3 Ch.D. 342; 46 L.J.Ch. 495; 35 L.T. 575; 25 W.R. 277, C.A.; 8 Digest (Repl.) 466, *1660.*

F *Down* v. *Worrall* (1833), 1 My. & K. 561; 39 E.R. 793; 8 Digest (Repl.) 395, *870.*

Appeal from a decision of the Court of Appeal (Lindley, Lopes, and Rigby, L.JJ.), reported [1897] 2 Ch. 105, reversing a decision of Romer, J., reported [1897] 1 Ch. 518.

By his will, dated May 26, 1877, of which his wife, Sarah Ann Hunter, Albert
G Gordon Langley and the respondent Francis Jacomb Hood were executors, the testator gave all his residue, in the events which happened, to A. G. Langley and F. J. Hood upon trust for conversion and investment as therein mentioned, and upon further trust to pay the income or annual proceeds of one moiety thereof to his sister, Rachel Hunter, during her life, and of the other moiety to his brother-in-law, John Strange Williams, during his life. The will continued:

H "And I declare that on the death of each of them my said sister and brother-in-law the moiety in which she or he shall have had a life interest as aforesaid, or so much thereof as shall be legally applicable for charitable purposes, shall be paid or transferred by my general trustees for the time being to special trustees, to be held and applied by them upon the trusts and in manner following (that is to say):—The special trustees may retain or invest such part of my residuary
I estate as shall come to or devolve upon them in or upon any stocks, funds, shares, or securities which they may think proper and whether of the class hereinbefore prescribed by me or not, and they may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations, or in erecting or contributing to the erection, improvement, or endowment of churches, chapels, or schools, or in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers, but upon the following conditions: (1) That only such churches or chapels shall be subscribed or contributed to wherein the service shall in the opinion of the

special trustees be conducted upon pure Protestant and Church of England principles, by which I mean the principles of the Church of England as held and inculcated by those of her divines, clergy, and members who are distinguished as Evangelical and loyal to the work and fruits of the Reformation and as holding doctrines and principles free from all Popish or Roman Catholic tendency and opposed thereto. (2) That only such schools shall be subscribed or contributed to wherein true Protestant and Church of England principles are distinctly taught and inculcated, with preference to those established for children of the poorer classes. (3) That only such masters and teachers receive grants who best show forth by their teaching and example true Protestant and Church of England principles. (4) That no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent unless upon condition that he shall, if not prohibited in law, at the principal Sunday morning service in his church, selecting a time and state of weather when the congregation is supposed to be the greatest, read the Thirty-nine Articles of the Church of England which I recommend that he should make the subject of his discourse from time to time. And upon further condition that he shall on the first Sunday of every month at the chief morning service preach a sermon on 'Love' from a text taken from the Gospel, Epistles, or Revelation of St. John. And I declare that if the special trustees shall find or consider that any rector, vicar, or incumbent, master, or teacher shall preach, teach, publish, inculcate, encourage, adopt, or follow any doctrines or practices which shall be contrary to or at variance with true Protestant and Church of England principles he or she shall be disqualified from receiving any benefit under this my will. And it being my wish that as much as possible of my residuary estate shall be applicable and available for administration by special trustees in manner aforesaid, I declare that all my debts, funeral and testamentary expenses, and the duty on all legacies under this my will or any codicil not payable by the legatees shall be raised and paid out of such parts of my residuary estate as are not legally applicable to charitable purposes to the exoneration of the residue thereof, and that no part of my residuary estate which shall be so legally applicable shall be invested or dealt with so as to make the same inapplicable or unavailable for those purposes."

The testator appointed the Rev. William Carus, the Rev. John Venn, the Rev. Edmund Holland, the Rev. Edward Auriol, and the Rev. William Cadman to be the first special trustees, and the will proceeded:

"If they shall decline to act as such, then special trustees shall be nominated by my general trustees for the time being, who I am sure will select men who may be depended upon to respect and fulfil my wishes. And I declare that on the death of each of them my said sister and brother-in-law so much of the moiety in which she or he shall have had a life interest as aforesaid as shall not be legally applicable to charitable purposes shall be held by my general trustees for the time being upon trust for my nieces Marion Edwards, Eliza Evelyn Edwards, Rachel Edwards, and Mary Ann Cooke, or such of them as shall survive me, in equal shares."

The testator's wife, his sister, Rachel Hunter, and his brother-in-law, J. S. Williams (the tenants for life of the two moieties of his residuary estate), his niece, Marion Edwards, and A. G. Langley all died in the lifetime of the testator. All the first special trustees also pre-deceased the testator, who himself died on July 13, 1896. The will was proved by the surviving executor, the respondent F. J. Hood, and the gross value of the personal estate amounted to £86,541 1s. 4d. On Oct. 31, 1896, the respondent Francis Jacomb Hood issued an originating summons in the Chancery Division asking for the determination by the court of the questions whether the trusts by the will declared and entrusted to special trustees were void or valid as charitable trusts or otherwise, and, if valid, what portions of the testator's

estate they affected, and also whether the estate or any portion of it was undisposed of and who was entitled to the same, and also whether the plaintiff was entitled to appoint new special trustees of the will. ROMER, J., held that the will did not create a charitable trust, and that there was an intestacy. His judgment was reversed. The next of kin appealed, the Attorney-General and an executor under the will being respondents to the appeal.

Cozens-Hardy, Q.C., *Levett, Q.C.*, and *G. Lawrence* for the appellants.

The Attorney-General (*Sir Richard Webster, Q.C.*), *Ingle Joyce*, and *Dibdin* for the respondents.

Their Lordships took time for consideration.

May 18, 1899. The following opinions were read.

THE EARL OF HALSBURY, L.C.—In this case it does not appear to me to be doubtful that ROMER, J., was right in holding that if the first purpose which the testator in this case has described as being a purpose to which some part or all of his residuary estate, according to the discretion of the trustees, may be applied is not "charitable" in the sense in which that word is understood by the Court of Chancery, then the whole gift must fail. It is undoubtedly the law that where a bequest is made for charitable purposes, and also for an indefinite purpose not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the judges of the Court of Appeal to question that doctrine. But, in a manner to which I shall refer presently, each of the learned judges gives reasons tending to show that ROMER, J., was wrong in saying that the first purpose in question was not a charitable gift.

It will hardly be contended that, if the words stood alone, the purchase of advowsons and presentations is a charitable purpose, and it certainly cannot be said that the trustees appointed by the testator might not devote every farthing of the fund in their hands to that one purpose. It is equally clear that he has declared no trust of the advowsons or presentations when purchased. The process of reasoning by which the judges of the Court of Appeal have come to the conclusion that they have the right to read the testator's will as establishing a charitable trust in the words to which I have referred is this. They say that they are sufficiently satisfied of the testator's intention by referring to other parts of the will, and I so far agree that, judging of his religious views by what he has said in other parts of his will, I have no doubt whatever that his general intention was to aid the particular school of religious thought in the Church of England to which he was himself attached, but it would be a strange canon of construction for a will to say that wherever you can discover what a testator's desires and wishes were, although you cannot find express words in the will which give the authority sought for, nevertheless you can supply words, and declare trusts, which are not to be found in the will itself; that, to put it plainly, the testator's intention is to be judged by the general desire that he has expressed to have his money devoted to such a purpose. To create a trust by such a process of argumentation as that appears to my mind to be not interpreting the will, but making a will for the testator.

LINDLEY, L.J., says, with the candour which always distinguishes that learned judge:

> "I do not say that the words fit it, but you can see plainly enough what the testator is driving at."

Again he says:

> "It is true that he [the testator] has not said in so many words that the part of his residuary estate which may be applied towards the purchase of advowsons or presentations is to be held when obtained upon the particular trusts."

Again he says:

> ". . . you are to look and see what the drift of the whole thing is and, looking at it from that point of view—although I quite feel it is difficult to fit the words in so as to make them accurately applicable—I think, if you apply the principle of trying to make them fit and then say because they do not fit there is an intestacy, you violate the whole scheme of this testator."

LOPES, L.J., puts the argument in a more compendious, but, I think, in a more obviously fallacious way, when he says:

> "What object could he [the testator] have in view when he directed these special trustees to spend large sums of money in buying advowsons or presentations except to advance religion in that particular form of Protestant religion?"

RIGBY, L.J., says:

> "I will take a more general view of it. What did the testator mean? He meant to carry out his object by means of churches, and chapels, and schools. He says churches, chapels, *or* schools. It is either churches, chapels, or schools, and through the instrumentality of rectors, vicars, and incumbents, and masters or teachers. There and then from that it appears to me plain that he was intending as far as he could to devote his property capable of being applied to charitable purposes for the purpose of religion or education. I do not say that we have got right through, but we are advanced. We find that by means of churches, chapels, or schools, and rectors, incumbents, or teachers he was going to have this money made available."

I venture to say that if you were to suppose that every one of the words which the learned lord justice has used was in the will itself, it would advance his argument no whit further. The point is this: Whatever his general intention may be, the testator has not done it. I must not omit to notice what LINDLEY, L.J., put as the cardinal and crucial question. Suppose the trustees here had proceeded to appoint a Ritualistic clergyman, would not the court restrain them? I admit that to be a plausible mode of putting the difficulty, but is it in reality anything else than giving a startling illustration of what the consequences would be if the testator, notwithstanding his general intentions, had not made sufficient provision for giving effect to his intentions? Is it any more than again stating the very question which your Lordships have to decide—that which LINDLEY, L.J., has described as the crucial question? Is it not only another mode of putting the point with which he has already dealt, and, I venture to say with all respect to him, not successfully? After all it is only what always happens when the testator forgets to give verbal expression to what may nevertheless be in his mind.

Admitting freely what each of the learned judges has said, I am unable to agree that such general intention, not carried out by appropriate words in the will itself, can give any court the right to place the words there for the testator. That, as I have said, is to make a will, not to interpret the will. You might as well argue that because you can discover that some one man was the object of the testator's affection you should invent a bequest for him, since he did not mean to die intestate, and he must, therefore, have meant to leave something to the object of his affection—that because you find general expressions in a will of affection and regard for certain persons, although there are no words in which provision is made for them, you are to interpret the will in such a way as in a large and general sense may be said to satisfy the wishes of the testator. The plain fact remains in this will that the testator has not declared the trust that the Court of Appeal have imagined for him, and no apt words have been found to fit or give effect to his supposed intention; and I think that your Lordships are not justified in taking such a liberty of interpretation. It certainly would be a strange mode of construing a will, that because you cannot find what else he must have intended to be done with his money, except something

of that nature, although it is admitted that there are no words in the will to convey the intention which it is suggested that he had in his mind, you can invent provisions, and impose conditions which the testator himself has not introduced.

With the utmost respect for the learned judges of the Court of Appeal, I say that it would be admitting a latitude of interpretation, and a looseness in the application of words in wills expressing the general intentions of the testator, which, although in this particular case it might do no harm, would let in a mode of interpreting wills which would cast upon the court in almost every case of a defectively made will the necessity of making a will for the testator, not interpreting the words which he has actually used. For these reasons I am of opinion that the judgment of the Court of Appeal ought to be reversed and the judgment of ROMER, J., restored.

LORD WATSON.—I have had an opportunity of considering the terms of the opinion prepared by my noble and learned friend LORD DAVEY, and I entirely concur in it.

LORD SHAND.—After very careful consideration, induced by the circumstance that the House is about to reverse the unanimous decision of the Court of Appeal, I agree in thinking that your Lordships should revert to the judgment of ROMER, J. That learned judge has held that while the testator, with reference to the first of the several purposes to which he has authorised the residue of his estate to be applied, has stated that his trustees "may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or next presentations," yet there is no provision to be found in his will that the advowsons or presentations so purchased, or for or towards the purchase of which grants shall be given, shall be affected by any charitable trust, or indeed by any definite trust whatever, and I concur in that view.

The testator has authorised his special trustees to apply the income or any portion of the capital of the residue of his estate in three different ways. First, in the purchase of advowsons or presentations; or, secondly, in the erection, improvement, or endowment of churches, chapels, or schools; or, thirdly, in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers. There is no direction to apportion the funds, and apply part to each of these purposes. The trustees might in their discretion apply the whole income or capital to any one of the three, and it follows that, if it be held that one of the purposes is not charitable, the will is not effectual as a charitable bequest of the residue as a whole. I agree with LINDLEY, L.J., that the words "but upon the following conditions," which immediately succeed the enumeration of the three trust purposes, taken grammatically, apply to all that has gone before; but, so reading the will, I can find no condition which has application to advowsons or presentations. These conditions, which make it clear, as regards the second and third trust purposes relating to churches, chapels, or schools, and to rectors, vicars, and teachers, have, by the language used, no application and no relation to advowsons or presentations. It is said in his Lordship's judgment:

> "I do not say that the words fit it, but you can see plainly what the testator is driving at."

With the utmost respect for the learned judge, I shall say that that is not enough. I see much in the provisions of the will relating to the endowment of churches or schools, and the contributions to the income of rectors or teachers, which leads me to think that the testator intended to make similar provisions in regard to grants for the purchase of advowsons or presentations, but, assuming that he had that intention, he has, in my opinion, failed to express it, and I say so, of course, taking the will as a whole.

The question is not one for speculative reasoning: "What do you think was the testator's intention?" but "What has he expressly or by implication" (but by

necessary implication where implication only is relied on) "expressed by the terms used?" On a sound construction of the will I am of opinion that the testator has not affixed any condition to the application of the residue, or part of it, in the purchase of advowsons or presentations which makes it an application to a charitable purpose, and, as the whole of that residue might thus be applied to a purpose not charitable, I am of opinion that the appeal must be allowed.

LORD DAVEY.—The primary question in this case is the construction of the testator's will. Reading the will shortly, the testator gave his pure personality to special trustees upon trust to invest, and with power to apply the income or any portion of the capital in—(i) grants for or towards the purchase of advowsons or presentations; or (ii) in erecting or contributing to the erection, improvement, or endowment of churches, chapels, or schools; or (iii) in paying or contributing to the salaries or income of rectors, vicars, or incumbents, masters, or teachers, but upon certain conditions which I will discuss presently. There is no doubt that the second and third purposes (they are not numbered in the will, but I have numbered them for convenience of reference) are in themselves charitable, assuming that the schools are not schools of a private character, and there is equally little doubt that a trust for making grants for or towards the purchase of advowsons or presentations is not in itself a charitable purpose. The learned judges in the Court of Appeal have, however, thought that they could spell out of the words of the will a charitable purpose in connection with the advowsons or presentations expressed with sufficient definiteness for the court to give effect to it.

What one ought to find is some trust imposed upon the holders of the advowson or presentation when purchased as to the manner in which the right of patronage is to be exercised. The mere purchase or contribution to the purchase of the property in an advowson or right of presentation is in truth a mere change of investment, and the charitable purpose must, in my opinion, be found in the use to be made of the property when purchased. I agree with RIGBY, L.J., that we must take the whole will together, and see what, as a fair result, is the meaning of the testator, if by that phrase is understood the meaning of the words he has used. I agree, too, with the lord justice that the circumstance that the testator makes a separation between the portion of his property which he can by law devote to charity and that which he cannot, and that he appoints special trustees to administer the trusts of the former portion of his property, are matters for serious consideration. But I further agree with the lord justice that you are not, because he has done that, to do violence to the language of any part of the will, or to import words which you do not find there to make the purposes charitable because of those prefatory dispositions which the testator has made. You must construe the words of the will fairly, and if you can find a charitable purpose sufficiently clearly expressed the court will give effect to it. If you do not find any such definite expression you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission. It may be that voluit sed non dixit.

Apart from the expressed conditions, there is nothing except the prefatory disposition already referred to, and the direction to his general trustees, in case the special trustees named decline to act, to nominate persons who may be depended on to respect and fulfil the testator's wishes. There is no suggestion made of any secret trust. These words, therefore, mean his expressed wishes, and do not seem to me to carry the matter any further. I am doubtful whether evidence that the nominated trustees were in fact the then trustees of the well-known Simeon trust is admissible for the purposes of construing the will. It is not pretended that the trusts of the Simeon foundation are imported by implication into the will, and if so I do not see the relevance of the evidence. It shows, indeed, what appears from other parts of the will, that the testator was a man of strong Evangelical principles, but it does not assist the court to arrive at the trusts intended to be imposed upon the

advowsons and rights of presentation to be purchased wholly or in part out of the testator's estate : See on this point *Doe d. Toone* v. *Copestake* (1).

I turn now to the expressed conditions, and I assume for the purposes of this case that, if applicable to the first purpose, there would be a good charitable trust. The first is that only such churches or chapels shall be subscribed or contributed to wherein the service shall in the opinion of the special trustees, be conducted in the particular manner prescribed. These words, it is admitted, do not in terms fit or apply to the purchase of advowsons. The learned judges have, however, endeavoured to apply the words to the first purpose. LINDLEY, L.J., said :

> "I do not say that the words fit it but you can see plainly enough what the testator is driving at. What are these advowsons or presentations to be bought for except for the purpose of advancing religion as he understands it, and he has told you plainly enough how he understands it in the words I have just read?"

With unfeigned respect for his opinion, this seems to me to be making a will for the testator and not interpreting the words which he has used. In no intelligible sense can the purchase of advowsons be called subscribing or contributing to churches or chapels, and to apply these words to the first purpose seems to be doing violence to the language of the will. The words are directly and plainly applicable to the second purpose, and, in my opinion, to that only. The second and third conditions I need not dwell on, because they relate to schools and masters and teachers only. The fourth condition provides that no payment shall be made directly or indirectly to or for the benefit of any rector, vicar, or incumbent except upon certain conditions, and this is followed by a declaration disqualifying any rector, etc., who shall preach or adopt or follow any doctrines or practices at variance with the testator's views of religion as stated. These provisions, again, are directly and properly applicable to the third purpose of the trust, and cannot be made to fit grants for the purchase of advowsons and presentations.

Possibly, if the first purpose were the only purpose of the trust, the court would, however difficult it might be, endeavour to make the conditions fit that purpose. But where you have other purposes to which the conditions, according to the ordinary construction of the words, are properly and directly applicable, it would, in my opinion, be wrong to strain and do violence to the language to make them fit the first purpose. I quite agree that advowsons may be made the subject of charitable trusts, as was decided by KAY, J., in *Re St. Stephen, Coleman Street, Re St. Mary the Virgin, Aldermanbury* (2). But I am unable to find that the testator has by his will annexed any trust either for a particular charitable purpose or for charitable purposes generally, or, indeed, any trust whatever, to the advowsons or rights of presentaion which he empowers his special trustees to make grants for the purchase of. The Attorney-General pointed out that the advowsons and rights of presentation were not intended to be, or, at any rate, might not be, purchased or held by the trustees themselves. The testator, therefore, has left his special trustees free to make grants to other persons, whether trustees or not, in their discretion, or, if the purchasers be trustees, without any definition or limitation of the trusts upon which such persons are to hold the purchased property. The court is always properly desirous of upholding a testator's will, but, after anxious consideration, I am unable to say that the will discloses any trust as regards the first purpose which the court can either execute or control the execution of by the trustees.

What, then, is the law applicable to the case? There are two classes of authorities. On the one hand, there is a long series of cases extending from *Morice* v. *Bishop of Durham* (3), decided by SIR WILLIAM GRANT, M.R., and LORD ELDON, L.C., to *Re Macduff* (4), decided by the Court of Appeal in 1896, and including two decisions of LORD COTTENHAM. In these cases it has been held that where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the court cannot execute them (such as "charitable or benevolent," or "charitable or

philanthropic," or "charitable or pious" purposes), or where the description includes purposes which may or may not be charitable (such as "undertakings of public utility") and a discretion is vested in the trustees, the whole gift fails for uncertainty. In *Vezey* v. *Jamson* (5) the trust was to dispose of the residue in such charitable or public purposes as the laws of the land would admit, or to any persons as the trustees in their discretion should think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit. SIR JOHN LEACH, V.-C., said (1 Sim. & St. at p. 71):

> "The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot, therefore, devote any part of it to charity. . . . The necessary consequence is that the purposes of the trust being so general and undefined that they cannot be executed by this court, they must fail altogether, and the next of kin become entitled to the property."

On the other hand, it has been decided in cases such as *Attorney-General* v. *Doyley* (6), and *Salusbury* v. *Denton* (7), that where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail, but in default of apportionment by the trustees the court will divide the fund between the objects charitable and non-charitable equally.

I have come to the conclusion that the present case falls within the first class of cases. As SIR WILLIAM GRANT, M.R., says, in *Morice* v. *Bishop of Durham* (3) (9 Ves. at p. 406):

> "The question is not whether [the trustee] may not apply it upon purposes strictly charitable, but whether he is bound so to apply it."

The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the court to attach any trust upon them.

A third class of cases was relied on by the respondent of which *Sinnett* v. *Herbert* (8) and *Re Douglas, Obert* v. *Barrow* (9) are examples in which there is a general overriding trust for charitable purposes, but some of the particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable. But, in my opinion, those cases have no application to that before your Lordships because, as I have already said, I think that there is not here any general trust for charity binding the whole fund. The result is that, in my opinion, the order of the Court of Appeal should be discharged, and that of ROMER, J., restored, except as relates to costs. The appellants here will have their costs out of the estate, and the Attorney-General no costs. The respondent, the executor, must also have his costs as between solicitor and client out of the estate.

Solicitors: *Hollams, Sons, Coward & Hawksley; Solicitor to the Treasury; West, King, Adams & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

WELTON *v.* SAFFERY

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Davey), March 17, 23, 24, 1896, April 8,
B 1897]

[Reported [1897] A.C. 229; 66 L.J.Ch. 362; 76 L.T. 505; 45 W.R. 508; 13 T.L.R. 340; 41 Sol. Jo. 437; 4 Mans. 269]

Company—Bonus shares—Shares issued at discount—Liability of holder to pay nominal value in winding-up—Adjustment of shareholders' rights inter se.

C Where the creditors of a company had been paid in full and the cost of the liquidation of the company had been provided for out of the assets of the company and the proceeds of calls made on shareholders whose shares had been fully paid-up it was **held** by the House (Lord Herschell dissenting) that the holder of bonus shares, on which nothing had been paid-up, and shares which had been illegally issued to him at a discount was liable to be called on to pay
D up to the nominal value of those shares in order to enable the liquidator to adjust the rights as between him and the other shareholders of the company.

Notes. Section 57 of the Companies Act, 1948 (3 Halsbury's Statutes (2nd Edn.) 452) now provides that it is lawful for a company to issue at a discount shares of a class already issued subject to the provisions in the section relating to the
E passing of a resolution of the company authorising the issue and its being sanctioned by the court, and the date of the issue of the shares. At the time of the case now reported the issue of shares at a discount was illegal.

Considered: *Randt Gold-Mining Co.* v. *New Balkis Eersteling* (1901), 71 L.J.K.B. 346. Distinguished: *Re Home and Investment Agency*, [1912] 1 Ch. 72. Applied: *Re Wilts. and Somerset Farmers*, [1928] Ch. 809. Considered: *Rayfield* v. *Hands*,
F [1958] 2 All E.R. 194. Referred to: *Re Welsh Whisky Distillery Co.* (1900), 16 T.L.R. 246; *Mother Lode Consolidated Gold Mines* v. *Hill* (1903), 19 T.L.R. 341; *Mosely* v. *Koffyfontein Mines*, [1904] 2 Ch. 108; *Bisgood* v. *Henderson's Transvaal Estates, Ltd.*, [1908-10] All E.R. Rep. 744; *Biddulph and District Agricultural Society* v. *Agricultural Wholesale Society*, [1927] A.C. 76; *London Sack and Bag Co.* v. *Dixon and Lupton, Ltd.*, [1934] 2 All E.R. 763; *Re Greene*,
G *Greene* v. *Greene*, [1949] 1 All E.R. 167.

As to the issue of shares at a discount and the treatment in a winding-up of a discount on shares illegally issued at a discount, see 6 Halsbury's Laws (3rd Edn.) 143-145, 680; and for cases see 9 Digest (Repl.) 303-309 and 10 Digest (Repl.) 1009, 1010.

H Cases referred to:

(1) *Ooregum Gold Mining Co. of India* v. *Roper, Wallroth v. Roper*, [1892] A.C. 125; 61 L.J.Ch. 337; 66 L.T. 427; 41 W.R. 90; 8 T.L.R. 436; 36 Sol. Jo. 344, H.L.; 9 Digest (Repl.) 304, *1913*.

(2) *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; 60 L.J.Ch. 93; 63 L.T. 686; 39 W.R. 49; 7 T.L.R. 67; 2 Meg. 283, 366, C.A.; 10 Digest (Repl.) 1066, *7393*.

I (3) *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745, H.L.; 9 Digest (Repl.) 435, *2844*.

(4) *Re Almada and Tirito Co.* (1888), 38 Ch.D. 415; 57 L.J.Ch. 706; sub nom. *Re Almado and Tirito Co., Allen's Case*, 59 L.T. 159; 36 W.R. 593; 4 T.L.R. 534; 1 Meg. 28, C.A.; 9 Digest (Repl.) 324, *2035*.

(5) *Re Anglo-Moravian Hungarian Junction Rail. Co., Dent's Case, Forbes' Case* (1873), 8 Ch. App. 768; 42 L.J.Ch. 857; 28 L.T. 888, L.C.; 9 Digest (Repl.) 92, *408*.

(6) *Hirsche* v. *Sims*, [1894] A.C. 654; 64 L.J.P.C. 1; 71 L.T. 357; 10 T.L.R. 616; 11 R. 330, P.C.; 9 Digest (Repl.) 308, *1936*. A

(7) *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. A.* (1865), 2 Drew. & Sm. 514; 5 New Rep. 503; 12 L.T. 228; 13 W.R. 574; affirmed, 4 De G.J. & Sm. 672; 6 New Rep. 10; 34 L.J.Ch. 643; 12 L.T. 289; 11 Jur.N.S. 551; 13 W.R. 631; 46 E.R. 1079, L.C.; 9 Digest (Repl.) 234, *1525*.

(8) *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (1865), 2 Drew. & Sm. 521; 13 L.T. 57; 11 Jur.N.S. 849; 13 W.R. 1059; 62 E.R. 717; sub nom. *Hutton* v. *Berry*, 6 New Rep. 376; 9 Digest (Repl.) 84, *355*. B

(9) *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361; 66 L.J.Ch. 246; 76 L.T. 132; 45 W.R. 321; 13 T.L.R. 199; 41 Sol. Jo. 255, C.A.; 9 Digest (Repl.) 82, *345*.

Also referred to in argument: C

Re Maria Anna and Steinbank Coal and Coke Co., Maxwell's Case, Hill's Case (1875), L.R. 20 Eq. 585; 44 L.J.Ch. 423; 32 L.T. 747; 23 W.R. 646; 9 Digest (Repl.) 101, *463*.

Re Maria Anna and Steinbank Coal and Coke Co., McKewan's Case (1877), 6 Ch.D. 447; 46 L.J.Ch. 819; 37 L.T. 201; 25 W.R. 857, C.A.; 9 Digest (Repl.) 102, *464*. D

Re Hodge's Distillery Co., Ex parte Maude (1870), 6 Ch. App. 51; 40 L.J.Ch. 21; 23 L.T. 749; 19 W.R. 113, L.JJ.; 10 Digest (Repl.) 1010, *6945*.

Birch v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

Re Bangor and Portmadoc Slate and Slab Co. (1875), L.R. 20 Eq. 59; 32 L.T. 389; 23 W.R. 784; 10 Digest (Repl.) 1011, *6949*. E

Re Gibson, Little & Co., Ltd., Ex parte James (1880), 5 L.R.Ir. 139; 9 Digest (Repl.) 313, **785*.

Re Newtownards Gas Co., Ex parte Stephenson (1885), L.R. 15 Ir. 51; 9 Digest (Repl.) 308, **757*.

Re Addlestone Linoleum Co. (1887), 37 Ch.D. 191; 57 L.J.Ch. 249; sub nom. *Re Addlestone Linoleum Co., Ltd., Ex parte Benson*, 58 L.T. 428; 36 W.R. 227; 4 T.L.R. 140, C.A.; 9 Digest (Repl.) 307, *1933*. F

Houldsworth v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 9 Digest (Repl.) 256, *1631*.

Appeal from a decision of the Court of Appeal affirming a decision of KEKEWICH, J. The appeal raised the question whether, in the course of the winding-up of the Railway Time Tables Publishing Co., Ltd., a call could be made upon the appellant in regard to bonus shares and shares which had been issued at a discount held by him in the company, for the purpose of adjusting the rights of the members of the company inter se. G

Swinfen Eady, Q.C., and *Eve*, Q.C., for the appellant. H
Renshaw, Q.C., and *Whinney* for the respondent, the liquidator of the company.

The House took time for consideration.

April 8, 1897. The following opinions were read.

LORD HALSBURY, L.C.—In this case a company limited by shares was duly registered in January, 1886. According to the memorandum of association its capital was to be £30,000, divided into 6,000 shares of £5 each. The memorandum also provided that there should be power to increase that capital and to issue fresh shares. Acting, apparently, on this power, in May and June of the same year the capital was increased to £40,000 and 2,000 additional shares of £5 each issued. One thousand four hundred of these shares were issued on terms which gave rise to the present litigation. Five hundred of these 1,400 shares were issued as fully paid-up without having anything paid upon them at all, and 900 were issued as I

A fully-paid up when only 10s. per share was paid up. The company purported to do this under the terms of an article of association passed contemporaneously with the resolution itself, which provided that the directors might allot or otherwise dispose of the new shares thus created to such persons, upon such terms and conditions, and at such times as the directors thought fit, and either at a discount, premium, or otherwise. In March, 1892, the company was wound-up, and Mr. B Welton, who is the holder of a number of shares upon which nothing has been paid, and of shares upon which 10s. only has been paid, has been held liable to pay up the alleged existing liability on both classes of shares, notwithstanding that they were issued to him pursuant to the authority purporting to be given by the fourth article above quoted, either as bonus shares because he subscribed for debentures, or as discount shares whereon 10s. each has been paid.

C In respect of the liability to pay up the shares so far as it is necessary to satisfy creditors and the cost of winding-up, I believe no doubt exists in the minds of any of your Lordships. Since *Ooregum Gold Mining Co. of India* v. *Roper* (1) in this House it would be impossible to contend that that question is not covered by authority. But it is said that where the only object in making a call is to settle the rights of the shareholders inter se the law laid down in the *Ooregum* D *Case* (1) does not conclude the question. I am unable to accede to that view. I think that the legislature, in permitting the existence of a company limited by shares and with limited liability, created a machinery out of which it is impossible by any expedient, either by company or shareholder, to act otherwise than in pursuance of the provisions of the statute. Whether for the purpose of settling the rights inter se, or for the purpose of satisfying creditors, it appears to me that E the statute enforces upon company and shareholder alike to conform to the rule laid down, that a share for a fixed amount shall make the person agreeing to take that share liable for that amount. I think that is the decision in the *Ooregum Case* (1), and though I am aware that a different view has been suggested where the question is not the payment of the debts of the company, but the settlement of the rights of the shareholders inter se, I am unable to see how this artificial creature, F limited within its sphere of action by the statute under which it is created, can do anything contrary to the provisions of the statute. It is not a question for what purpose it is done. Dealing with it as I think it must be dealt with, as an artificial creation, it can only act as a company or as shareholder in either of those characters within the fetters created by the Act of Parliament.

G It is said, and I think justly said, that people have been invited to take shares under an article of association which expressly provided that shares might be issued at a discount. It is, I think, hard for persons who have relied upon that assurance to find out that the article which authorised the issue of the shares at a discount was ultra vires the company because it is in conflict with the memorandum of association which by the statute itself must determine the rights in that respect, H but not the less on that account must one insist that the statute must be obeyed. If one were to suppose that the whole 6,000 original shareholders or persons who became shareholders by purchase in the market were to have agreed that these shares should only be regarded as having 10s. due upon them, each of them might perhaps against himself establish some contract by which the person agreeing with him in his individual capacity might have rights, but it would not be in his capacity as shareholder, it would be in his capacity as individual. The liquidator can only I recognise shareholders, and their relation to the company of which they are shareholders must be regulated by the Act of Parliament.

The right to have a call made where it is necessary to adjust the rights between the different shareholders themselves appears to me not less imperative than that a call should be made if only the creditors were in question. The supposed bar to such a proceeding is the agreement not to ask more than 10s. per share upon the discount shares, but the whole question goes back to the same point. If the legislature has prohibited it there is no such agreement. The directors have no

power to make such an article. The company qua company have no power to agree to such an article, and those who have taken shares and paid for them in pursuance of the Act of Parliament I think have a right to have the shares paid up which the Act of Parliament has enacted shall be liable to that payment. In truth, though in form reserved by the discussion in the *Ooregum Case* (1), I think that the *Ooregum Case* (1) does decide the question now in debate, and whether they were bonus shares upon which nothing was paid, or discount shares upon which 10s. only was paid, the holders of those shares are, in my judgment, liable to make good for any company purpose the amount of the money which, upon the face of the share, they undertake to pay. I confess it seem to me, however hardly it may operate upon individuals, to be a just and right thing that those who have completely discharged their statutory obligations should have a right to call upon the other shareholders to do as they have done and pay what is due upon the shares. No question as to the preference shares is really in debate. For these reasons I am of opinion that the order appealed from ought to be affirmed, and this appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON.—I need not refer in detail to the facts of this appeal, which are fully explained in the opinions which are yet to be read by my noble and learned friends. But I find it necessary to indicate briefly the considerations upon which my decision rests, because I apprehend that they are not altogether the same with the reasons which have influenced some of the noble and learned Lords with whom I agree in the result.

In dealing with the questions which arise for our decision, there appear to me to be two points which must be kept in view. The first of these, which is now beyond the range of controversy, is that the provisions of the Companies Act, 1862, as they have already been interpreted by the House, make it unlawful for a company incorporated with limited liability, to issue at a discount any of its shares, whether ordinary or preference. The second point, which has not, in my opinion, been definitely settled by authority, involves the construction of s. 25 of the Companies Act, 1867 [see the Companies Act, 1948, s. 52 (1) (b)]. The decision of the House in *Ooregum Gold Mining Co. of India* v. *Roper* (1) carries that construction thus far, that no member of a limited company, who is not protected by a proper contract, duly registered in terms of the clause, can have a good defence against payment of such proportion of the nominal amount of his shares as has not been paid in cash, when payment is required by the liquidator for the purpose of meeting the claims of creditors of the company, or the cost of liquidation.

The appellant is the holder of preference shares, which were issued at a discount, in pursuance of a power reserved to the company by its memorandum of association

> "to issue any shares in the original or in any new capital as preferential or guaranteed or deferred shares,"

and of power conferred upon the directors by its articles of association to issue new shares

> "upon such terms and conditions, and with such rights and privileges annexed thereto as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends, and in the distribution of the assets of the company, and with a special or without any right of voting."

I need hardly observe that a power expressed in these wide terms could give the directors no right to issue shares at a discount, a right which would be contrary to statute, even if it were expressly conferred by the memorandum of association. That proposition is not disputed by the appellant, who admits that, if the call which is sought to be enforced in this case had been made upon him by the liquidator for the purpose of paying creditors or cost of liquidation, he would have been liable, notwithstanding the immunity purporting to be attached to the issue of his shares.

But the call is not made upon him for either of these purposes. The creditors of the company have been paid in full, and the cost of liquidation has been provided for out of the assets of the concern and of calls made upon and responded to by the ordinary shareholders. In these circumstances, the appellant maintains that the condition of immunity from calls, although ineffectual in law to the extent which he concedes, constitutes a contract valid inter socios, and binding upon the company and its ordinary members in all questions between them and the holders of these preference shares. Upon that ground he contends that he is not liable in any contribution in respect of his preference shares, because it is an admitted fact in the case that the sole object of the liquidator, in making a call upon him, is to repay to the ordinary shareholders money which they were under an obligation to pay so as to keep him indemnis. I am not prepared to affirm that the enactments of s. 25 of the Act of 1867, which were certainly meant to give further security on payment to the creditors of the company, were also intended to take away, or even impair, any right to make future arrangements between ordinary and preference shareholders through the medium of the company in regard to the privileges to be borne by preference shares, which could have been lawfully made under the previous Companies Acts. No such arrangement can now be made, or, so far as I am able to judge, could ever have been lawfully made to the effect of relieving preference shareholders of any part of their statutory liabilities to the creditors of the company. The rights and liabilities inter se of the members of different classes of shareholders, in relation to matters which do not concern or affect the interests of creditors, do not appear to me to stand in the same position. I can find no provision in the statute which either expressly or by implication enacts that ordinary shareholders desiring to raise additional capital by the issue of preference shares, may not through the company undertake that the sum required to pay creditors in liquidation and the costs of liquidation shall be charged primarily upon the unpaid capital which they are liable to contribute that that no contributions shall be required from the preference shareholders for the purpose of reimbursing them, or for any other purpose than meeting debts and costs of liquidation.

Assuming always that proper means are employed for accomplishing that object, it is, in my opinion, perfectly lawful. It is true that no arrangement can be made which trenches upon the rights conferred by statute upon creditors. But in so far as concerns what may be described as the free assets of the company, meaning by that expression its surplus assets remaining after paying all debts and costs of liquidation, the sole interest is in the members who are the units of the incorporation. It has never, so far as I am aware, been disputed that a condition may be lawfully attached to the issue of preference shares to the effect that, in the event of there being at any time funds available for the declaration of a dividend, these shares shall carry a higher, or it may be a lower dividend than the original shares. And in like manner it is, according to my apprehension, a lawful condition that, in the event of there being surplus assets when the company is wound-up, such surplus shall be apportioned, according to any rule which may be agreed on, among the different classes of shareholders. The truth is, that all those are domestic matters, in which neither creditors nor the outside public have any interest, and with which, in my opinion, it is the policy of the legislature not to interfere.

I desire to add that, in my judgment, when conditions for which due provision is made in the constitution of the company, are sanctioned by its shareholders, and are inserted in the contract under which a preference shareholder accepts his shares, such conditions, if they be of the character which I have just indicated, will form an integral part of the contract, and be enforceable by the shareholder either against the company or its liquidator. The difficulty which I have felt in the case is one which I casually encountered, without requiring to solve it, in *Ooregum Gold Mining Co. of India* v. *Roper* (1). In the present case my difficulty assumes this form—do the three contracts under which the appellant's shares were issued and accepted contain a severable and valid condition that the holders of

such shares shall not, in the event of the company going into liquidation, be liable to make any payment for the purpose of equalizing the contribution of ordinary and preference shareholders? In all these cases, the resolution of the shareholders giving authority for the increase of capital, and the issue of shares by the directors in pursuance of such authority are in practically the same terms. The authority given was to issue the shares at a discount; and, although part only of their nominal amount had been paid, they were issued by the directors as fully paid-up. It does not, therefore, admit of doubt, and it is not disputed, that the issue of the shares on these terms, and the resolutions authorising it, were ultra vires of the shareholders, the directors, and the company.

Viewed in its integrity, the condition that partly-paid shares should be issued as fully paid-up was an absolute nullity, and so was the authority given to issue them on these terms. But the appellant argues that the condition, when resolved into its compound elements, must be held to comprise, not a single stipulation, but a whole nest of stipulations, one of which only—that which exempts the shareholder from liability for debts and costs of liquidation—is ultra vires, and, therefore, contrary to law. He, accordingly, maintains that, while the condition must be disregarded in so far as it involves any stipulation which can be shown to be ultra vires, it must be treated as a valid and subsisting contract, protecting him against any and every kind of liability in respect of his shares, from which the company, with the sanction of its members, could have given his exemption in express terms, and by a separate and substantive condition.

I entertain considerable doubts whether, having regard to the terms of the condition, and to the vice by which it is affected, it is capable of being dealt with in the manner proposed by the appellant; but I do not consider it necessary to determine that point. Apart from the rule of ultra vires, it appears to me that the contract is not one which can be so severed into parts. I find it impossible to speculate what form the arrangement might have assumed, if the parties had at the time known and believed that the issue of shares at a discount was contrary to the statute law. The position of the appellant is no doubt a hard one, but it results from the original allottee of his shares having relied on a mistaken view of the law; and I am apprehensive that an attempt to sever the condition in the manner proposed might result in making a contract for the parties which they had not in their contemplation. For these reasons, I concur in the resolution moved by the Lord Chancellor.

LORD HERSCHELL (read by LORD WATSON).—The questions which arise in this case are of far-reaching importance. They concern not only the parties to this litigation, but the shareholders in many other public companies.

The facts are somewhat complicated, because they relate to three different classes of shares held by the appellant. On Jan. 5, 1886, the Railway Time Tables Publishing Co. was registered as a company, with limited liability. The original capital was £30,000, divided into 6,000 shares of £5 each. All the shares, with the exception of ten issued to the persons signing the memorandum of association, which were paid for in cash, were, under a duly registered agreement, allotted to the vendor to the company or his nominees as the consideration for the transfer of the copyright, goodwill, plant, and stock-in-trade of his business. By a special resolution of the company, confirmed on June 11, 1886, the capital was increased to £40,000 by the creation of 2,000 shares of £5 each. Of these, 600 were issued and paid for in cash, 500 as bonus shares and 900 as discount shares. A second special resolution was confirmed on the same day, substituting new articles for those contained in Table A. To some of these it will be necessary presently to direct particular attention. In July, 1886, the directors determined, for the purpose of raising funds which were required to carry on the affairs of the company, to issue debentures of £10 each, to the amount of £3,000, bearing interest at 6 per cent., and to issue to the subscribers for each of these debentures two fully paid-up shares

of £5 each. At an extraordinary meeting of the company held on July 29, the action of the directors with reference to the issue of debentures was approved, and they accordingly issued debentures to the extent of £2,500, and two fully paid-up shares to each subscriber of £10. Contracts were entered into as to 490 of the 500 bonus shares providing for their issue as fully paid up, and such contracts were duly filed.

By a special resolution, confirmed on Nov. 29, 1886, the capital was further increased by £25,000 by the creation of 5,000 additional shares of £5 each. These shares were, in the first instance, offered to the existing shareholders at the price of £1 per share. This proposal not having met with a satisfactory response, they were again offered at the reduced price of 10s. a share, and on those terms not only these 5,000 shares, but also the 900 above mentioned as discount shares, were allotted. By another special resolution of the company, duly confirmed on Feb. 10, 1888, the capital of the company was further increased to £100,000 by the creation of 7,000 additional shares of £5 each, entitled to a preferential dividend of 7 per cent. One thousand six hundred and eighty of these shares were allotted to a Mr. Hoare, who was a creditor of the company in respect of debentures and otherwise; only a portion of these debentures, however, represented a present debt.

It has, therefore, been held that no more than 1,112 of the shares can be regarded as fully paid, that 567 must be treated as wholly unpaid, and one with £2 10s. paid. At the time when an order was made to wind-up the company, the appellant was the holder of 215 of the bonus shares, as to 205 of which an agreement had been duly filed. He was the holder of 4,460 discount shares, as to 640 of which there were registered contracts. He also held 1,680 of the preference shares. Two calls have been made, amounting together to £2 15s., on the bonus, discount, and preference shares for the purpose of satisfying the liabilities of the company, and of paying the costs, charges, and expenses of and incidental to the winding-up. As to these calls no question arises. Another call has, however, been sanctioned on these shares of £2 5s., the balance remaining uncalled, to enable the liquidator, by means thereof, to adjust the rights of the contributories inter se—in other words, to provide funds for the purpose of making repayment to the ordinary shareholders.

Before proceeding to consider what are the rights of the contributories inter se, it will be expedient to call attention to some of the provisions to be found in the memorandum and articles of association. By the former, power was taken to increase the capital, and to issue any shares in the original or in any new capital as preferential, or guaranteed, or deferred shares. By art. 4 it was provided that the shares should be under the control of the directors, who might allot or otherwise dispose of the same to such persons, on such terms and conditions, and at such times, as the directors thought fit, and either at a discount, premium, or otherwise. By art. 42 new shares were to be issued upon such terms and conditions, and with such rights and privileges annexed thereto, as the directors might determine; and in particular such shares might be issued with a preferential or qualified right to dividends and in the distribution of assets by the company. Article 140 is in these terms:

> "If the company shall be wound-up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid-up, or which ought to have been paid-up, on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions."

I will consider, in the first instance, the case of the shares issued at a discount —that is to say, the £5 shares which were issued as fully paid-up in consideration of the payment of 10s. per share. There can be no doubt after the decision in *Ooregum Gold Mining Co. of India* v. *Roper* (1) that the issue of the shares at a

discount was so far invalid that it did not prevent the holder of them from being liable to contribute to the full amount of the shares for the purpose of paying the creditors of the company. Whatever the dicta bearing on the point, that case did not determine the question what was the effect of such an issue as regards the shareholders inter se in the case of a winding-up of the company. The decision was mainly founded on ss. 8 and 38 of the Companies Act, 1862, and on s. 25 of the Act of 1867. A careful consideration of these provisions is essential to a correct view of the limits of the decision referred to. Section 8 prescribes that, in the case of a company formed on the principle of having the liability of its members limited to the amount unpaid on their shares, the memorandum of association shall state, inter alia, the amount of the capital with which the company proposes to be registered divided into shares of a certain fixed amount. This fixed amount is by s. 38 to be the limit of his liability in case the company is ordered to be wound-up. I think it very important to observe that the statement in the memorandum of association just mentioned, as prescribed in s. 8, to which so much weight was attached in the *Ooregum Case* (1), applies only to companies with limited liability [see now Companies Act, 1948, s. 2 (4), s. 212]. By the express terms of s. 10 of the Companies Act, 1862, where a company is formed on the principle of having no limit placed on the liability of its members, the memorandum of association need not contain any such statement [Act of 1948, s. 2 (4)].

This appears to me to show that the provision contained in s. 8 (5) was enacted for the purpose of protecting the creditors of a company the liability of the shareholders of which was limited. They were not to be liable beyond the fixed amount stated, but they were to be liable to that amount, and the design was that the memorandum should give notice to all who trusted the company of the extent of the members' liability. The enactment, in my opinion, does not and was not intended to determine the rights or liabilities of members of the company inter se. So far as regards the members of the company inter se, there were no reasons for hampering them in any arrangements they might choose to make as to the interest they should have in the capital or assets of the company, or as to the proportion in which they should share its profits or discharge its liabilities in the case of a limited than of an unlimited company. Section 38 provides that, in the event of a company being wound-up, every member of such company shall be liable to contribute to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories among themselves, with certain qualifications, of which the following is one:

> "(4) In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member." [See now the Act of 1948, s. 212 (1) (d).]

It is to be observed that, apart from the qualifications, the enacting part of s. 38 applies equally whether the liability of the members is limited or unlimited. What the rights of the contributories among themselves are, for the adjustment of which members are to contribute the sums required, is not determined by any enactment of the Companies Act. It is not provided that, for the purpose of such an adjustment, every member shall be liable to contribute to the assets of the company such a sum as will make the payment of each member the same in respect of each share which he holds.

How, then, are the rights of the contributories inter se to be ascertained? I reply, from the terms of the articles of association of the company and the acts done by the company, under the powers conferred by them. In the absence of any provision to the contrary, it would, no doubt, be right to assume that every shareholder was intended to contribute an equal sum in respect of his share, and

calls would be rightly made for the purpose of enforcing this equality. The statute, however, does not provide that the liquidator shall make calls for the purpose of equalising the payments made by the contributories in respect of their shares, but only that he shall make them for the purpose of adjusting the rights of the contributories. What those rights are and what payments must be made to adjust them are left undetermined by the statute. It no more requires that, inter se, every shareholder shall contribute alike to the funds of the company, or share alike in the distribution of its surplus assets, than it does that shareholders who have contributed the same amount to its capital shall take the same share of the profits it earns. In the absence of any provision to the contrary, each shareholder could no doubt claim a share of the profits proportionate to the share in which he had contributed to the capital. But it is, of course, everyday experience that the articles of a compnay provide for preference shareholders who are to receive a certain payment out of the profits before the other shareholders receive anything.

I think, then, that it is a fallacy to assume that the liquidator may in all cases make calls upon shareholders in order to equalise the payments in respect of all the shares. I can find no warrant for such propositions in the provisions of the statute, and, for the reasons which I have given, it does not seem to me in the least to follow from the circumstance that every shareholder is under the statute liable to pay the amount unpaid on his share. What calls may be made in order to adjust the rights of the contributories inter se is, in my opinion, in no way determined by the decision in the *Ooregum Case* (1), that the holder of every share in a limited company is liable to pay in cash the amount of his share. It no more determines to what extent this liability may be enforced in a particular case to adjust the rights of contributories than it does to what extent it can be enforced for the purpose of paying the debts of the company and the expenses of the liquidation. In the latter case the amount of calls which can be made, within the limit of liability, depends upon the amount of the debts and expenses, in the former upon the rights of the contributories inter se, whatever they may be. But the liability to pay the amount of the share fixed by the memorandum no more ascertains what those rights are than it does the amount of the debts and the expenses of the liquidation.

I have already drawn attention to the fact that the provision we are considering applies alike to unlimited and limited companies. How are the rights of the contributories any more determined by the fact that in the latter companies there is liability only to a certain amount than they are in the former case by the fact that the liability is without limit, or why in the one case more than in the other must calls be made, independently of the provisions of the articles, for the purpose of equalising the payment of the members? Section 16 of the Act of 1862 provides that the articles of association, when registered, shall bind the company and the members thereof to the same extent as if each member had signed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles subject to the provisions of this Act [Act of 1948, s. 20 (1)]. The articles thus become in effect a contract under seal by each member of the company and regulate his rights. They cannot, of course, diminish or affect any liability created by the express terms of the statute, but, as I have said, the statute does not purport to settle the rights of the members inter se; it leaves these to be determined by the articles (or the articles and memorandum together) which are the social contract regulating those rights.

I think that it was intended to permit perfect freedom in this respect. It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company, but the articles do not any the less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the

contract with the company gives. It is for this reason that I cannot agree with the view taken by the Court of Appeal in *Re Weymouth and Channel Islands Steam Packet Co.* (2), which was pointedly put by BOWEN, L.J., that in order to maintain the proposition for which the appellant here contends it is necessary to imply a contract between the individual members apart from the provisions to be found in the articles. Nor can I agree that the contract made by those who take shares issued at a discount is an "illegal" contract, though it is no doubt ineffectual to enable the holder to escape from further calls for all purposes for which by s. 38 of the Act of 1862 contributions may be enforced.

It was not denied by the learned counsel for the respondent that the articles might provide for different classes of shareholders having different rights; that, for example, members might be entitled to a preference in respect of dividend or in the distribution of the assets of the company. I can see nothing in the statute to prevent the articles of a company providing for any such differences in the rights and liabilities of the members, inter se, as may be thought expedient. Indeed, to take an example s. 24 of the Companies Act, 1867, expressly recognises that a company may make arrangements on the issue of shares for a difference between the holders of such shares in the amount of the calls to be paid, and in the time of payment of such calls [Act of 1948, s. 59 (a)]. There is nothing, in my judgment, in s. 25 of the same Act which militates against the views which I have expressed. It provides that every share in a company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a duly filed contract. I do not question that the shares issued at a discount in the present case must be deemed to have been issued, and to be held on those terms, but this does not determine the amount of contribution which the liquidator is entitled to require from a member. That must be ascertained by inquiring how much beyond what is necessary to pay the debts of the company and the expenses of winding-up is requisite in order to adjust the rights of the members inter se. The argument for the respondent involves the assumption that, after the debts and expenses of winding-up are provided for, every member must be bound in respect of each share he holds to contribute an equal sum to the funds of the company in order to adjust their rights, an assumption for which I can see no warrant in the statute.

I have, therefore, arrived at the conclusion that there is nothing to prevent a company from providing by its articles that certain members or a certain class of members shall as between themselves and other members be entitled to an equal share in the assets of the company, although they have made smaller payments in respect of their shares, and that they shall not be bound to contribute more than a specified amount, although this may be less than the amount which they are liable to contribute for the purpose of paying the debts of the company and the expenses of winding-up.

The next questions which arise are: Have the company done so in the present case, and how ought the rights of the members among themselves to be adjusted? The articles of the company distinctly authorised the directors to issue the shares at a discount—that is to say, on the terms that, on payment of less than their full amount they should be treated as fully paid up, and they were issued on the terms that the person taking them should not be liable to pay more than 10s. per share in respect of them. At the time when this was done there was judicial authority for the view that this could lawfully be done even to the extent of exonerating the holder from further liability for the purpose of satisfying the debts of the company. There can be no doubt that both those who took the shares and the other members of the company intended and anticipated that no further call should be made upon them. In so far as the claims of creditors are concerned, it has since been held that the provisions of the statute render the attempt thus to limit the liability to something less than the amount of the shares nugatory, even though all the members of the company had expressly determined that this should be done.

But is there anything to prevent its being binding, so far as the members themselves are concerned? If I am right in thinking that a company might be constituted with articles providing for this result I can seen no reason why the article providing for the issue of shares on which no more than a specified sum was to be paid should not be binding in respect of shares issued on those terms upon all members of the company. Why should members, who have become as much bound by the articles as if they had executed them under seal, in accordance with the provisions of which shares have been taken on the terms that no more than 10s. should be paid in respect of them, be allowed to say that, to adjust their rights and to diminish their loss, or even put money in their pockets, further payment should be required? It would be, I think, much more consonant with recognised principles to hold the members bound, and the transaction valid, in so far as the statute does not invalidate it. Any other conclusion would lead, in many cases, to grievous injustice where companies and their members have acted in good faith, but under an erroneous view of the law. In the present case, for example, it may be that the original shares, or some of them, are still held by the vendor to the company to whom they were allotted as fully paid-up, so that a member who has come in when the affairs of the company were desperate would be compelled to find money to provide for a cash payment to the vendor whose business had turned out so unprofitable. Or, again, the shares may have been bought by the present members for 10s. a share, and the contribution of the holder of discount shares might more than recoup this amount.

If the statute compels such results, we must not shrink from construing it correctly because this construction would lead to injustice. But if, without violating any legal principle, this can be avoided, I think it ought to be done. I may here observe that the clause of the articles which provides for the distribution of the surplus assets, and requires that they shall be distributed so that the losses should be borne by the members in proportion to the capital paid up, or which ought to have been paid up, on the shares held by them was to be "without prejudice to the rights of the holders of shares issued upon special conditions." I do not think that, if the holders of discount shares are right in their present contention, it follows that they would be entitled to be recouped out of the contributions of the other members the sums they have been compelled to pay for the discharge of the debts of the company. It is one thing to say that they are not bound to make a contribution merely for the benefit of other members, that these possess no rights for the adjustment of which this is necessary, and another thing to imply an obligation on the part of the other members to make good any sums which the discount shareholders are under the provisions of the statute, held bound to pay.

I do not feel pressed by the difficulties which it is suggested would flow from such a conclusion. It is a part of the contract that the holder of a discount share should be entitled to participate in the assets of the company equally with the shareholders who have fully paid up their shares or become the holders of fully paid-up shares. No shareholder can be compelled to pay more than the nominal amount of his share. But if at the time of the winding-up there be shares with a liability upon them, I cannot see why this liability should not be enforced to the full before the holders of these shares are entitled to participate equally in the distribution of surplus assets, with those whose shares are, by the contract inter socios, to be treated as fully paid-up. I cannot see that wrong will in any case be done to the shareholders other than the discount shareholders by the conclusion, which I think logically sound. On the contrary, they might in certain cases even obtain an advantage for which they did not bargain.

I have hitherto confined my consideration to the discount shares, but all that I have said is, in my opinion, equally applicable to the bonus shares allotted to the subscribers for debentures. The allotment of such shares was part of the consideration of a loan to the company, without which it would not have been made. Granting that in spite of this the holders are liable to contribute up to the

amount of their shares for payment of the debts of the company, why should the other members be able to say that in order to adjust their rights as against these holders they should be compelled to make a further contribution? I do not think that the preference shares issued as part of the consideration for the extinction of a debt of £13,402 can stand on a different footing. The directors had power under art. 4 to issue shares on these terms so far as the members could give it. I think the decision of the Court of Appeal ought to be reversed.

LORD MACNAGHTEN.—In the liquidation of the Railway Time Tables Publishing Co., Ltd., the position of affairs is this: The list of contributories has been settled, and there is no application before the court seeking to have it rectified. By means of calls made in the winding-up all the debts of the company have been paid, and the costs and expenses of the liquidation have been provided for. And now it is proposed to make a further call for the purpose of adjusting the rights of the contributories among themselves.

The original capital of the company was £30,000, divided into 6,000 shares of £5 each. On three occasions additions were made to the capital until, at last, it reached £100,000. All the shares were of the same nominal amount, and all were ordinary shares except those of the last issue, which were intended to carry a preferential dividend. With the exception of ten shares taken by the subscribers to the memorandum of association, the whole of the original capital was issued as fully paid-up under a duly registered contract in consideration of property made over to the company; 600 shares of the second issue were paid-up in cash. The remainder of the capital was dealt with in a less regular manner. To induce persons to take debentures two ordinary shares, nominally paid-up in full, were offered by way of bonus with every £10 debenture. Other shares were issued at a discount of 90 per cent., so that a £5 ordinary share, nominally paid-up in full, was to be had for 10s. Then, in July, 1890, more than a year and a half before the liquidation commenced, a circular was sent by the directors to the holders of discount and bonus shares calling their attention to recent decisions "under which," it was stated, "it would appear that certain liabilities are in law attached to these shares." The holders of discount shares were recommended to exchange them for preference shares at the rate of ten discount shares for one preference share; the holders of bonus shares were advised to surrender them to the company.

These suggestions, however, were not adopted by the appellant, who was a large shareholder holding bonus shares and discount shares, as well as preference shares. All his shares were entered on the register as fully paid, and he continued to hold them all until the winding-up. Upon the facts being then investigated he was placed on the list of contributories in respect of 215 bonus shares, as the holder of shares on which nothing had been paid, and in respect of 4,460 discount shares, as the holder of shares on which there remained a liability of £4 10s. per share. There were, besides, 1,680 preference shares standing in his name. The chief clerk certified that they were all fully paid. KEKEWICH, J., however decided that only 1,112 were fully paid, and that of the rest one was paid to the extent of £2 10s., while 567 were wholly unpaid. The appellant, having duly paid the former calls, objects to the call now proposed, on the ground that the shares standing in his name ought, by reason of the terms on which they were issued, to be treated as fully paid-up to the extent not required for the payment of the company's debts and the costs and expenses of liquidation.

Whatever colour there may be for the appellant's contention in regard to his bonus and discount shares, there can be none, as it seems to me, in regard to his preference shares. They were not issued on special terms at all. They were meant to be paid for in full in the ordinary way. But it was held by the learned judge that the consideration for which they were issued could not be treated as payment in cash, and that if it amounted to payment in any other form there was no registered contract to satisfy the requirements of the Act of 1867. As regards the shares

which the directors purported to issue on special terms, it would perhaps have been more regular, and certainly it would have raised the question more plainly, if, instead of merely resisting the liquidator's summons, the appellant had made a substantive application asking the court to rectify the list of contributories, or to make a declaration in his favour controlling its effect. Anyhow, the burden lies with him. It is for him to show that he has some equity clear enough and strong enough to relieve him from the ordinary consequences of his present position.

In the present state of things, the application of the liquidator would seem to be a matter of course. It stands unchallenged on the records of the court that some of the contributories have discharged in full their obligation to the company, while others have not done so. Why should not those who have paid more than their proportionate share of the general liability call upon those who are behindhand for contribution? It was said that the statute does not in terms provide that calls are to be made for the purpose of equalising the payments of members. That is quite true. The right to contribution does not depend on statute any more than it depends on contract. It is one of the plainest of equities, and, although no doubt in the case of limited companies where there are successive issues of capital it may sometimes operate unexpectedly, and perhaps even harshly on shareholders who come in at the very last moment, the apparent hardship is really due to their own want of prudence.

Why, then, I ask, is the appellant to be relieved from the obligation of contributing his proportionate share of the losses of the undertaking? It was said that there was a "social contract" to which effect ought to be given now that the rights of creditors are out of the way. There, as it seems to me, lies the fallacy. How was the supposed contract made? Who gave the requisite authority for making it? Not the company, nor the shareholders, nor any representative body of shareholders. It is beyond the powers of a limited company to limit the liability of shareholders in a manner inconsistent with the conditions of the memorandum of association. The directors, therefore, had no authority from the company to issue shares at a discount, or on any terms relieving the shareholder from liability to pay in full. The shareholders had no power to authorise the directors to do, on behalf of the company, that which the company itself could not authorise them to do. The articles of association no doubt empower the directors to issue shares on such terms as they think fit, but that must mean, of course, on such terms as they think fit consistently with the provisions of the Companies Acts. The articles in express terms purport to authorise the directors to issue shares at a discount. That provision, however, is in contravention of the Companies Act, 1862, and simply void. Neither the company nor the shareholders, even if they had been unanimous, could have empowered the directors to do anything of the kind. If the directors acted without authority, how can their action bind those who are supposed to have given them authority, but, in fact, gave them none?

The truth is, as it seems to me, that there never was a contract between the company or the shareholders, on the one hand, and the persons to whom these discount shares were offered, on the other. There was an offer by the directors purporting to act on behalf of the company, but it was an offer of that which the company could not give, because the law does not allow it. There was an acceptance by the discount shareholders of that offer. But that offer and acceptance could not constitute a contract. Both parties acted under a misconception of law, and the whole thing was void. The company, however, placed the names of the discount shareholders on the register, and they allowed their names to remain there until their remedy against the company was gone, and now they cannot be heard to say that they were not shareholders.

Your Lordships were reminded that there was a judicial decision, for several years unreversed, which sanctioned the issue of shares at a discount. That is so. But it must be remembered that, at the time when that decision was pronounced, the current of authority had drifted somewhat away from the true principles of the

Act of 1862. As soon as those principles were re-asserted and re-established by your Lordships' House in *Trevor* v. *Whitworth* (3) it became clear again—clear, I think, beyond argument—that the shares of a company limited by shares could not be issued at a discount. The issue of shares at a discount is just as much an unauthorised reduction of capital as the purchase by a company of its own shares. And so it was held by the Court of Appeal in *Re Almada and Tirito Co.* (4) and afterwards in this House in the *Ooregum Case* (1). Speaking for myself, I must say I do not think the *Ooregum Case* (1) laid down any new law. It was no new departure. Your Lordships will find the governing principle stated as plainly and as emphatically in *Dent's Case* (5) in 1873 by SELBORNE, L.C., as it was by any of the noble and learned Lords who took part in the *Ooregum Case* (1) in 1892. Holding, as your Lordships afterwards held in the *Ooregum Case* (1), that the memorandum of association of a limited company has the effect of prescribing as well as limiting the liability of its members, LORD SELBORNE points out, as has been pointed out over and over again, that with certain exceptions, not material for the present purpose, s. 12 of the Act of 1862 forbids any alteration in the conditions contained in the memorandum [cf. Act of 1948, ss. 4, 5, 18, 22, 23, 61, 69 (6), 72, 203, 206, 210 (3)]. His Lordship said (8 Ch. App. at p. 776):

> "It is quite certain that, under that clause, if there be found anything in the articles limiting the liability of the shareholders in a way inconsistent with the memorandum—anything tending to reduce the liability of the shareholders thereby prescribed—it is simply void."

Nothing can be more to the point than that. So far the *Ooregum Case* (1) goes; but it was not, I think, meant to go further. And, indeed, several of the noble and learned Lords who took part in the judgment in that case guarded themselves against being supposed to determine or prejudice the present question. It may be that the principle on which the decisions in *Dent's Case* (5) and the *Ooregum Case* (1) proceed leaves little room for the appellant's contention. Still, if it could be shown that the appellant has any equity to be relieved from further liability—if the court could be "satisfied of the justice of the case," to use the words of the Act of 1862—I do not think the decision in the *Ooregum Case* (1) would be a fatal bar. Nor, with all deference to the view thrown out by the Court of Appeal in *Re Weymouth and Channel Islands Steam Packet Co.* (2) would it be a sufficient objection that the contract, if there be a contract, was one with the company and not with the shareholders. If directors, being duly authorised in that behalf, invite persons to take shares on certain terms varying the rights of members inter se, acceptance of the invitation must, I think, establish a contractual relation between the members themselves.

But really all the arguments urged on behalf of the appellant however they may be presented—and they were presented in various ways—must go back to contract as the foundation and starting point. It was said, and said truly, that the directors might have issued shares with a preferential right as regards capital in the event of winding-up, is which case the ordinary shareholders would have had not right to contribution, and then it was urged that to that extent, at any rate, effect should now be given to what was described as the intention of the parties. I could have understood that argument if I could have found a contract. It may well be that one party to a contract cannot escape from his obligations by pleading incapacity to perform them in full if the other party is willing to take something less than that which he bargained for. But if there is no contract, but only an agent acting without authority, I cannot see what equity there is to compel a principal to submit to one set of conditions, because his agent has attempted ineffectually to bind him to another and a different set; nor is the case of the party disappointed by reason of the agent's want of authority bettered by the circumstance that the relief he is seeking is not only different from, but incon-

A sistent with the position he would have occupied if the authority of the agent had been sufficient.

Some things were introduced into the discussion which are hardly matters of argument. It was said that, if effect were to be given to the view of the Court of Appeal, it would lead to great hardship in many cases. Perhaps it may. There is B plenty of hardship in almost every case of winding-up. But I must say I cannot see any particular hardship in the present case. The appellant was warned in time, but he chose to disregard the warning. If a man will remain on dangerous ground after he has been told of the risk, I do not think he has much reason to blame the persons who invited him there, especially when those who gave the invitation did their best to set things right by giving warning in time. Then it C was said that some of the members now claiming contributions may have bought their shares in the market for less than the price asked from the discount shareholders. But, surely the owner of a thing, whether he has paid much or little for it, is entitled to all the rights attached to it. It was said, further, that some of the claimants were the very persons who sold to the company the property which has turned out such a disastrous bargain. Can your Lordships go into that D matter? There is no evidence that the company gave too much for the property they bought. The failure of the company proves nothing. Is it not enough that the shares were in fact fully paid, and the honesty of the transaction is not impeached?

These are small matters, and hardly, I think, worth noticing. But the question before the House is very serious and very important. It would be, I think, much to E be regretted if your Lordships were compelled to yield to the arguments of the appellant. These companies are the creatures of statute, and by the statute to which they owe their being they must be bound in regard to shareholders as well as in regard to creditors in all matters coming within the conditions of the memorandum of association. Shareholders in these companies require protection just as much as creditors—perhaps even more; shareholders are not partners for all F purposes; they have not all the rights of partners, they have practically no voice in the management of the concern. Their security in a great measure depends on the directors adhering to the requirements of the Act. A limited company cannot, in matters within the conditions of its memorandum, go on leading, as it were two lives, one strict and precise and regular, and the other a life of greater freedom and laxity, substituting the easier yoke of "social contract" for the rigour of G statutory directions. The confusion would be hopeless. Take the present case as an example. The questions are comparatively simple when you get to a winding-up, but in the meantime, what is the position of a so-called discount shareholder? Can calls be made upon him? If so can calls be made to develop the business or only to meet the demands of creditors? Has he any right of recourse against the other shareholders? Then how about transfer? The directors could not allow these H shares to be transferred on a certificate stating that they were fully paid, or they (see *Hirsche* v. *Sims* (6)) would be the only persons liable for the breach of trust in issuing them as fully paid. It is not necessary, I think, to pursue this point further. It seems to me that you would be met by practical difficulties at every turn if you were to accede to the view presented by the appellant. I am of opinion that the decision of the Court of Appeal must be affirmed.

I

LORD MORRIS.—I am of opinion that this appeal should be dismissed. I see nothing to limit the application of s. 25 of the Companies Act, 1867, to the case of a creditor and the company; it applies as much to a shareholder or sets of shareholders and the company. It is general in its terms, applying to all cases of the issue of shares. Any agreement or resolution of the company to issue shares on terms short of full payment was consequently illegal, and the liquidator is bound to bring the appellant's shares to the same level of payment as the other shareholders by making a call for the purpose of such levelling up. This appears to

me clear on the statute and to be the principle decided in the *Ooregum Case* (1). I entirely agree with the full reasons for arriving at this result which my noble and learned friend LORD DAVEY is about to read, and which I have had the advantage of seeing.

LORD DAVEY.—The Railway Time Tables Publishing Co., Ltd., was registered on Jan. 4, 1886, under the Companies Acts, as a company limited by shares. The memorandum of association contains the following clause:

> "The capital of the company is £30,000, divided into 6,000 shares of £5 each, with power to increase the capital, and to issue any shares in the original or in any new capital as preferential or guaranteed or deferred shares."

I do not know what was meant by "guaranteed shares" as distinguished from "preferential," and no explanation of that term has been offered at the Bar. No articles were registered with the memorandum. The regulations adopted for the conduct of the affairs of the company were, therefore, in the first instance, those contained in Table A. in Schedule 1 to the Companies Act, 1862. All the original shares (except the ten subscribed for in the memorandum) were issued to the vendor as fully paid-up under a registered contract, and it is not disputed that they were rightly so issued. They have been dealt with, and large numbers of them are in the hands of the general public. By a special resolution passed and confirmed on May 25 and June 11, 1886, the capital was increased to £40,000 by the creation of 2,000 additional shares of £5 each. Of these shares 600 were issued and paid-up in cash, 500 were issued as what is called "bonus shares," and the remaining 900 were issued as what is called "discount shares." By a second resolution passed and confirmed on the same dates, new articles of association were adopted in the place of Table A.

The material articles, for the present purpose, are those numbered 4, 41, 42, and 140, which are in the following terms:

> "4. The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such person on such terms and conditions, and at such times, as the directors think fit, and either at a discount, premium, or otherwise. 41. The company may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient. 42. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company, and with a special or without any, right of voting."

Article 140 provides for the distribution of surplus assets in course of a winding-up in a manner not apparently differing from the usual way, and concludes with these words: "But this clause is to be without prejudice to the rights of holders of shares issued upon special conditions." The bonus shares were issued to subscribers for debentures in the company as fully paid-up, without any consideration in money or money's worth, except the subscription for the debentures. The discount shares, after being offered to the existing shareholders at the price of £1 per £5 share, were issued to Mr. Henry Hoare as fully paid-up, in consideration of the payment of 10s. per share, or, in other words, at a discount of £4 10s. per share. Mr. Welton, the present appellant, is the holder of 215 discount shares, which he acquired for a nominal consideration from Hoare. As to 205 only of these shares, agreements were duly filed in accordance with s. 25 of the Companies Act, 1867. The appellant has been placed on the list of contributories for the whole of these 215 as wholly unpaid. The appellant is also the holder of 4,460 discount shares, which he also acquired from Hoare for a nominal consideration. As to 460 only of these shares, agreements were filed. The appellant has been placed on the

list of contributories as the holder of 4,460 shares upon which £4 10s. remains unpaid. There was a further issue of preference shares, some of which were held by the appellant; but as to these the question is a different one, and I will mention it later.

By an extraordinary resolution, dated Mar. 25, 1892, it was resolved that the company be wound-up voluntarily. By an order of April 13, 1892, the voluntary winding-up has been continued, subject to the supervision of the court. The respondent is the present liquidator of the company. Calls have been made in the course of winding-up on the bonus and discount shares, the proceeds of which, it is assumed, are sufficient for the payment of the debts of the company and the costs of winding-up. The liquidator now proposes to call up the balance of £2 5s. per share on the bonus and discount shares, for the purpose of adjusting the rights of the contributories inter se. The appellant disputes the right of the liquidator to make the call for that purpose, and contends that, as between him and the other shareholders, his shares should, by reason of the terms on which the same were issued, be treated as paid-up to the extent not required for payment of debts or costs of winding-up. This contention has been rejected by KEKEWICH, J., and the Court of Appeal following the previous decision of the latter court in *Re Weymouth and Channel Islands Steam Packet Co.* (2).

The appellant's case was argued with great ability by his leading counsel, and, as presented by him, it had not only an appearance of plausibility, but an attractive air of fairness and good faith. He argued that, as between themselves, the shareholders were bound to give effect to the contract upon which the appellant had become a shareholder, so far as they legally could do so, and, although that contract could not have effect given to it as against creditors, there was no legal principle which should prevent the court from giving effect to it in a question inter socios; and, further, that the rights of the contributories inter se must be determined with reference to that contract. A fuller consideration of the case since the argument has satisfied me that we cannot accede to the appellant's contention consistently with what has been decided by this House in the *Ooregum Gold Mining Co.'s Case* (1) and the settled principles of law applicable to joint stock companies incorporated with limited liability.

The question now before the House was, it is true, left open in the *Ooregum Case* (1), but the solution of it seems to me logically and necessarily to follow from what was decided in that case. Let us ask, what is really meant by the issue of a share at a discount. It means that, although less than the nominal amount, or even (as in the case of the bonus shares) nothing whatever, has been paid up on the share, it is to be treated for all purposes of the company, and to be placed on the same footing as regards the rights of the shareholders, as if it had been fully paid-up in cash. The consequence as regards the distribution of surplus assets in case of a winding-up, would seem to be that the discount shareholder would have the right (a) if all the other shares were fully paid-up, to participate in the surplus in proportion to the shares, or (b) if some of the other shares were not fully paid-up to require a call to be made upon them, and to have the proceeds of such call distributed as surplus assets, or (which is the same thing) to have the difference between the amount considered as paid up on the discount shares and the amount actually paid up on the cash shares paid to the discount shareholder before any distribution of the residue of the surplus assets. In the present case the appellant is resisting a call upon him, but the extent to which his argument must necessarily go in other conceivable cases should be considered. If the contract that no call shall be made upon the discount shareholders is valid as against shareholders, although not as against creditors, the result would also seem to be that the discount shareholder would be entitled to be recouped the calls which he had been obliged to pay contrary to the contract out of surplus assets before distribution, and then to participate pari passu in the ultimate residue (if any). If this be not so, the amount of calls which the holders of discount

shares have to pay would depend on the promptness with which the liquidator might be able to realise the assets and pay the debts out of them, instead of making a call. A

Counsel for the appellant, in answer to a question which I took the liberty to ask, said that the company might make calls on the discount shares while the company was a going concern. But why? If he had had the courage of his argument he would have replied "no," because the creditors have no rights while the company is a going concern, except to sue the company, and the question is then entirely one inter socios. In short, the argument, in my judgment, must be that, except for the purpose of payment of debts and costs on a winding-up, no call can be made upon a discount share beyond the specified amount, and as between themselves the contract is that no calls shall be made on the shares in question. B C

Let us see what was decided in the *Ooregum Case* (1), and what was the basis of the decision. It was, in the first place, held in this House that the capital mentioned in the memorandum was intended to be the real capital of the company, i.e., the capital represented by money or money's worth, and not merely the nominal capital for the purpose of fixing the proportionate rights of the members inter se. It was further held that s. 8 of the Companies Act, 1862, requiring the memorandum to contain the amount of the capital divided into shares of a fixed amount, combined with the statutory limitation of liability in s. 38 (a) is equivalent to a statutory requirement that such fixed amount shall be payable in money or money's worth. LORD HALSBURY, L.C., said ([1892] A.C. at p. 133): D

> "It seems to me that the system thus created, by which the shareholder's liability is to be limited by the amount unpaid upon his share, renders it impossible for the company to depart from that requirement, and by any expedient to arrange with the shareholders that they should not be liable for the amount unpaid on their shares, although the amount of their shares has been in accordance with the Act of Parliament fixed at a certain sum of money." E

It is, therefore, in my opinion, conclusively decided that the obligation to contribute to the assets of the company in one way or another the nominal amount of the shares is part of the statutory constitution of every joint stock company limited by shares embodied in its memorandum of association, and, therefore, not alterable by the company or by the unanimous consent of all the shareholders. It is a liability from which the company cannot release or relieve the shareholder. On the one hand, there is the liability to pay; on the other hand there is the correlative right of every shareholder to insist on the due performance of the conditions of the memorandum. F G

It is familiar law that no article can be valid or binding upon the shareholders, which is in conflict with the memorandum or with the general law. Nor does it admit of doubt that shareholders equally with creditors have the right to invoke the conditions contained in the memorandum and resist any infraction of them; and, in fact, until the winding-up takes place a creditor has no right to do so. That was the principle on which both the cases of *Hutton* v. *Scarborough Cliff Hotel Co.* (7) (8) were decided. Doubts have been entertained as to the correctness of the decision in those cases, and it has been thought that the priority between existing shareholders and the holders of new share capital created under a power is one of those matters of internal management, which, if not expressly settled by the memorandum, may be settled by the articles. Dissent from the decision in the second case of *Hutton* v. *Scarborough Cliff Hotel Co.* (8) has been expressed by one of your Lordships in this House and it has recently not been followed in the Court of Appeal: *Andrews* v. *Gas Meter Co.* (9). In the present case, however, there is no doubt, after the *Ooregum Case* (1), that the obligation to pay up the amount of the shares flows from and is part of that which the Act requires to be stated in the memorandum, and the shareholders have a right to the performance of that H I

condition. The social contract is to be found not in the articles alone but in the memorandum and articles, and as much in the former document as in the latter.

Therefore, in the ultimate adjustment of their rights inter se which takes place before the final dissolution of the company, regard must be had to the primary obligation of every contributory to contribute the amount of his share to the assets of the company, and, according to the ordinary principle of equity, the contributories have the right to have the adjustment made on the basis that all have satisfied or will satisfy their primary obligation to the company. I do not think that any article or regulation of the company which ignores that primary liability or purports to provide for the adjustment of their rights on any other basis could validly be made, because it would be inconsistent with the memorandum as interpreted by this House. This opinion, I should observe, is perfectly consistent with a regulation being made for priority to certain shareholders in the distribution of surplus assets when ascertained and got in. But no contributory can take or retain anything out of the surplus assets until he has satisfied his primary obligation either by payment of, or being debited in account with, the amount remaining unpaid on his shares.

If this be so, there is, in my opinion, an end of the appellant's case, because so much of art. 4 as purported to empower the directors to issue shares at a discount is ultra vires the company altogether and everything purporting to have been done under it is a nullity as against both shareholders and creditors in a winding-up. Article 140 must be read as applying only to special conditions which the company could legally attach to shares. No shareholder can derive any right as against his co-shareholders, or have assets distributed otherwise than in accordance with law, from an act of the directors or the company which is ultra vires. But it is argued that the company might have done the same thing in another way, e.g., if they had conferred on the bonus and discount shares a preference in distribution of capital which was within their powers. My present impression is, that in the particular circumstances of this case such a provision would probably have worked out the same result, although by a different road, as issuing the shares at a discount but liable to calls for payment of debts. But I have already shown that in other perfectly conceivable circumstances the result would have been widely different, and the holders of the discount shares (if valid) might be entitled not only to be preferentially recouped out of surplus assets the calls they had paid, but also to participate in any remaining assets on the footing that their shares were paid up in full, or to have calls made upon other shareholders for the purpose of adjusting their rights, although they had not themselves in fact contributed towards the company's assets.

I cannot, therefore, agree that the company could have done the same thing as issuing the shares at a discount inter socios in another way, and I think they could not. However, the company did not make the contract for attaching a priority to the shares. What the directors purported to do was to issue these shares free from liability for calls (altogether or beyond 10s. per share), and they no doubt believed they could do so, and intended to do so. It appears to me that it would be contrary to principle and unsound to split up a contract made alio intuitu, and convert it into a very different contract which the parties never thought they were making, because the contract as made cannot be carried into effect, but a similar result might in certain circumstances and to a limited extent be arrived at in a different way. Such a proceeding would not be giving effect to the contract but making a new contract. Of course, individual shareholders may deal with their own interests by contract in such way as they may think fit. But such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders. There is no suggestion here of any such private agreement outside the machinery of the Companies Acts. The

parties interested in opposing the appellant seem to be the present holders of the original shares and of the new shares issued for cash. They may or may not be the same persons as holders of shares at the time of the issue of the bonus and discount shares. In the view that I take it is not necessary to decide the point; but I am of opinion, having regard to the language of s. 25 of the Act of 1867, that the appellant could not have succeeded according to any view of the law as regards those bonus and discount shares in respect of which no agreements have been filed. There is a third class of shares mentioned in the case as preference shares. These shares were apparently issued as cash shares, and the contest has been whether they were in fact paid up. By an order of June 14, 1893, some of the appellant's preference shares were declared to be fully paid, others wholly unpaid, and one to be paid to the extent of £2 10s. There is no appeal against this order, and I fail to understand what question can now arise respecting these preference shares. I am, therefore, of opinion that the appellant has failed to show any special conditions attached to the issue of any of the three classes of shares held by him of which the court can take cognisance, and the rights and interests of himself and his contributories must be determined and adjusted on the basis that the appellant as well as the other contributories have contributed or will contribute the full amount of their shares to the company's assets. This appeal should, in my opinion, be dismissed with costs.

Appeal dismissed.

Solicitors: *Slaughter & May; C. T. Whinney.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

R. *v.* LILLYMAN

[Court for Consideration of Crown Cases Reserved (Lord Russell of Killowen, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), April 25, June 16, 1896]

[Reported [1896] 2 Q.B. 167; 65 L.J.M.C. 195; 74 L.T. 730; 60 J.P. 536; 44 W.R. 654; 12 T.L.R. 473; 40 Sol. Jo. 584; 18 Cox, C.C. 346]

Criminal Law—Evidence—Complaint—Sexual offence—Evidence of consistency of complainants' story, not of commission of offence—Negation of consent to acts complained of—Direction to jury.

On the trial of an indictment for a sexual offence against a female evidence is admissible, not only of the fact that the prosecutrix made a complaint as speedily after the act complained of as could reasonably be expected, but also of the particulars of the complaint so made. This evidence is not to be taken as proof of the acts complained of; it can legitimately be used only (a) to enable the jury to judge for themselves whether the conduct of the prosecutrix was consistent with her testimony on oath regarding the offence, (b) as negativing her having consented to the acts complained of and as affirming that those acts were done against her will, and (c) to show that her conduct was what would be expected in a truthful woman in the circumstances detailed by her. It is the duty of the judge to impress on the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of the facts complained of or for any other purpose than those hereinbefore stated.

Notes. Applied: *R.* v. *Folley* (1896), 60 J.P. 569. Considered: *Beatty* v. *Cullingworth* (1896), 60 J.P. 740; *R.* v. *Rowland* (1898), 62 J.P. 459. Applied:

A *R.* v. *Merry* (1900), 19 Cox, C.C. 422. Distinguished: *R.* v. *Kingham* (1902), 66 J.P. 393. Considered: *R.* v. *Osborne*, [1904-7] All E.R. Rep. 54. Applied: *Chesney* v. *Newsholme*, *Newsholme* v. *Chesney*, [1908] P. 301. Distinguished: *R.* v. *Christie*, [1914-15] All E.R. Rep. 63. Applied: *R.* v. *Camelleri*, [1922] 2 K.B. 122. Considered: *R.* v. *Lovell* (1923), 129 L.T. 638. Distinguished: *R.* v. B *Whitehead*, [1928] All E.R. Rep. 186. Considered: *R.* v. *Cummings*, [1948] 1 All E.R. 551. Referred to: *R.* v. *Smith* (1897), 18 Cox, C.C. 470; *R.* v. *Wannell* (1922), 87 J.P. 48; *R.* v. *Coulson* (1927), 20 Cr. App. Rep. 106; *Sutton* v. *R.*, [1933] A.C. 348; *Corke* v. *Corke and Cooke*, [1958] 1 All E.R. 224.

As to the admission of evidence of complaints, see 10 Halsbury's Laws (3rd Edn.) 468, 469; and for cases see 14 Digest (Repl.) 452-456. As to sexual offences C see now Sexual Offences Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 215).

Cases referred to:

(1) *R.* v. *Brasier* (1779), 1 Leach, 199; 1 East, P.C. 443, C.C.R.; 14 Digest (Repl.) 524, *5080.*

(2) *R.* v. *Clarke* (1817), 2 Stark. 241; 14 Digest (Repl.) 413, *4028.*

(3) *R.* v. *Walker* (1839), 2 Mood. & R. 212, N.P.; 14 Digest (Repl.) 452, *4383.*

D (4) *R.* v. *Megson*, *Battye and Ellis* (1840), 9 C. & P. 420; 14 Digest (Repl.) 453, *4386.*

(5) *R.* v. *Guttridge* (1840), 9 C. & P. 471; 14 Digest (Repl.) 453, *4387.*

(6) *R.* v. *Osborne* (1842), Car. & M. 622; 14 Digest (Repl.) 453, *4384.*

(7) *R.* v. *Wink* (1834), 6 C. & P. 397, N.P.; 14 Digest (Repl.) 452, *4378.*

(8) *R.* v. *Eyre* (1860), 2 F. & F. 579; 14 Digest (Repl.) 453, *4388.*

E (9) *R.* v. *Wood* (1877), 14 Cox, C.C. 46; 14 Digest (Repl.) 543, *4389.*

(10) *R.* v. *Thomas* (1875), L.R. 2 C.C.R. 141; 44 L.J.M.C. 42; 31 L.T. 849; 39 J.P. 212; 23 W.R. 344; 13 Cox, C.C. 52, C.C.R.; 14 Digest (Repl.) 362, *3536.*

Also referred to in argument:

R. v. *Nicholas* (1846), 2 Car. & Kir. 246; 2 Cox, C.C. 136; 14 Digest (Repl.) 453, *4392.*

F *R.* v. *Bedingfield* (1879), 14 Cox, C.C. 341; 14 Digest (Repl.) 451, *4370.*

R. v. *Little* (1883), 15 Cox, C.C. 319; 14 Digest (Repl.) 297, *2772.*

Aveson v. *Lord Kinnaird* (1805), 6 East, 188; 102 E.R. 1258; sub nom. *Avison* v. *Lord Kinnaird*, 2 Smith, K.B. 286; 22 Digest (Repl.) 92, *707.*

R. v. *Foster* (1834), 6 C. & P. 325; 14 Digest (Repl.) 451, *4368.*

G *Thompson* v. *Trevanion* (1693), Holt, K.B. 286; Skin. 402; 90 E.R. 1057, N.P.; 14 Digest (Repl.) 450, *4367.*

Wright v. *Doe d. Tatham* (1837), 7 Ad. & El. 313; 2 Nev. & P. 305; 7 L.J.Ex. 340, Ex. Ch.; affirmed sub nom. *Wright* v. *Tatham* (1838), 5 Cl. & Fin. 670; 2 Jur. 461; 7 E.R. 559; sub nom. *Wright* v. *Doe d. Tatham*, 4 Bing. N.C. 489; 6 Scott, 58; 7 L.J.Ex. 363, H.L.; 22 Digest (Repl.) 364, *3928.*

H *R.* v. *Ridsdale* (1837), Starkie on Evidence, 4th Edn., p. 469; 14 Digest (Repl.) 452, *4379.*

R. v. *Lunny* (1854), 6 Cox, C.C. 477; 14 Digest (Repl.) 451, **2835.*

R. v. *Pook* (1871), 13 Cox, C.C. 172, n.; 14 Digest (Repl.) 450, *4365.*

R. v. *Wainwright* (1875), 13 Cox, C.C. 171; 14 Digest (Repl.) 317, *3047.*

R. v. *Goddard* (1882), 15 Cox, C.C. 7; 14 Digest (Repl.) 451, *4731.*

I **Case Stated** by Hawkins, J.

The prisoner was tried at the Nottingham Assizes upon an indictment containing three counts, the first, charging him with an attempt to have carnal knowledge of one Florence Sevestre Green, a girl above the age of thirteen and under the age of sixteen years; the second, with an assault upon the same girl with intent to ravish and carnally know her; the third, with an indecent assault upon the same girl. Florence Green was called in support of these charges. She deposed to the acts complained of having been done without her consent. Counsel for the Crown tendered evidence in chief of a complaint made by the girl to her mistress in the

absence of the prisoner very shortly after the commission of these acts, and proposed to ask the details of that complaint as made by the girl. Counsel for the prisoner objected to the admission of such evidence. HAWKINS, J., overruled the objection and admitted the evidence, and the girl's mistress then deposed to all the girl had said respecting the prisoner's conduct towards her. The jury found the prisoner Guilty on the first count, and the learned judge sentenced him to one month's imprisonment with hard labour, subject to the opinion of the court upon the question: Was the evidence so admitted rightly admitted? If it was, the conviction was to be affirmed, otherwise it was to be quashed. His Lordship said in the Case: The cases bearing upon this question are all to be found collected in ROSCOE'S CRIMINAL EVIDENCE under the heading "HEARSAY," and in ARCHBOLD'S CRIMINAL PLEADING AND EVIDENCE. They are conflicting. I have, therefore, reserved this case for consideration, in the hope that the law may be settled upon a point which is of daily occurrence.

J. E. Fox for the prisoner.

The Solicitor-General (*Sir Robert Finlay, Q.C.*), *H. Sutton*, and *Cracroft* for the Crown.

Cur. adv. vult.

June 16, 1896. The judgment of the court was read by

HAWKINS, J.—The prisoner was tried before me at the Nottingham Assizes upon an indictment containing three counts. The first charged him with an attempt to have carnal knowledge of one Florence Sevestre Green, a girl above the age of thirteen and under the age of sixteen; the second, with an assault on the same girl with intent to ravish her; the third, with an indecent assault also upon the same girl. The girl was examined as a witness in support of these charges, and deposed to the acts she complained of having been committed without her consent. For the Crown evidence was tendered in chief of a complaint made by the girl to her mistress in the absence of the prisoner very shortly after the commission of the acts charged, and it was proposed to ask witness, called for that purpose, to state the details of the complaint in the language used by the girl. Counsel for the prisoner objected, first, that the complaint could not be given in evidence at all; and secondly, that even if the fact of a complaint having been made was admissible, the particulars of it could not be elicited in the examination in chief. I overruled both objections, and the complaint with full particulars was deposed to by the witness. The jury found the prisoner Guilty on the first count only. That, however, does not affect the question we have to decide, because although to establish guilt upon that count it was not essential to prove want of consent, yet as the girl had emphatically stated that whatever was done was against her will, the reasons which, in our opinion, as it will appear, made the complaint evidence upon the second and third counts were equally applicable to the first.

It is necessary in the first place to have a clear understanding as to the principles upon which evidence of such a complaint not on oath, nor made in the presence of the prisoner, nor forming part of the res gestæ can be admitted. It clearly is not admissible as evidence of the facts complained of; those facts must, therefore, be established, if at all, upon oath by the prosecutrix or other credible witness. And, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains.

In every one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In HAWKINS' PLEAS OF THE CROWN (7th Edn.), bk. 1, c. 41, s. 9, it is said:

> "It is a strong but not a conclusive presumption against a woman that she made no complaint in a reasonable time after the fact."

A And in BLACKSTONE'S COMMENTARIES, vol. 4, c. 15, referring to the time when BRACTON wrote in Henry III's reign, it is said (at p. 211):

> "But in order to prevent malicious accusations it was then the law that the woman should immediately after, dum recens fuerit maleficium, go to the next town and there make discovery to some credible persons of the injury she has
B suffered."

Later on it is said (ibid. at p. 213):

> "And first the party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed must be left to the jury upon the circumstances of fact
C that occur in that testimony. For instance if the witness be of good fame; if she presently discovered the offence, and made search for the offender . . . these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others, if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged
D to be committed was where it was possible she might have been heard, and she made no outcry, these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false and feigned."

It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily
E after the acts complained of as could reasonably be expected.

We proceed to consider the second objection, which is that the evidence of complaint should be limited to the fact that a complaint was made without giving any of the particulars of it. No authority binding upon us was cited during the argument, either in support of or against this objection. We must, therefore, determine the matter upon principle. That the general usage has been substantially
F to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person, cannot be denied; but it is equally true that judges of great experience have dissented from the limitation; and those who have adopted the usage have ever carefully discussed or satisfactorily expressed the ground upon which their views have been based.

G *R.* v. *Brasier* (1), decided in 1779, is the earliest authority I propose to cite as throwing any valuable light upon the subject. Before that case there existed in the minds of some of the judges an impression that, although a child incapable of understanding the nature and obligation of an oath was not a competent witness, nevertheless, upon a charge of rape or assault with intent to commit that crime, she might and ought to be heard without oath to give the court information; and
H that upon unsworn information the accused person might be convicted. In *R.* v. *Brasier* (1), tried before BULLER, J., that learned judge went still further, and admitted as evidence such information as the testimony of third persons to whom it was first given. There the prisoner was indicted for an assault with intent to commit a rape upon a girl under seven years of age. The girl herself, by reason of her then presumed incompetency to be sworn, was not produced as a witness
I on the trial; inasmuch, however, as she had on the afternoon of the day on which the outrage was charged to have been committed, immediately on her coming home made a statement to her mother (though not in the presence of the prisoner) of the full particulars of the alleged assault, her mother was allowed to prove this statement, and it was left to the jury as evidence of the facts complained of, and practically upon it the prisoner was convicted. The case was afterwards twice considered by the judges. Upon the first occasion two of them (GOULD and WILLES, JJ.) expressed a view that the girl's statement was admissible as part of the transaction itself. This view was not, however, adopted by the rest of the

judges, and on the second occasion they were all unanimously of opinion that no testimony whatever could legally be received except upon oath, and that no evidence on oath of the commission of the crime having been given, the evidence of the girl's statement to her mother ought not to have been received. This case, therefore, in effect, decided that the mere complaint is no evidence of the facts complained of, and that the admissibility of the evidence of the complaint is dependent upon proof of the facts or other legalised testimony. It is obvious, however, that, upon the assumption that the complaint was admissible in evidence, it was, in the case referred to, admitted with all its details.

When and for what reason the proof of the complaint was first limited to answers to such questions as these: "Did she make a complaint?" "Did she mention a name?" "Whose name?", I have not been able to discover. *R.* v. *Clarke* (2) is cited in several text-books on criminal evidence as an authority that in proving the complaint the particulars of it cannot be given in evidence, but the ruling of HOLROYD, J., certainly does not go to that extent. That learned judge ruled, indeed, that the fact of the woman having made a complaint was admissible in evidence, as also a description of her state and appearance at the time. But he did not rule that the particulars of such complaint could not be given in evidence. He only ruled, and in our opinion correctly ruled, that they were not evidence of the truth of her complaint or of the statements of fact on which it is based. In this sense the ruling is cited in PHILLIPS ON EVIDENCE (10th Edn.), vol. 1, p. 151, and in this sense we adopt it as settled law. That case is clearly not an authority for the limitation of the evidence of the complaint.

In *R.* v. *Walker* (3), on the trial of a person for assaulting a female with intent to commit a rape, PARKE, B., permitted a relative of the woman to whom she had made immediate complaint to give evidence generally that such complaint was made; but refused to allow the witness on examination in chief to state the particulars of it, upon the ground that, according to the usage which had obtained, such particulars should not be given, but that it should be left to the prisoner's counsel to bring the details of the complaint before the jury if he thought fit so to do. It is clear, however, that the learned baron did not approve of that usage, for he prefaced his ruling by saying (2 Mood. & R. at p. 212):

> "The sense of the thing certainly is that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand the usage has obtained."

R. v. *Megson, Battye and Ellis* (4) was an indictment against the prisoners for a rape on a woman who had since died without having made any admissible depositions which could be laid before the jury. That she had been ravished by somebody was beyond all question. On the part of the prosecution it was sought to put in evidence a detailed account of the transaction in the shape of a complaint by the woman with a view by it alone to show the prisoners to be the guilty persons. ROLFE, B., rejected it, saying (9 C. & P. at p. 422):

> "There is a wide difference between receiving such statements as confirmatory of the prosecutrix's credibility in a charge of rape on which she is examined as a witness, and a case like the present, where the complaint made is to be received as independent evidence."

In summing-up he added (ibid.):

> "In ordinary cases of rape, when a witness describes the outrage in the witness box, evidence of her complaint soon after the occurrence of the outrage is properly admissible to show her credit and the accuracy of her recollection."

This case is, in our opinion, improperly cited as an authority for excluding the particulars of the complaint. We look upon it only as a ruling that the particulars

could not be used as independent evidence of the facts alleged to the same effect as was, according to our interpretation, the ruling in *R.* v. *Clarke* (2). The last few words of the summing-up rather indicate that ROLFE, B.'s, view was that for the purpose of confirmation merely the details ought to be given; how otherwise, one might well ask, could the "woman's credit and the accuracy of her recollection" be tested by it?

R. v. *Guttridge* (5) was a very similar case. The prosecutrix was absent when the trial took place. It was sought to put in her complaint made on the following day after the alleged outrage. PARKE, B., thought it safer to reject the evidence on the ground that it was not part of the res gestæ, but only confirmatory evidence which could not be used as the prosecutrix had given no evidence. There is nothing in that case to suggest that the learned baron intended to rule that, if evidence of the complaint were admissible the particulars ought to be excluded.

In *R.* v. *Osborne* (6), on an indictment for rape, the prosecutrix on oath stated that soon after the alleged outrage, and as she was returning home, she made complaint to a Mrs. Partridge, who was called as a witness to confirm her statement. The counsel for the prosecution was allowed to ask: "Did the prosecutrix make any complaint?" to which the answer was "Yes"? He was then allowed to ask: "Did she name any particular person?" to which she also said "Yes." It was then proposed by the counsel to ask: "Whose name was mentioned?" To this it was objected that the question was inadmissible upon the ground that, though the fact of the complaint was admissible as showing that the prosecutrix was not an assenting party, the name was an important particular as against the prisoner, and, therefore, could not be asked, and the ruling of PATTERSON, J., in *R.* v. *Wink* (7) (hereafter referred to) was cited in support of the objection. In support of the question it was urged that the whole complaint was admissible as part of the res gestæ. CRESSWELL, J., ruled that the statement of the prosecutrix did not form part of the res gestæ (treating *R.* v. *Wink* (7) as a direct authority against the question). In the ruling we agree, but if it had been pressed upon that learned judge that the complaint in all its details was nevertheless a fact admissible for the purpose of showing consistency of conduct on the part of the woman, we doubt if he would have rejected the evidence. At all events the case cannot be taken as a ruling upon the point now under discussion, for the decision was founded entirely upon the statements not being part of the res gestæ.

In support of the view that all the particulars of a complaint are admissible, it was pointed out that the late SIR JAMES FITZJAMES STEPHEN, in his DIGEST OF THE LAW OF EVIDENCE (5th Edn.), note to art. 8, says:

> "I heard WILLES, J., rule that they were, on several occasions, vouching PARKE, B., as his authority."

And, after saying BRAMWELL, B., had been in the habit of admitting the whole of the complaint, adds his own view that such practice is certainly in accordance with common sense.

Two reported cases were brought to our attention in which such view was acted upon. In *R.* v. *Eyre* (8), tried before BYLES, J., on a trial for rape the prosecutrix, being examined in chief, was asked whether she had made any complaint, and what she said. To an objection made by the prisoner's counsel, BYLES, J., said (2 F. & F. at p. 79):

> "Whatever she said immediately after the occasion, and what was said to her in answer, is equally evidence."

The latter part of this ruling is open to question. In *R.* v. *Wood* (9), tried before BRAMWELL, L.J., at Chester, the prosecutrix gave evidence that the prisoner came to a room in an inn where she was barmaid, when she was alone, committed a rape upon her, and then left the house, and that an hour and a half afterwards a

customer came in to whom she made a complaint, mentioning the prisoner's name in connection with it; it was proposed for the prosecution to ask her what she said to the customer and his reply. BRAMWELL, L.J., said (14 Cox, C.C. at p. 47):

> "I shall admit the conversation; you give evidence of a complaint being made, and use the name of the prisoner, leaving it to the jury to infer that the girl said he had committed the offence we are now trying him for. I do not see why you should not give in evidence all she said when she did so complain, leaving it to the jury to judge of the value of such testimony."

The girl then told in minute detail the particulars of all that had, as she alleged, been done to her by the prisoner and the customer's replies to her story. This customer was also called, and spoke again in detail as to the complaint.

I am not aware of any other cases directly bearing upon the question before us. Many others were cited, all of which we have examined, but finding they were decided upon other principles of the laws of evidence than that which governs the present case, and that they render no assistance to us in our consideration of it, we abstain from any discussion or expression of opinion upon them.

After very careful consideration, we have arrived at the conclusion that we are bound by no authority to suppose the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. The evidence is admissible only upon the ground that it was a complaint of that which is charged against the prisoner, and can be legitimately used only for the purpose of enabling the jury to judge for themselves whether the conduct of the woman was consistent with her testimony on oath, given in the witness box, negativing her consent and affirming that the acts complained of were against her will, and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her. The jury, and they only, are the persons to be satisfied whether the woman's conduct was so consistent or not. Without proof of her condition, demeanour, and verbal expressions, all of which are of vital importance in the consideration of that question, how is it possible for them satisfactorily to determine it?

Is it to be left to the witness to whom the statement is made to determine and report to the jury whether what the woman said amounted to a real complaint? And are the jury bound to accept the witness' interpretation of her words as binding upon them without having the whole statement before them and without having the power to require it to be disclosed to them, even though they may feel it essential to enable them to form a reliable opinion? For it must be borne in mind that if such evidence is inadmissible when offered by the prosecutrix, the jury cannot alter the rules of evidence and make it admissible by asking for it themselves. In reality affirmative answers to such stereotyped questions as these: "Did the prosecutrix make a complaint" (a very leading question, by the way) "of something done to herself?" "Did she mention a name?", amount to nothing to which any weight ought to be attached—they tend rather to embarrass than assist a thoughtful jury, for they are consistent either with there having been a complaint or no complaint of the prisoner's conduct. To limit the evidence of the complaint to such questions and answers is to ask the jury to draw important inferences from imperfect materials, perfect materials being at hand and in the cognisance of the witness in the box.

In our opinion, nothing ought unnecessarily to be left to speculation or surmise. It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated.

With such a direction we think the interest of an innocent accused would be more protected than they are under the present usage. For when the whole statement is laid before the jury, they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused. Moreover, the present usage and consequent uncertainty in practice (for the usage is not universal) provokes many objections to the evidence on the part of the prisoner's counsel, and these are generally looked upon with disfavour by the jury; and the very object of confining the evidence of the complaint to the few stereotyped questions we have referred to is often defeated by a device, not to be encouraged, by which the name of the accused, though carefully concealed as an inadmissible particular of the complaint, is studiously revealed to the jury by some such question and answer as the following: "In consequence of that complaint did you do anything?" "Yes; I went to the house of the prisoner's mother, where he lives, and accused him." This seems to us to be an objectionable mode of introducing evidence indirectly which if tendered directly would be inadmissible. We are aware that PATTESON, J., is reported in *R.* v. *Wink* (7) to have suggested that such a mode of obtaining the evidence might be adopted, but we cannot help thinking that there must be some inaccuracy in the report, and the suggestion did not meet with the approval of CRESSWELL, J., in *R.* v. *Osborne* (6), nor of BRETT, J., in *R.* v. *Thomas* (10), nor can we approve of it.

In the result, our judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as a part of the case for the prosecution, and that the evidence in this case was, therefore, properly admitted. The conviction must be affirmed.

Conviction affirmed.

Solicitors: *Williams & Son*, Lincoln; *Solicitor to the Treasury.*

[*Reported by* A. A. BETHUNE, ESQ., *Barrister-at-Law.*]

Re MILNER. BRAY *v.* MILNER

[CHANCERY DIVISION (Stirling, J.), January 12, 17, February 22, 1899]

[Reported [1899] 1 Ch. 563; 68 L.J.Ch. 255; 80 L.T. 151; 47 W.R. 369]

Power of Appointment—Exercise—Special power—Power to appoint life interest to husband—Power validly exercised by will containing gift, bequest and appointment of residue of testatrix' estate to husband.

A testatrix, under her father's will, had power to appoint a life interest in certain funds to her husband. By her will, after giving legacies to persons who were not objects of the power out of her separate estate or any estate of effects over which she had a disposing power, continued: "I give, bequeath, and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband . . . absolutely."

Held: on proof that the testatrix' power was only a testamentary power, it had been exercised by the bequest of residue, particularly having regard to the use of the word "appoint" in addition to "give" and "bequeath."

Rule stated by PEARSON, J., in *Von Brockdorff* v. *Malcolm* (1) (1885), 30 Ch.D. at p. 179, applied.

Notes. Distinguished: *Re Rickman, Stokes* v. *Rickman* (1899), 80 L.T. 518; *Re Hayes, Turnbull* v. *Hayes*, [1901] 2 Ch. 529. Referred to: *Re Mayhew, Spencer*

v. *Cutbush* (1901), 70 L.J.Ch. 428; *Re Beresford's Will Trusts, Sturges* v. *Beresford*, [1938] 3 All E.R. 566; *Re Holford's Settlement, Lloyds Bank, Ltd.* v. *Holford*, [1944] 2 All E.R. 462; *Re Latta's Settlement, Public Trustee* v. *Latta*, [1949] 1 All E.R. 665.

As to the exercise of special powers by will, see 30 HALSBURY'S LAWS (3rd Edn.), 225. For cases on expression of intention to exercise powers, see 37 DIGEST 431 et seq.

Cases referred to:

(1) *Von Brockdorff* v. *Malcolm* (1885), 30 Ch.D. 172; 55 L.J.Ch. 121; 53 L.T. 263; 33 W.R. 934; 37 Digest 480, *771*.

(2) *Pidgely* v. *Pidgely* (1844), 1 Coll. 255; 3 L.T.O.S. 200; 8 Jur. 529; 63 E.R. 408; 37 Digest 452, *546*.

(3) *Banks* v. *Banks* (1853), 17 Beav. 352; 1 W.R. 511; 51 E.R. 1070; 37 Digest 452, *547*.

(4) *Re Teape's Trusts* (1873), L.R. 16 Eq. 442; 43 L.J.Ch. 87; 28 L.T. 799; 21 W.R. 780; 37 Digest 451, *541*.

(5) *Re Swinburne, Swinburne* v. *Pitt* (1884), 27 Ch.D. 696; 54 L.J.Ch. 229; 33 W.R. 394; 37 Digest 453, *550*.

(6) *Re Mills, Mills* v. *Mills* (1886), 34 Ch.D. 186; 56 L.J.Ch. 118; 55 L.T. 665; 35 W.R. 133; 37 Digest 447, *506*.

(7) *Re Williams, Foulkes* v. *Williams* (1889), 42 Ch.D. 93; 58 L.J.Ch. 451; 61 L.T. 58, C.A.; 37 Digest 437, *427*.

(8) *Re Huddleston, Bruno* v. *Eyston*, [1894] 3 Ch. 595; 64 L.J.Ch. 157; 43 W.R. 139; 8 R. 462; 37 Digest 447, *504*.

(9) *Cotton, Wood* v. *Cotton* (1888), 40 Ch.D. 41; 58 L.J.Ch. 174; 37 W.R. 232; 37 Digest 451, *539*.

(10) *Cowx* v. *Foster* (1860), 1 John. & H. 30; 29 L.J.Ch. 886; 2 L.T. 797; 6 Jur.N.S. 1051; 70 E.R. 649; 37 Digest 450, *536*.

(11) *Ferrier* v. *Jay* (1870), L.R. 10 Eq. 550; 39 L.J.Ch. 686; 23 L.T. 302; 18 W.R. 1130; 37 Digest 451, *537*.

(12) *Thornton v. Thornton* (1875), L.R. 20 Eq. 599; 37 Digest 453, *549*.

(13) *Price* v. *Price* (1882), 46 L.T. 228; 37 Digest 452, *544*.

Also referred to in argument:

Hope v. *Hope* (1854), 5 Giff. 13; 23 L.T.O.S. 343; 8 Jur. 823; 2 W.R. 674; 66 E.R. 902; 37 Digest 453, *552*.

Clogstoun v. *Walcott* (1843), 13 Sim. 523; 7 Jur. 616; 60 E.R. 203; 37 Digest 450, *534*.

Greville v. *Browne* (1859), 7 H.L.Cas. 689; 34 L.T.O.S. 8; 5 Jur.N.S. 849; 7 W.R. 673; 11 E.R. 275, H.L.; 44 Digest 576, *3942*.

Cooke v. *Cunliffe* (1851), 17 Q.B. 245; 21 L.J.Q.B. 30; 15 Jur. 1076; 117 E.R. 1274; 37 Digest 450, *531*.

Gainsford v. *Dunn* (1874), L.R. 17 Eq. 405; 34 L.J.Ch. 403; 30 L.T. 283; 22 W.R. 499; 44 Digest 523, *3401*.

Adjourned Summons to determine whether the testatrix had exercised the special power conferred upon her by her father's will.

Under the will of her father, Henry Milner, Mrs. Bray, the testatrix, had power to appoint a life interest in certain funds to her husband. By her will, dated Nov. 16, 1882, she bequeathed certain pecuniary and specific legacies "out of my separate estate, or out of the estate and effects over which I have any disposing power, all free from legacy duty."

The will then continued:

"I give, bequeath, and appoint all the residue of my estate and effects whatsoever and wheresoever unto my husband, James Bray, of Ghent, aforesaid absolutely, whom I appoint sole executor and trustee of this my will."

A The testatrix died on July 20, 1883, leaving her husband surviving her, and the question was whether by the above bequest she had exercised in his favour the special power conferred by her father's will.

Lambert for the trustees.
Beaumont for the husband.
B *Upjohn, Q.C.*, and *Romer* for the next of kin.
Greenwood for other parties.

Cur. adv. vult.

Feb. 22, 1899. **STIRLING, J.,** stated the facts, and continued:—It was stated at the Bar, and I shall assume for the present purpose, until the reverse is proved, C that this power is only a testamentary power to which Mrs. Bray was entitled, and as to this circumstance giving force and cogency to the evidence of intention to exercise such power it is sufficient to refer to *Pidgely* v. *Pidgely* (2), *Banks* v. *Banks* (3), *Re Teape's Trusts* (4), and *Re Swinburne*, *Swinburne* v. *Pitt* (5). It was contended that evidence of that fact was inadmissible having regard to the decisions in *Re Mills*, *Mills* v. *Mills* (6), *Re Williams*, *Foulkes* v. *Williams* (7), and D *Re Huddleston*, *Bruno* v. *Eyston* (8). But all of these are directed to a different point, and they were not intended, so far as I can see, to overrule the series of cases above mentioned, and not one of them is mentioned in this latter series of decisions.

The rule applicable to cases of this sort is thus stated by PEARSON, J., in *Von Brockdorff* v. *Malcolm* (1) (30 Ch.D. at p. 179):

E "The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against F the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will?"

This passage is cited with approval by NORTH, J., in *Re Cotton*, *Wood* v. *Cotton* (9).

In applying a rule of this kind, it is obvious that little assistance is derived from decisions on wills of different form and expression. It may, however, be useful to G state that, where a will is found containing a general intention to exercise a disposing power, the court has repeatedly refused to infer a contrary intention from such circumstances as a direction to pay debts or legacies or bequests in favour of persons not objects of the power. On this, in addition to the cases already mentioned, I would refer to *Cowx v. Foster* (10), *Ferrier* v. *Jay* (11), *Thornton* v. *Thornton* (12), and *Price* v. *Price* (13). *Re Cotton* (9), which I have just men- H tioned, is the best case in recent times where a contrary intention has been held sufficiently clear.

In the present case the circumstances relied on as shewing an intention not to exercise the power are, first, that not one of the legatees is an object of the power, and, secondly, that all that is given to the husband is the residue of the testatrix's estate and effects. Still she does at the commencement of the will indicate an I intention to exercise powers vested in her as well as dispose of her own estate, and by the use of the word "appoint" in addition to the words "give" and "bequeath" she seems to me to shew that this intention extended to what she describes as the residue of her estate and effects. On the whole, applying the rule stated as well as I can, I am of opinion that the power has been exercised.

Solicitors: *W. Stubbs*, for *Hirst & Capes*, Harrogate; *Frank Richardson & Sadler; T. B. & W. Nelson*, for *Nelson, Eddisons & Lupton*, Leeds.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

THE GEMMA

[Court of Appeal (A. L. Smith and Vaughan Williams, L.JJ.), July 25, 26, August 5, 1899]

[Reported [1899] P. 285; 68 L.J.P. 110; 81 L.T. 379; 15 T.L.R. 529; 8 Asp.M.L.C. 585] B

Admiralty—Jurisdiction—Action in rem—Appearance entered by defendant—Personal liability of defendant—Bail bond—Release of ship—Damages awarded exceeding amount of bond.

A person who enters an appearance as defendant to an admiralty action commenced in rem becomes personally liable to pay any damages that may be awarded. Even though he has obtained the release of a ship involved in a collision by entering into a bail bond for the agreed value of the ship and its freight, the ship is nevertheless liable to seizure under a writ of fieri facias if the damages awarded exceed the amount of the bail bond. C

The Christiansborg (1) (1885), 10 P.D. 141, distinguished.

The Dictator (2), [1892] P.D. 304, approved. D

Notes. The Admiralty Court Act, 1861, s. 15, provided as follows: "All decrees and orders of the High Court of Admiralty, whereby any sum of money or any costs charges or expenses shall be payable to any person shall have the same effect as judgments in the superior courts of common law, and the persons to whom any such moneys or costs charges or expenses shall be payable shall be deemed judgment E creditors and all powers of enforcing judgments possessed by the superior courts of common law, or any judge thereof, with respect to matters depending in the same courts as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys costs F charges or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid."

This section was repealed by the Statute Law Revision and Civil Procedure Act, 1881, s. 13, and Schedule, but with the assignment of the jurisdiction of the Court of Admiralty to the High Court, the ordinary remedies for enforcing a judgment in the High Court are applicable to admiralty actions: see 1 Halsbury's Laws (3rd G Edn.) 114-115.

Considered: *The Port Victor*, [1901] P. 243. Distinguished: *The Burns*, [1907] P. 137. Applied: *The Dupleix*, [1912] P. 8; *The Broadmayne*, [1916] P. 64. Considered: *The Beldis*, [1935] All E.R. Rep. 760. Referred to: *The Joanna Vatis* (*No. 2*), [1922] P. 213; *The Point Breeze*, [1928] P. 135; *The Roberta*, [1938] P. 1; *The Majfrid* (1943), 170 L.T. 375; *Admiralty Comrs.* v. *Josefina Thorden*, *Owners*, H *The Josefina Thorden*, [1945] 1 All E.R. 344.

As to the liability of a defendant in proceedings commenced in rem, see 1 Halsbury's Laws (3rd Edn.) 50, 79, 114-115, and for cases see 1 Digest (Repl.) 264-265.

Cases referred to:

(1) *The Christiansborg* (1885), 10 P.D. 141; 54 L.J.P. 84; 53 L.T. 612; 1 T.L.R. 634; 5 Asp.M.L.C. 491, C.A.; 41 Digest 955, *8498*. I

(2) *The Dictator*, [1892] P. 64, 304; 61 L.J.P. 73; 67 L.T. 563; 7 Asp.M.L.C. 251; 1 Digest (Repl.) 121, *68*.

Also referred to in argument:

The Freedom (1871), L.R. 3 A. & E. 495; 41 L.J.Adm. 1; 25 L.T. 392; 1 Asp.M.L.C. 136; 1 Digest (Repl.) 195, *813*.

The Wild Ranger (1863), Brown. & Lush. 84; 2 New Rep. 402; 1 Digest (Repl.) 196, *818*.

A *The Parlement Belge* (1880), 5 P.D. 197; 42 L.T. 273; 28 W.R. 642; 4 Asp.M.L.C. 234, C.A.; 1 Digest (Repl.) 121, *70.*

Appeal by the plaintiffs from a decision of BUCKNILL, J., dated July 13, 1899, whereby he directed the sheriff to withdraw from possession of the defendants' ship the *Gemma* which the sheriff had seized under a writ of fieri facias.

B The plaintiffs' ship was in collision with the *Gemma*, a foreign ship owned by foreigners. Proceedings in rem were thereupon started against the *Gemma* which was arrested. The defendants entered an appearance and entered into a bail bond for the value of the ship and its freight, thus obtaining the release of the *Gemma*. The *Gemma* was later held wholly to blame for the collision, and damages were awarded against the defendants for an amount exceeding the bail. The plaintiffs C issued a writ of fieri facias and had the *Gemma* seized by the sheriff at Berwick, where it had put in. On an application by the defendants, BUCKNILL, J., ordered the sheriff to withdraw. The plaintiffs appealed.

The facts appear more fully in the judgment of A. L. SMITH, L.J.

Robson, Q.C., and *Aspinall, Q.C.*, for the plaintiffs.

D *Joseph Walton, Q.C., Carver, Q.C.*, and *Batten* for the defendants.

Cur. adv. vult.

Aug. 5, 1899. **A. L. SMITH, L.J.**, read the following judgment.—By s. 15 of the Admiralty Court Act, 1861, it is enacted: [HIS LORDSHIP read the section, and continued:] The above being the statute, the question is, Can the plaintiffs, who E have an unsatisfied decree of the Admiralty Court in their favour, by means of a writ of fieri facias directing the sheriff of the county to take the goods of the defendant within his bailiewick, have execution levied under such a writ upon the ship of the defendants, which happens to come and be within the jurisdiction of the sheriff, after the ship had been arrested and released on bail before judgment in an action commenced in the Admiralty Court in rem? It will be noticed that the F section is in terms general. It enacts that judgment creditors under decree shall have all such powers of enforcing decrees of the Court of Admiralty as are possessed by judgment creditors in the superior courts of common law, and there is no fetter imposed by the section as to taking the ship in execution if the ship seized by the sheriff had heretofore been held to bail and then released in an action in rem.

On Feb. 21, 1898, a collision took place between the plaintiffs' ship, the *Kildona*, G and the defendants' ship, the *Gemma*, which was a foreign ship owned by foreigners, Messrs. Holm and Molzen, the defendants in the action, and proceedings in rem were, therefore, taken by the plaintiffs against the defendants' ship and her freight, and the defendants' ship was arrested by the marshal of the Admiralty Court, it being then within the jurisdiction of that court. The defendants thereupon entered an appearance in the action, in order, I apprehend, to effect the release of the ship, H and to combat the plaintiffs' allegation that the defendants' ship was in default as regards the collision. On Feb. 24, 1898, the defendants' solicitors, in order to release the ship, undertook to put in bail to the value of the *Gemma* and her freight, the amount of which was agreed to be £4,875, made up of £4,500 the agreed value of the ship, and £375 the agreed value of the freight. Subsequently a bail bond was entered into, saying by bail, "that if the said defendants, the owners of the *Gemma*, I shall not pay what may be adjudged against them in the said action, together with costs, execution may be issued against us, the bail, for a sum not exceeding £4,875.

On April 6, 1898, the statement of claim was delivered by the plaintiffs in the action claiming "judgment against the defendants and their bail for the amount of damages occasioned by the said collision and costs, and for a reference to the registrar and merchants to assess the amount." To this statement of claim the defendants put in a defence traversing the plaintiffs' allegations in their statement of claim, and also containing a counterclaim against them. That the defendants then submitted to the jurisdiction of the court, I cannot doubt, and the issues so

raised upon the pleadings by the respective parties were then fought out, with the result that on June 12, 1898, a decree was made pronouncing the *Gemma* solely to blame for the collision, and further pronouncing "against the defendants' counterclaim," and the learned judge condemned the defendants and their bail in damages and costs, and referred such damages to the registrar and merchants to report the amount thereof. This reference has taken place, and the registrar has reported that the plaintiffs' damages amounted to £5,538 and the costs have been taxed at £441, making £5,980 in all; so that, allowing for the £4,875, for which bail was given, there is still unsatisfied under the decree and payable to the plaintiffs by the defendants the sum of £1,105. I would point out that if the defendants had not appeared, and the proceedings had throughout been solely in rem, the judgment or decree, according to the practice of the Admiralty Court, would have been not, as in the present case, condemning the defendants in damages and costs, but would have condemned the ship alone.

Apart from authority, it appears to me that when a person whose ship has been arrested by the marshal of the Admiralty Court thinks fit to appear and fight out his liability before the court, the forms of proceedings in the Admiralty Court show—and it is not disputed that the forms I have mentioned are those which have been in use, according to the practice of the court from olden times—that the persons appearing as defendants have in the present case become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced in rem becomes a personal action against the defendants on appearance.

For what purpose does the defendant appear to an action in rem? There are, as it seems to me, three reasons: First, to release the ship so that it may go on trading for the owner; secondly, to test the plaintiffs allegations that the ship had been in default; and, thirdly, in order to prevent its being sold. The President, in a judgment full of learning and research, in which he has dealt with all the cases from the earliest times, whether in conflict or not, has held in *The Dictator* (2) that a person appearing in an action in rem becomes personally liable, and considering that no real argument was addressed to us to impeach this judgment, and having considered it and the principles appertaining to the present case, I do not doubt that the President came to the correct conclusion, and I adopt it. I will here use the words of Mr. Barnes—now Barnes, J.—which I find in his argument in *The Dictator* (2), for in my opinion they express in short and clear language that which I wish to express. He says ([1892] P. at p. 306):

> "The plaintiffs have, therefore, a judgment in their favour for this amount, and as the defendants appeared and gave an undertaking equivalent to bail [in the present case they have done far more] they have submitted themselves to the jurisdiction of the court, and have thereby rendered themselves personally liable. The result is that the plaintiffs are in a position to issue execution against the property of the defendants to the extent of the property proceeded against, and under the present practice it is not necessary that a monition to pay should be served upon the defendants before suing out writs of fieri facias."

I asked, during the argument, upon what principle it was that the defendants contended that no fieri facias could be sued out by a judgment creditor against the goods of a judgment debtor under the Act of 1861. I was told that it was upon the ground that it was against good faith to do so when bail had been given for a ship proceeded against in rem. But where is there any bad faith in a judgment creditor attempting to realise the fruits of his judgment from a person who has been condemned to pay the same to him? This I cannot see.

The Christiansborg (1) was cited in support of the proposition that it was against good faith, but that case appears to me to be altogether different. In it the plaintiff had brought an action in rem in Holland and arrested the defendants' ship, and the plaintiffs then allowed the ship to be released on the underwriters of the ship

guaranteeing to the persons interested 175,000 gulden for compensation, which the ship might eventually have to pay by legal decision in Holland. The ship was then released, and, while the suit was proceeding in Holland, the plaintiffs took second proceedings in rem against the ship here. The majority of the court (BAGGALLAY and FRY, L.JJ., LORD ESHER dissenting) held that bail having been given in Holland in an action in rem, the second action in rem should not be allowed to go on here at the same time; or, if the guarantee given in Holland was not equivalent to bail, but was a private agreement, then the arrest of the ship in England was against good faith as regards the agreement. How does that case apply to the present, where no one is litigating in rem in two courts at the same time, and where no one is proceeding to take the ship in breach of any agreement that, when a decree had been made they would not realise what they were entitled to under it? Where is to be found anywhere in this case any agreement that, if the bail put in to release the ship did not satisfy the damages and costs afterwards to be awarded to the plaintiffs, and after the defendants had unsuccessfully litigated with the plaintiff and put them to the cost of so doing, that the defendants should be released from the payment of that in which they had been condemned? I can find no such agreement.

This is simply a case of a judgment creditor endeavouring to obtain satisfaction of his judgment by taking, by means of a writ of fieri facias, the goods of his judgment debtor, which in the year 1899 happens to be within the jurisdiction of the sheriff to whom the writ has been directed. There is no bad faith at all, at any rate upon the plaintiffs' part. I need say nothing about the other ship of the defendants, the *Wega*, for it escaped before the writ of fieri facias could be executed, and it was not disputed at the Bar that had this writ been executed all would have been in order. For these reasons I hold that the sheriff should not have been ordered to withdraw, and that the appeal must be allowed with costs here and below.

VAUGHAN WILLIAMS, L.J.—I agree.

Appeal allowed.

Solicitors : *T. Cooper & Co.; Stokes & Stokes.*

[*Reported by* SUTTON TIMMIS, ESQ., *Barrister-at-Law.*]

Re BAYLIS

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), April 22, 1896]

[Reported [1896] 2 Ch. 107; 65 L.J.Ch. 612; 74 L.T. 506; 44 W.R. 533; 12 T.L.R. 339; 40 Sol. Jo. 355]

Solicitor—Costs—Agreement—Retention of percentage under verbal agreement out of loans procured by solicitor for client—No bill of costs delivered—Cash accounts rendered debiting client with lump sums retained—Sums described in accounts as "costs as agreed"—Agreed remuneration exceeding scale fees—Delay by client in applying for delivery of bills and taxation—Solicitors Act, 1843 (6 *& 7 Vict., c.* 73), *s.* 41—*Solicitors Remuneration Act*, 1881 (44 *& 45 Vict., c.* 44), *s.* 8.

From 1883, when the client had just attained twenty-one, until 1894 a solicitor acted for the client in a variety of matters, in particular assisting the client to borrow money from insurance companies and other reputable associations. It was verbally agreed between the solicitor and client that the solicitor's remuneration would be five per cent. on any loan advanced to the client, and out of the

loans from time to time obtained the solicitor retained the sums due to him under the agreement. He did not deliver any bill of costs, but he furnished the client with cash accounts debiting him with the sums retained, which were entered as lump sums and described as "costs as agreed." The accounts were signed by the client as examined and approved by him. The sums retained by the solicitor under the agreement greatly exceeded the scale fees. In 1896, some twelve years after the first account was rendered, the client obtained an order for delivery of bills of costs and for taxation. On appeal by the solicitor,

Held: (i) a solicitor who paid himself by retaining moneys and did not deliver a bill of costs could not treat the retention as payment, delivery of a bill of costs under the order would not convert the retention into payment, and so the accounts were not paid accounts (*Hitchcock* v. *Stretton* (1), [1892] 2 Ch. 343, distinguished); (ii) there was no agreement in writing to pay remuneration within the meaning of s. 8 of the Solicitors Remuneration Act, 1881 (repealed), since the words on the face of the accounts "costs as agreed" referred to the antecedent verbal agreement and the accounts themselves did not constitute the agreement (*Re Frape, Ex parte Perrett* (2), [1893] 2 Ch. 284, distinguished); (iii) although there had been delay by the client the order was not unjust, for the solicitor on his own evidence still had in his possession ample material to make out a bill, and, further, the high charges agreed to by the client required investigation; and, therefore, the order was correctly made.

Notes. As to agreements with respect to remuneration for non-contentious business, see now s. 57 of the Solicitors Act, 1957. As to taxation of bills on the application of the party chargeable see s. 69 of the Act of 1957.

Referred to: *Re A. & B., Ex parte W.* (1900), 44 Sol. Jo. 315.

As to special agreements fixing the amount of a solicitor's remuneration regarding non-contentious business; as to delivery of a bill of costs and as to what constitutes payment, see 36 HALSBURY'S LAWS (3rd Edn.) 129, 130 and 151, para. 200 respectively. For cases see 42 DIGEST 126, 135 and 180. For the Solicitors Act, 1957, see 37 HALSBURY'S STATUTES (2nd Edn.) 1053.

Cases referred to:

(1) *Hitchcock* v. *Stretton*, [1892] 2 Ch. 343; 61 L.J.Ch. 529; 66 L.T. 707; 40 W.R. 555; 42 Digest 183, *1945*.

(2) *Re Frape, Ex parte Perrett*, [1893] 2 Ch. 284; 62 L.J.Ch. 473; 68 L.T. 558; 41 W.R. 417; 37 Sol. Jo. 373; 2 R. 411, C.A.; 42 Digest 128, *1224*.

(3) *Re Bischoff and Cox, Ex parte Hemming* (1856), 28 L.T.O.S. 144; 42 Digest 189, *2047*.

(4) *Re Thompson, Ex parte Baylis*, [1894] 1 Q.B. 462; 63 L.J.Q.B. 187; 70 L.T. 238; 42 W.R. 462; 10 T.L.R. 89, D.C.; 42 Digest 127, *1217*.

Also referred to in argument:

Re David (1861), 30 Beav. 278; 54 E.R. 896; 42 Digest 182, *1937*.

Turner v. *Hand* (1859), 27 Beav. 561; 54 E.R. 222; 42 Digest 180, *1914*.

Re Street (1870), L.R. 10 Eq. 165; 39 L.J.Ch. 495; 22 L.T. 429; 42 Digest 182, *1939*.

Appeal from an order of CHITTY, J., on a summons taken out by a client, Mr. Buckley, against his solicitor, Mr. Baylis, for delivery of bills of costs and for taxation.

For over ten years, from 1883, when the client was an undergraduate at Oxford, down to 1894, the solicitor acted for him in respect of legal business, more particularly in procuring him money loans; and it was verbally agreed between them that the solicitor's remuneration was not to be according to the scale charges, but by a percentage on the loans procured. The solicitor retained the various sums so due to him out of the loans from time to time advanced, and merely furnished his client with cash accounts, debiting him with the sums in question, which were therein entered in lump sums as "costs," or "costs as agreed," or "legal charges."

These accounts were signed by the client as "examined and approved." The sums so received by the solicitor were largely in excess of the scale charge to which he would have been entitled, and he alleged as the reason that he had special facilities for obtaining the loans. These were made at a reasonable rate of interest, and no charge of fraud or improper conduct was made against the solicitor; nor, indeed, could any be made. All the payments were made more than twelve months before the summons, the limit fixed for an application to tax after payment, under s. 41 of the Solicitors Act, 1843, [now s. 69 (2) proviso (ii) of the Solicitors Act, 1957]. The summons was adjourned into court, and came on to be heard before CHITTY, J., in March, 1896, when his Lordship ordered the solicitor to deliver his bill of costs, referred it to the taxing master to tax the bill, and directed that the taxing master should inquire whether any and what special agreement had been entered into between the parties within the Solicitors Remuneration Act, 1881, and, if so, whether any and which of such agreements were or were not fair and reasonable. The solicitor now appealed. On the appeal four objections to the order for taxation made by CHITTY, J., were made on behalf of the solicitor: (i) that the cash accounts were settled accounts which the court would not order to be reopened; (ii) that they constituted agreements within the Solicitors Remuneration Act, 1881; (iii) that the moneys retained by the solicitor would constitute payments as soon as a bill was delivered, so that the order for taxation was premature; and (iv) that relief ought to be refused on the ground of delay.

Scrutton for the solicitor.

Farwell, Q.C., and *A. Sington* for the client, were not called on to argue.

LINDLEY, L.J.—In my opinion the order made by CHITTY, J., was perfectly correct. Mr. Baylis ceased to act as Mr. Buckley's solicitor in 1894, and Mr. Buckley has now taken out this summons for delivery of a bill and taxation. It was said, and the statement is perfectly true, that this step would not have been taken but for the unpleasant feeling which existed between Mr. Baylis and Mr. Buckley's father. The correspondence shows that these proceedings were the father's doing. But it is not a case of the father using the name of the son in any proceedings, but he urged his son to take proceedings. The true inference is that, although the father has prompted the proceedings, they are really the proceedings of the son. Whether they were instigated by the father or not is immaterial, for they are bona fide the litigation of the son.

The present appeal is by Mr. Baylis in order to show why no bill should be delivered, or at all events that no order to tax should be made, even guarded as this order was by CHITTY, J. Several points are made on his behalf. The first point made is, that these are settled accounts and have been paid. We may treat them as one, because, though separate in one sense, the answer to one is the answer to the others. We cannot hold that these were settled accounts or paid accounts, inasmuch as there never has been any delivery of any bill of costs of any sort or kind. Counsel for the solicitor has urged that they will be paid accounts when the bill is delivered under the order of the court, because the payments will then be held to refer to the bill, and that, therefore, it is premature to order taxation. I cannot follow that argument. There is no bill now before the court, there is no bill to which these payments can be referred. This is not like *Hitchcock* v. *Stretton* (1), in which I think that perhaps STIRLING, J., went a little too far in holding that on delivery of a bill of costs after the issue of the writ in the action payments made before the proceedings could be referred to it. I cannot help thinking that the real reason why STIRLING, J., decided in this way was that when he came to see the bill of costs he could not find that there was anything at all which required taxation. I am quite satisfied that, if he had thought these were improper payments, he would have ordered taxation. As a matter of law, I repeat, I think that he went a little too far, though I do not say that the decision was wrong, but I feel convinced that this explanation of his reason is the true one. It is said that, having regard to

Ex parte Hemming (3), we ought to stay our hands in this case; but that is an impossible contention, and the same observation applies to *Re Thompson, Ex parte Baylis* (4), where the court came to the conclusion that the payment could be referred to the bill of costs because the client had actually had the bill and had been satisfied with it. Here we can exercise no judgment of that kind, because we have no materials to enable us to do so. The authorities only show that a solicitor who pays himself by retaining, and does not deliver a bill of costs, cannot treat that retention as payment. No authority to the contrary has been cited, and I cannot see that there has been here payment or settled account.

The other point is different. It is said that it was wrong to order taxation because these accounts were written agreements within s. 8 of the Solicitors Remuneration Act, 1881. If there had been any agreement in writing within the Act we should have to pay attention to it. If the circumstances are looked at it is clear what the agreement was, viz., that the real agreement was a verbal agreement with this young man that Mr. Baylis should pay himself his costs in this way. Having our attention called to that, I am not prepared to construe the words as we construed those in *Re Frape, Ex parte Perrett* (2). In this case we are told that the agreement was only for "costs as agreed." That expression does not look as if this document was the written agreement, but rather as if it referred to some other agreement. The account refers to some antecedent agreement not embodied in that account, so that the decision in *Re Frape* (2) does not cover this case at all. I think that decision was quite right, and I will not throw any doubt upon it; but to extend that decision to a case where there is no agreement in writing would be a very different matter.

The delay which has taken place is a further and a serious point. If by ordering taxation we should be doing an injustice to Mr. Baylis, or if, owing to lapse of time, he had lost the materials for preparing his bill and could not comply with the order, it would be different; but on his own evidence he has in his possession ample materials for making it out, and there is nothing to show that we should be doing any injustice in ordering him to do so. I have only one other word to say. When you look at these charges they are very large sums; I do not say they are overcharges, but the difference between them and the scale fees is shown by the evidence, and they are much larger than the usual charges made by solicitors. That requires investigation, and was quite enough to justify CHITTY, J., and this court in making the order which has been made. That order is guarded in the manner which I have pointed out, and was quite right, and the appeal must, therefore, be dismissed with costs.

LOPES, L.J.—I am of the same opinion, and I think that the order made by CHITTY, J., is perfectly right in the circumstances of this case. It is said that one reason why it is not right is that there has been delay. It is perfectly true that there has been delay. Mr. Buckley attained his majority in 1882, and twelve years elapsed during which Mr. Baylis acted for him without any question being raised. No doubt that is a long delay, and if it had not appeared from the evidence that Mr. Baylis was in a position to prepare a bill of costs, if he had not got the materials before him from which he would be able to prepare his bill, that would have great weight. But he has the materials, and I have even some doubt whether he has not got the bill itself ready. That is the answer to the plea of delay. But there is another answer. I cannot help thinking that there is ground for saying that the agreement relied upon is somewhat unreasonable, because it does appear that there is a very large excess in the amounts charged compared with what would be chargeable under the scale, and that is a strong argument in favour of the order made by CHITTY, J., and one which tells against the suggestion that the order is wrong because of delay.

Then it is said that there has been payment and a settlement of account; but, in my opinion, there has been neither payment nor settlement. No bill of costs has ever been delivered. It is said that the solicitor has retained the money himself,

and that that amounts to payment. It is not said that if no bill had been delivered that would be payment; but that, when under the order the bill is delivered, if it contains anything to which the previous retention can refer, that will convert the retention into payment. That seems to be a preposterous contention. There is no doubt a case of *Hitchcock* v. *Stretton* (1), in which it was held that retention could be referred to a bill delivered after the issue of the writ; but that was a different case. And the reason why STIRLING, J., acted as he did was, because he felt that under the circumstances there was nothing wrong, but that all was fair and right, and that to send the bill for taxation would have been a useless proceeding.

The further point taken is under the Act of 1881, s. 8. [HIS LORDSHIP read the section, and continued:] The question is, whether in this case there was any such agreement in writing as is contemplated by that enactment. The expressions used in the accounts are "costs" and "costs as agreed." In my opinion that is not a compliance with the statute, and I cannot help thinking (speaking for myself) that the terms of the agreement ought to be found in the writing, and that that is what the statute intended. It is not necessary to go that length for the purpose of this case. Upon "costs" and "costs as agreed," taken by themselves, it is impossible to come to any conclusion what the agreement may be; but we are relieved from the difficulty which might have arisen, because we were told by the solicitor's counsel what the real agreement was, viz., that there was to be an allowance of 5 per cent. on loans procured by Mr. Baylis. That was an oral agreement, and how can it be said that these words "costs" and "costs as agreed" in any way indicate what the real agreement was? That point also fails, and in my opinion the order made by CHITTY, J., was in every respect right.

KAY, L.J.—I am of the same opinion, but I will add a few words, because this is a matter which involves principles of great importance. In every case of an agreement between a solicitor and client the court has always recognised that a solicitor can exercise great influence over his client, and it looks upon an agreement prepared by the solicitor with great jealousy and care, and throws upon the solicitor the burden of showing that it was fair and proper. The Act of 1881 did not alter that, but recognised it in the plainest possible terms. Where there is an agreement the court can refer that to the taxing master to ascertain whether it is fair and reasonable, and if not it is not to be treated as binding upon the client.

Is there here, in the first place, an agreement binding under the Act of 1881? The only thing in writing and signed, which is what the Act requires, is a statement which in the first account is in these words, "costs of mortgage as agreed, £35." In some of the later ones it is, "costs as agreed," and so on. The solicitor's counsel argued that there you have on the face of the document an agreement that that is to be the amount of the costs. But he began by saying that there was a verbal agreement with this young man just after he attained twenty-one, to the effect that when any money was borrowed the solicitor should be paid 5 per cent. on the gross amount to cover his costs and commission. That was the agreement on their part. Although it may have been difficult for the other side to set up that case it is different when the solicitor tells us so himself, and it is quite plain that these documents refer to that agreement. They are not in themselves the agreement, but they refer to an antecedent agreement to pay 5 per cent. for commission and costs, and the words "costs of mortgage as agreed" are completely explained. This was not a written agreement at all; it was a verbal agreement, and not in writing, and ought not to be binding on the client.

It was said that that was not consistent with the decision in *Re Frape* (2), but I think it is consistent with it. It was a strong decision. I was a party to it. But it does not go so far as we are asked to go in this case. The question there was this: In an account which had been signed by the client there was an item for "agreed costs £80." That document enabled the court to say that it was a sufficient description of all the costs incurred down to the date of that document (and there was no

suggestion of any agreement outside that document), and that the agreement was that £80 should be the amount payable for all these costs. That is quite different from the point now before us. This is not on the face of the document an agreement, but a reference to an antecedent verbal agreement which is not binding on the client. That completely distinguishes this case from *Re Frape* (2). This verbal agreement was entered into with Mr. Buckley when he was just of age. The court will look very carefully at an agreement even if it has been signed, but the true result of this is that there was no agreement. There is not enough to satisfy the Act of 1881, and we must treat it as if there was no signed agreement. If we had to look into it further I should say that the agreement, whether written or not, requires most careful investigation, because the first account does not refer to any agreement. It says, "costs as to loan, £30." That was a loan of £600 made by one of the leading insurance societies in London. The account is made out by the society, and refers to costs of investigation of title. Therefore, the investigation was not made by Mr. Baylis, but by the solicitors of the society. On looking at the scale it appears that the only charge Mr. Baylis could have made was 1 per cent., which would have amounted to £6; instead of which he has charged £30. That seems to me to be an exorbitant charge, which would quite justify the court in inquiring whether it was a fair and reasonable agreement.

Then it was said that there had been payment of these accounts. I asked whether there had ever been a case in which retention had been held to be payment where no bill of costs had been delivered, and here no bill has been delivered up to this moment. The answer was "no"; but that there are cases where a bill has been delivered after the retention, and has been kept for some time without objection, and the retention has been held to refer to that bill and treated as payment. Other cases are said to have gone further than that. As for instance *Hitchcock* v. *Stretton* (1), before STIRLING, J., where after the action had begun the bill was for the first time delivered, and the learned judge thought himself bound to treat that as referable to the retention which had been made before any proceedings had been commenced, or any bill delivered. With great deference to STIRLING, J., I should not have so decided. I do not think that anything warrants us in going that step further than we did in *Re Frape* (2). We are asked to go even further than the decision in *Hitchcock* v. *Stretton* (1), and to hold that a bill delivered under the order of the court will relate back and make all these retentions payments. Even if *Hitchcock* v. *Stretton* (1) was right, this would be to carry it a great deal further. I entirely dissent from the argument that delivery of a bill under this order would make that payment which is not payment now. I cannot follow that argument.

Then it is said that this is a settled account; but the same answer as is given to the suggestion of an agreement is conclusive. There is one item which the client has had no opportunity of investigating. He has not agreed in any way binding on him to make a payment of that item, and no bill has been delivered, and it cannot be treated as a settled account. It is urged that the respondent is coming a long time after the event. There is no Statute of Limitations which applies, and the Act of 1881 says not a word as to the time within which a bill must be delivered, so there is no statutory bar. But still there has been a long delay. The first account was in 1885, and we are now in 1896. If it could be added to that that the solicitor is in a great difficulty, that he has lost his vouchers and cannot make out a bill, there would be great force in the argument; but we have it that he has the materials, and that his clerk has actually made out a draft bill, so there is no difficulty of that kind. This is a matter between solicitor and client, and of a client very much in the hands of the solicitor, and I do not feel disposed to say that the question of delay is enough to make the order of CHITTY, J., improper. I also think that the father's action was quite right, although the son is perhaps doing what he would not have done without it. [HIS LORDSHIP referred to the order, and continued:] If the taxing master finds that there has been an agreement which is binding under the Act of 1881, he will tax the bill in relation to that agreement, but he cannot tell until he sees the

bill whether the agreement is reasonable or not. Seeing that the solicitor has all the materials, it is rather extraordinary that he should attempt to interfere with an order which is reasonable, right, and proper. The appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Peard & Son*, for *T. W. Baylis*, Brighton; *Rowcliffes, Rawle & Co.*, for *A. & G. W. Fox*, Manchester.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

BROWN AND ANOTHER *v.* DUNSTABLE CORPORATION

[CHANCERY DIVISION (Cozens-Hardy, J.), May 5, 6, 8, 9, 10, 19, 1899]

[Reported [1899] 2 Ch. 378; 67 L.J.Ch. 498; 80 L.T. 650; 63 J.P. 519; 47 W.R. 538; 15 T.L.R. 386; 43 Sol. Jo. 508]

Sewage—Right of owners and occupiers to pass sewage into sewer—Right of sanitary authority to drain sewage onto plaintiff's land.

Sewer—Drain—Connection with public sewer—Right of owners and occupiers to connect with public sewer—Limitation of powers of sanitary authority to prescribing mode of connection—Public Health Act, 1875 (38 & 39 *Vict.*, *c.* 55), *ss.* 21, 299.

The plaintiff was the owner of low-lying land known as Dunstable Park on to which ancient sewers had for many years conveyed not only surface water but also foul matter coming from house drains. Sewage matter did not find its way into the sewers to any great extent until after the year 1873. After a number of alterations had been made to the construction of the sewers most of the sewage matter drained on Dunstable Park, where, by the time this action was brought, it had formed a pond several acres in extent. The plaintiff brought an action for an injunction to restrain the defendants, the urban sanitary authority, from discharging or permitting the discharge of sewage on his land. The defendants pleaded a lost grant, acquiescence by the plaintiff and his predecessors in title, and that householders had acquired prescriptive rights to use the sewers.

Held: (i) the evidence fell far short of what was requisite to raise the presumption of a lost grant, and so the defendants had no prescriptive right to drain sewage on to the plaintiff's land, and an injunction would be granted to restrain them from directing or authorising any sewage or foul matter to flow or to be discharged from sewers or drains vested in them into the park; but (ii) under s. 21 of the Public Health Act, 1875, owners and occupiers had an absolute right to drain into an existing sewer, the powers of the urban sanitary authority being limited under that section to prescribing the manner of connection to the sewer, and, therefore, an injunction could not be granted which would prohibit the defendants from permitting or allowing fresh connections to be made.

Ainley v. *Kirkheaton Local Board* (1) (1891), 60 L.J.Ch. 734, applied.

Charles v. *Finchley Local Board* (2) (1883), 23 Ch.D. 767, disapproved.

Per CURIAM: The plaintiff's proper course to abate the nuisance would have been by way of application to the Local Government Board for an order under s. 299 of the Public Health Act, 1875.

Notes. Section 21 of the Public Health Act, 1875, was repealed and re-enacted in substantially amended form by s. 34 of the Public Health Act, 1936. Sections 321 and 322 of the 1936 Act correspond to s. 299 of the 1875 Act which was repealed for the purposes of the present case by the Local Government Act, 1929, and the Public Health Act, 1936.

Applied: *East Barnet Valley U.D.C.* v. *Stallard*, [1909] 2 Ch. 555. Referred to: *Eastwood Bros.* v. *Honley U.D.C.*, [1900] 1 Ch. 781; *St. Mary Islington Vestry* v. *Hornsey U.D.C.* (1900), 69 L.J.Ch. 324; *Southall Norwood U.D.C.* v. *Middlesex County Council* (1901), 83 L.T. 742; *West Riding of Yorkshire Rivers Board* v. *Gaunt* (1902), 19 T.L.R. 140; *Faber* v. *Gosworth U.D.C.* (1903), 88 L.T. 549; *Harrington* v. *Derby Corpn.*, [1905] 1 Ch. 205; *Waltham Holy Cross U.D.C.* v. *Lee Conservancy Board* (1910), 103 L.T. 192.

As to prescription and easements in artificial water courses, see 12 HALSBURY'S LAWS (3rd Edn.) 543 et seq., 598 et seq.; and for cases see 19 DIGEST (Repl.) 57 et seq., 160 et seq. As to drainage into public sewers, see 31 HALSBURY'S LAWS (3rd Edn.) 210 et seq.; and for cases see 41 DIGEST 42 et seq. For the Public Health Act, 1936, ss. 34, 321, 322, see 19 HALSBURY'S STATUTES (2nd Edn.) 336, 483.

Cases referred to:

(1) *Ainley* v. *Kirkheaton Local Board* (1891), 60 L.J.Ch. 734; 55 J.P. 230; 7 T.L.R. 323; 35 Sol. Jo. 315; 41 Digest 42, *305*.

(2) *Charles* v. *Finchley Local Board* (1883), 23 Ch.D. 767; 52 L.J.Ch. 554; 48 L.T. 569; 47 J.P. 791; 31 W.R. 717; 41 Digest 33, *245*.

(3) *Haig* v. *West*, [1893] 2 Q.B. 19; 62 L.J.Q.B. 532; 69 L.T. 165; 57 J.P. 358; 4 R. 396, C.A.; 32 Digest 431, *1053*.

(4) *A.-G.* v. *Clerkenwell Vestry*, [1891] 3 Ch. 527; 60 L.J.Ch. 788; 65 L.T. 312; 40 W.R. 185; 41 Digest 42, *304*.

(5) *A.-G.* v. *Dorking Union* (1882), 20 Ch.D. 595; 51 L.J.Ch. 585; 46 L.T. 573; 30 W.R. 579, C.A.; 41 Digest 42, *308*.

(6) *A.-G.* v. *Acton Local Board* (1882), 22 Ch.D. 221; 51 L.J.Ch. 108; 47 L.T. 510; 31 W.R. 153; 41 Digest 19, *150*.

Also referred to in argument:

Glossop v. *Heston and Isleworth Local Board* (1879), 12 Ch.D. 102; 49 L.J.Ch. 89; 40 L.T. 736; 44 J.P. 36; 28 W.R. 111, C.A.; 28 Digest (Repl.) 737, *5*.

Lemmon v. *Webb*, [1894] 3 Ch. 1; 63 L.J.Ch. 570; 70 L.T. 712; 58 J.P. 716; 10 T.L.R. 467, C.A.; affirmed, [1895] A.C. 1; 64 L.J.Ch. 205; 71 L.T. 647; 59 J.P. 564; 11 T.L.R. 81; 11 R. 116, H.L.; 36 Digest (Repl.) 305, *519*.

A.-G. v. *Richmond* (1866), L.R. 2 Eq. 306; 35 L.J.Ch. 597; 14 L.T. 398; 30 J.P. 708; 12 Jur.N.S. 544; 14 W.R. 686; 36 Digest (Repl.) 311, *580*.

Metropolitan Board of Works v. *London and North Western Rail. Co.* (1881), 17 Ch.D. 246; 50 L.J.Ch. 409; 44 L.T. 270; 29 W.R. 693, C.A.; 41 Digest 44, *321*.

Action by the plaintiffs, the freeholder and his tenant of lands known as "Dunstable Park," against the defendants, the corporation of Dunstable, as the urban sanitary authority of the district, to restrain them from discharging, or allowing to be discharged or to flow on to the said lands, any water, sewage, or other foul or noxious matter, and from allowing any such matter to be discharged from sewers or drains belonging to the defendants on to the said lands. The freeholder only is referred to as plaintiff in future.

The following statement of facts is taken from the judgment. Dunstable is an ancient town. Two Roman roads, namely, Watling Street and Icknield Way, crossed each other at this point. It was nothing more than an ordinary parish until 1863, when a local board of health was formed, and in 1864 for the first time it was incorporated as a municipal borough. There are along Watling Street, which is now High Street, sewers of great age. Through these sewers surface water from the streets has, as far as living memory goes, flowed in three directions, part through

the drain or pipe under what is known as Perkin's House, in High Street, and thence into a pond in the park, the overflow of which goes to a low-lying piece of land near the railway embankment. Another part crosses Icknield Way, now known as Church Street, and then enters land not belonging to the plaintiff, but this also ultimately finds its way into the low land near the railway embankment. The third part went, until recently, in a comparatively short sewer in the High Street towards the north, outside the boundary of the parish, to a field formerly belonging to the plaintiff, known as the Dog Kennel Close. It has been proved that these ancient sewers have for many years conveyed not only surface water but also slops and foul matter coming from house drains, the consequence of which was that the open ditches or receptacles in Dunstable Park and in the Dog Kennel Close became from time to time offensive. It was proved that, as far back as 1869, no less than 610 houses were connected with the sewers. With reference to sewage matter other than slops and house drainage, it was not satisfactorily shown that it found its way into the sewers to any considerable extent until after the year 1873, when for the first time a water company supplied the town with water, but probably there were a few water closets prior to that date which were flushed by means of rain water cisterns, and there may have been a few privies the contents of which found their way into one or other of the sewers. But, speaking generally, the ordinary mode of dealing with sewage of this nature was by cesspools which were periodically emptied.

In 1887 part of the Dog Kennel Close was sold by the plaintiff, and the pond into which the overflow from the third sewer above mentioned used to pass was filled up. Two dome wells were constructed nearer the road in order to receive and retain the sewage and other matter which formerly went into the pond, and the plaintiff covenanted with the purchaser, in effect, to prevent any sewage matter from coming on to the land. In 1890 the plaintiff sold the rest of the Dog Kennel Close, including the two dome wells. These soon proved a nuisance, and the defendants, with a view to remedying this nuisance reversed the gradient of this third sewer so that the fall was toward the south instead of towards the north, and the contents of this sewer, which formerly discharged into the Dog Kennel Close, thenceforward passed under Perkin's House into Dunstable Park. At the present time there is a foul pond of several acres in extent in Dunstable Park, and it is of this that the plaintiff complains. The surface is so clogged with filth coming from the sewers that the water will not pass away into the chalk. The value of Dunstable Park is substantially lessened by reason of its being made the receptacle for the sewage of a large part of Dunstable, but there is no evidence of injurious effect upon health. Among the houses which thus drain into Dunstable Park are a number of houses belonging to the plaintiff, and some of them drain by means of the Church Street sewer, passing through the land of other persons before reaching Dunstable Park.

In their defence the defendants pleaded a lost grant and acquiescence by the plaintiff and his predecessors in title, and they alleged that the drain connections had been made without their sanction or authority, and in some cases in spite of direct orders to the contrary; that the various householders had thereby acquired prescriptive rights to the use of such sewers; and that the defendants had no control over the matter.

By the Public Health Act, 1875, s. 21:

> "The owner or occupier of the premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, or subject to the control of any person who may be appointed by that authority to superintend the making of such communications.

Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding twenty pounds, and the local authority may close any communication beween a drain and a sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section."

Eve, *Q.C.*, and *Cann* for the plaintiffs.
A. T. Lawrence, *Q.C.*, *Hughes*, *Q.C.*, and *Kenyon Parker* for the defendants.

Cur. adv. vult.

May 19, 1899. **COZENS-HARDY, J.,** stated the facts and continued: In this state of facts several distinct questions arise for my decision. The defendants, by an amendment, which I allowed at the trial, allege that the owners in fee of Dunstable Park granted to trustees for the inhabitants of the parish the right to drain all surface water of the parish and all sewage and drainage from any messuages or tenements built, or to be built, within the parish, and to discharge such water and sewage through ditches or sewers on to Dunstable Park, but that such grant has been lost, and they further allege that the plaintiff has acquiesced in, and taken advantage of, such grant, and uses the existing system of sewage. This claim, if well-founded, disposes of the whole action; but, in my judgment, it cannot be maintained. A lost grant is a valuable legal fiction devised to support long-continued possession and oft-repeated acts, which otherwise could not be legally justified. Thus, prior to the Prescription Act, 1832, it was the custom to direct juries to find a lost grant after more than twenty years' enjoyment of an easement. *Haigh* v. *West* (3) is a modern example of the use of this fiction. But the evidence in the present case falls far short of what is requisite to raise the presumption of a lost grant. Such a grant must have been made before 1846, and the state of things existing at that date was essentially different from the present state of things. It would be highly dangerous to allow the trivial and occasional passage along a natural channel of water more or less contaminated to ripen into a legal claim to pour sewage of all kinds and of indefinite amount along such natural channel. I, therefore, hold that the defendants' claim of right fails, and I must grant an injunction to restrain them from exercising that alleged right.

This, however, by no means disposes of the action, and it remains to consider to what, if any, further relief the plaintiff is entitled. In the first place, there are a large number of houses in respect of which prescriptive rights to pass sewage into and along the sewers have been gained. And it is plain that no injunction can be granted which will interfere with such rights. For this reason, among others, it is impossible for me to make any order which will involve the complete closing or abandonment of the sewers. In the second pace, there are other houses, the connections of which with the sewers have been made with the consent or by the acquiescence of the defendants, and it is settled law that I cannot interfere with them: *A.-G.* v. *Clerkenwell Vestry* (4). In the third place, there are a few houses which have been connected with the sewers, in spite of the protest of the defendants, and the plaintiff contends that the defendants ought to stop up these connections. But I think the defendants must be taken to have acquiesced in that to which they at first objected, so that these houses really fall under the second head. If, however, I am wrong in this, they must be treated as falling under the fourth head. In the fourth place, the plaintiff contends that an injunction ought to be granted to restrain the defendants from allowing any future connections to be made. The defendants are willing, if they fail, as I hold they have failed, in their major claim of right, to undertake not to authorise or direct any such connection, but beyond this they will not go. The strength of the plaintiff's case lies in this, that the defendants can, without being guilty of any trespass, stop up any future connection with their sewers, and it is urged that this is the true test, and that which has been

A applied by the court in similar cases. On the other hand, it is urged that under s. 21 of the Public Health Act, 1875, a householder adjoining the sewer has a right to connect his house with the sewer, and could obtain an injunction if the defendants absolutely refused on any terms to allow him to connect his house with the sewer.

It is necessary to consider some of the authorities cited by counsel on this point. B In *A.-G.* v. *Dorking Union* (5) it was held in 1882 by the Court of Appeal that where a sanitary authority had not themselves constructed the sewers which were a nuisance, but only permitted them to be used as formerly by the inhabitants, they could not be restrained by injunction. But SIR GEORGE JESSEL, M.R. (20 Ch.D. p. 606), laid stress upon the fact that the defendants could not physically put an end to the nuisance, and could only proceed by means of actions for injunction against C persons who, with or without legal justification, were pouring sewage matter into the defendants' sewers. Section 21 of the Public Health Act, 1875, was cited, but SIR GEORGE JESSEL, M.R., does not seem to have considered that section to be material. In the same year in *A.-G.* v. *Acton Local Board* (6), FRY, J., refused to grant a mandatory injunction, which would compel the stopping up of existing drains, but he granted an injunction as to the future, restraining the defendants from D directing or authorising sewage to flow into the sewers in question, but he deliberately declined to insert in the injunction the word "permitting."

In the following year, 1883, *Charles* v. *Finchley Local Board* (2) came before PEARSON, J., who granted an injunction restraining the local board from allowing sewage to flow into a brook opposite the plaintiff's house on the ground that they could at any time physically put an end to the nuisance without any action at all. E This decision was primarily based upon the fact that the defendants had given permission to the third person to lay down a pipe from his house to the brook to pass pure water only, and that as he, in breach of their permission, was sending sewage through the pipe, they could, and ought to, revoke the permission. This may be a sufficient ground for the decision, but the learned judge (23 Ch.D. at p. 775) expressly held that the local board had a right under s. 21 of the Public Health F Act, 1875, to abate the nuisance without asking any leave, and without bringing any action. I am not satisfied that in the *Finchley Case* (2) there was any sewer to which s. 21 would be applicable, but this does not diminish the weight to be attached to the deliberate opinion of PEARSON, J. He certainly held that the board could prevent an adjoining owner from connecting with the sewer. In 1891, in *Ainley* v. *Kirkheaton Local Board* (1), STIRLING, J., held that under s. 21 a right G is given to the owner or occupier to drain into an existing sewer, without reference to the question of whether sewage matter, if it once enters the sewer, occasions a nuisance to a third party.

This absolute right is no doubt subject to any regulations in respect of the mode of making connections, and subject to the control of any person appointed to superintend the making of the connections, but no regulations can justify an absolute H refusal to allow a connection to be made on any terms. No regulations under s. 21 have been made by the defendants. But certain byelaws were made by their predecessors, the local board of health, in 1864. The 20th byelaw is the only relevant byelaw, and I assume that it is in force. It prescribes no notice, and it only directs that the drains of all houses shall be connected with the sewers in such manner as the local surveyor shall direct. It is obvious that under this byelaw the surveyor I can only prescribe the manner of connection—he cannot refuse to allow any connection. Upon consideration I adopt the view of STIRLING, J., in preference to the view of PEARSON, J., and I must follow the precedent of FRY, J., and decline to grant an injunction which would prohibit the defendants from permitting or allowing fresh connections to be made, or, in other words, would oblige the defendants to stop up all future connections. A sanitary authority, in whom sewers are vested, has only a limited property in these sewers. It is not in the same position as an owner of a private sewer, who can absolutely prevent any one from touching his property. It seems to me that the plaintiff has mistaken his remedy. He ought to have applied

to the Local Government Board to make an order under s. 299, which might ultimately be enforced by writ mandamus.

There are two minor points which I have not overlooked. It is said that the defendants ought to be restrained from allowing the sewage from the town hall to pass into the sewer. But the defendants are sued as the urban sanitary authority only, and not as owners of the town hall. I am not satisfied that the town hall has not a prescriptive right; but however that may be, I am not prepared to give the plaintiff a relief which is not sought by the pleadings. Again, it is said that the reversal of the gradient of the sewer in High Street for the purpose of bringing the Dog Kennel sewage into Dunstable Park increased the burden on the plaintiff's property, and was an illegal act on the part of the defendants. But I think it was really done in order to satisfy the plaintiff's complaints, and to relieve him from the legal liability which rested upon him by reason of his covenant. The houses draining into this short reversed sewer are those which drained into the unreversed sewer, and are few in number, and I cannot interfere with their de facto enjoyment of the sewer. To grant an injunction in respect of these two matters might occasion serious damage to health without conferring any benefit upon the plaintiff, and this is a consideration to which weight ought to be attached.

The result is that I must grant an injunction restraining the defendants, as the urban sanitary authority of the borough of Dunstable, from directing or authorising any sewage or foul matter to flow or to be discharged from sewers or drains vested in them as such sanitary authority on to Dunstable Park. With respect to the costs, I think it is not possible to distinguish the costs attributable to the claim of the defendants of a right to send sewage into Dunstable Park from the other costs. And I see no reason why the defendants should be relieved from any part of the costs of this litigation.

Solicitors: *Walls & Stallard; Maples, Teesdale & Co.*, for *Benning & Son*, Dunstable.

[*Reported by* A. L. Morris, Esq., *Barrister-at-Law.*]

R. *v.* ERDHEIM

[Court for the Consideration of Crown Cases Reserved (Lord Russell of Killowen, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), May 2, June 2, 1896]

[Reported [1896] 2 Q.B. 260; 65 L.J.M.C. 176; 74 L.T. 734; 44 W.R. 607; 12 T.L.R. 445; 40 Sol. Jo. 569; 18 Cox, C.C. 355; 3 Mans. 142]

Bankruptcy—Evidence—Notes taken at public examination—Admissibility against bankrupt—Notes taken by shorthand writer, but not read over to or signed by the bankrupt—Admissibility of parol evidence by shorthand writer of admissions made by bankrupt—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 17 (8).

By the Bankruptcy Act, 1883, s. 17 (8) [now s. 15 (8) of the Bankruptcy Act, 1914]: "The debtor shall be examined on oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor at all reasonable times."

The provision contained in s. 17 (8) of the Bankruptcy Act, 1883, that the notes of the examination when read over to and signed by the bankrupt might be used in evidence against him, **held** merely to provide a convenient method of proof, and not to exclude oral evidence of the statements made by the bankrupt in the course of such examination.

Notes. Section 11 of the Debtors Act, 1869, has been repealed. See now ss. 154, 159 of the Bankruptcy Act, 1914. Section 17 of the Bankruptcy Act, 1883, has been repealed. See now s. 15 of the 1914 Act.

Referred to: *R.* v. *Bird* (1898), 79 L.T. 359; *Re Atherton*, [1912] 2 K.B. 251.

As to admissibility in other proceedings of bankrupt's admissions, etc., in public examination, see 2 HALSBURY'S LAWS (3rd Edn.) 333, 334; and for cases see 4 DIGEST (Repl.) 553 et seq. For the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321 et seq.

Cases referred to:

(1) *Re Worrall, Ex parte Cossens* (1820), Buck 531, L.C.; 5 Digest 658, *5774*.

(2) *R. v. Scott* (1856), Dears. & B. 47; 25 L.J.M.C. 128; 27 L.T.O.S. 254; 20 J.P. 435; 2 Jur.N.S. 1096; 4 W.R. 777; 7 Cox, C.C. 164, C.C.R.; 4 Digest (Repl.) 553, *4857*.

Also referred to in argument:

R. v. *Sloggett* (1856), Dears. C.C. 656; 25 L.J.M.C. 93; 27 L.T.O.S. 142; 20 J.P. 293; 2 Jur.N.S. 476; 4 W.R. 487; 7 Cox, C.C. 139, C.C.R.; 4 Digest (Repl.) 553, *4856*.

R. v. *Skeen* (1859), Bell, C.C. 97; 28 L.J.M.C. 91; 23 J.P. 101; 5 Jur.N.S. 151; 7 W.R. 255; 8 Cox, C.C. 143, C.C.R.; 4 Digest (Repl.) 553, *4860*.

Case Stated by the deputy recorder for the city of Leeds.

The defendant, Max Erdheim, was tried before the deputy recorder for the city of Leeds in January, 1896, upon an indictment charging him with the commission of the following misdemeanours under the Debtors Act, 1869, s. 11, namely, not discovering part of his property to the trustee in his bankruptcy, fraudulently removing goods to the value of £10 within four months before the presentation of a bankruptcy petition against him, making material omissions from documents relating relating to his affairs, and attempting to account for his property by fictitious expenses.

The following facts were stated in the Case: On May 3, 1895, a petition in bankruptcy was filed against the defendant in the Leeds County Court, and a receiving order was duly made thereon. On May 20, 1895, the defendant was adjudged bankrupt. Pursuant to the Bankruptcy Act, 1883, s. 17, the public examination of the defendant was held before the county court on June 25, 1895, and by adjournment on July 9, July 23, Sept. 24 and Nov. 19, 1895, respectively, upon which last day the examination was adjourned sine die, and had not been resumed at the date of the trial.

Under s. 17 (8) of the Bankruptcy Act, 1883, and r. 67 of the Bankruptcy Rules, 1886, the county court appointed William Foster Greenhalgh to take down in shorthand the evidence of the defendant at the said public examination, and to make transcripts of the questions and answers put to and given by the defendant at the said public examination, and those transcripts were to be the notes of the examination under s. 17. On each of the five days of the public examination of the defendant, Greenhalgh took down in shorthand the evidence of the defendant, and made transcripts of the questions and answers. None of the transcripts were read over to or signed by the defendant. Greenhalgh was called as a witness for the prosecution at the trial, and proved formally the various matters stated above. As the notes of the public examination could not be used in evidence against the defendant, the counsel for the Crown proposed to give parol proof of admissions, made by the defendant in

the course of the public examination, of facts tending to establish the charges contained in the indictment, and for that purpose tendered the further evidence of Greenhalgh so that he might prove those admissions verbally.

Counsel for the defendant objected that the further evidence of Greenhalgh was not admissible on two grounds. First, that the public examination never having been completed, the defendant might not have had an opportunity to make a complete statement and explanation with regard to everything charged against him; and, secondly, that inasmuch as the notes of the examination had not been read over to or signed by the defendant, s. 17 had not been complied with and no other evidence could be given of any admission made by him at the public examination. The deputy recorder overruled both the objections stating that with regard to the first, it could only appear when proof was tendered of it whether the statement were incomplete or not. He found as a fact that no incomplete statement was given in evidence before him. As to the second objection he decided that since the public examination and the notes of the defendant's evidence had been properly taken in accordance with s. 17, and that by law the defendant was compelled to answer upon oath all questions the court might put or allow to be put to him, whether tending to criminate him or not, and that the statute was permissive only as to making the notes of evidence, the fact that those notes had not been read over to and signed by the defendant did not exclude the ordinary rule of law that parol admissions made by a prisoner might be proved by the parol evidence of some person who heard them. He therefore permitted the further evidence of Greenhalgh to be given, and left all the facts proved by him and the other witnesses to the jury who found the defendant guilty on all the counts of the indictment.

The question of law reserved for the Court for Consideration of Crown Cases principle nemo tenetur se ipsum accusare was relied upon. I proceed to consider the trial.

C. Mellor for the defendant.

The Solicitor-General (Sir Robert Finlay, Q.C.) (H. Sutton and *G. Banks* with him) for the Crown.

June 2, 1896. **LORD RUSSELL OF KILLOWEN, C.J.,** read the following judgment: The defendant was charged with certain misdemeanours under the Debtors Act, 1869. On May 20, 1895, he had been duly adjudicated bankrupt, and under the Bankruptcy Act, 1883, s. 17, he had been duly examined on oath on five different days, and on the last of those days—namely, Nov. 19, 1895—the examination was adjourned sine die. During his examination a shorthand writer had taken down in shorthand the evidence of the defendant and made a transcript of it, but the transcript was not read over to or by or signed by the defendant. At the trial parol evidence of the shorthand writer was tendered and received of statements or admissions made by the defendant in the course of his examination of facts tending to establish the misdemeanours with which he was charged. The question is, was that parol evidence properly admitted?

It was argued that it was improperly admitted—first, on the ground that the examination, having been adjourned sine die, was not completed, and therefore the defendant might not have had the opportunity of making a complete statement and explanation. As to this, it is to be observed that the deputy recorder has in the case before us found as a fact that no incomplete statement was given in evidence, by which I understand him to mean that the statements of which evidence was given were not fragmentary, but were, as far as the particular facts dealt with by them, complete. This however, is not, I apprehend, the character of the objection in fact urged. That objection I understand to be that, even if otherwise admissible, the parol evidence of the statements made was not admissible, because the examination was adjourned sine die and was not in that sense complete. In my judgment, whichever form the objection takes, it is one which goes only to the effect and weight of

A the evidence, and not to its admissibility. If the jury thought that the statements were fragmentary or incomplete it would properly affect the weight they would think it just to attribute to them, but their admissibility would not be thereby affected.

The second and main objection urged is that upon the true construction of s. 17 of the Bankruptcy Act, 1883, the only evidence which can be received of the statements made by the bankrupt is the transcript taken down in writing and read over to B and signed by the debtor under that Act, or read over by the debtor and signed by him under the later Act of 1890. A further objection urged was that any such transcript, even if read over and signed, would not be admissible in a criminal prosecution, and that à fortiori parol evidence of statements made during the examination was not admissible in such a prosecution. In support of these objections the principle nemo tenetur se ipsum accusare was relied upon. I proceed to consider C these contentions.

The principle referred to has undoubtedly been regarded as an important one. Lord Eldon described it in *Re Worrall, Ex parte Cossens* (1) as one of the most sacred principles of the law. But he proceeds to point out that he has always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy—namely, that a bankrupt cannot refuse to discover his estate and effects D and particulars relating to them, though, in the course of giving information to his creditors, that information may tend to show that he has committed a criminal offence. He points out that, under the law then existing, while the commissioners would not compel a bankrupt to answer a question directly aimed at incriminating him, they would compel him to answer questions which might tend in that direction. I am, however, relieved from the necessity of considering old authorities on this E subject, as express statutory provisions have taken the place of usage and judicial authority, and the latter are only useful in so far as they may throw light upon the proper principle of construction to be applied to Acts of the legislature. By the Bankruptcy Act, 1849, s. 117 [repealed], it was provided that the court might summon the bankrupt before it, and, if necessary, compel his attendance by warrant, and that it should be lawful for the court to examine the bankrupt (after he had F made a solemn declaration to speak the truth) touching all matters relating to his trade, dealings, or estate, or which might tend to disclose any secret grant or concealment, and to reduce his answers into writing, which examination when reduced into writing the bankrupt should sign and subscribe.

The construction and effect of that section were carefully considered in *R.* v. *Scott* G (2). In that case the answers of the bankrupt had been reduced into writing and signed by him. Questions were put to the bankrupt and answered by him, under threat of committal, in relation to his trade books, and these are stated in the Case framed by Willes, J., for the opinion of the Court for Crown Cases Reserved, to have influenced the jury against the prisoner, and tended to cause his conviction. It was objected in that case that the statements, being made after a declaration H tantamount to an oath, they were inadmissible; secondly, that they were not voluntary; and, thirdly, were made after threats from a person in authority; but the court (Coleridge, J., dissenting) held that the signed statement was admissible. As to the first objection, the court held that, if the examination was taken under oath administered by proper authority, it is admissible. As to the objection that the statements were not voluntary, it was held that such an objection does not apply I to a lawful examination in the course of a judicial proceeding, and, as to the alleged threats, two or three were no more than a warning to the defendant of the consequences which in point of law would follow from his refusing to give a true answer to the questions put to him. Lastly, as to the arguments based upon the principle nemo tenetur se ipsum accusare, the court held that the statute of 1849 had in the case in question taken away this privilege, by enacting that he must answer touching all matters relating to his trade or estate without any qualification. It is to be observed that in this case there was no express provision that the answers of the bankrupt should be admissible in evidence against him.

In my judgment the principles enunciated in this case (with the decision in which I entirely agree) practically determine the present case, but as the precise question here reserved turns upon a later statute, it is necessary to examine that later statute. The examination in question took place under the Bankruptcy Act, 1883, s. 17 of which provides that the court may appoint a day for the examination of the debtor, at which he shall be examined as to his conduct, dealings, and property. It provides that the court may adjourn the examination from time to time, that the official receiver may take part in the examination and, if authorised, may employ a solicitor with or without counsel; a trustee, if appointed before the examination concludes, may take part in it; the court may put such questions to the debtor as it may think expedient, and lastly it is provided by sub-s. (8):

> "The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him. They shall also be open to the inspection of any creditor at all reasonable times."

Finally, by sub-s. (9) [now s. 15 (9) of the 1914 Act], when the court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall declare the examination concluded. As to the subjects upon which the debtor may be examined, it is to be observed that his "conduct" is included, a word not found in s. 117 of the Act of 1849 [repealed]. In my judgment this makes no difference, and I think that under the former Act the matter intended to be covered, as I conceive by that word in the latter section, could have been made the subject of examination under the former Act. It seems to me that "conduct" there relates to the matters referred to in s. 28 [see now s. 26 of the 1914 Act] dealing with the considerations which the court ought to weigh as to granting or refusing an order of discharge, or as to the terms on which such order may be granted.

To return to the construction of this section, it will be seen that the examination, if authenticated as provided in sub-s. (8), may thereafter be used in evidence against the bankrupt without any qualification pointing to its exclusion in the case of criminal proceedings. Indeed, seeing that a bankrupt is not likely to be the subject of civil proceedings, it is more difficult to suppose that the exclusion of criminal proceedings could have been intended. I think, therefore, it must be taken as clear, conformably with the decision in *R.* v. *Scott* (2), that, if duly authenticated as provided by sub-s. (8) the examination could properly be used against the defendant on a criminal charge. It is equally clear that, not being regularly authenticated, it cannot be put in evidence. If it could, it would become in itself, without further proof than compliance with the formal provisions of the Act, substantive evidence, but the point that we have here to decide is: Is such authenticated examination the sole evidence which can be given of statements or admissions of the defendant during his examination? I am clearly of opinion that it is not. In the first place, the statute does not say that it shall be the only evidence of his statements. In the next place, his statements have been made on an occasion when he was under lawful examination on oath, and therefore are not to be regarded as induced by threats, or promises, or under undue influence, circumstances which would properly cause them to be regarded as not being voluntary, and therefore inadmissible. I regard the statutory provision, therefore, as one intended to provide only for the most authentic way of presenting to the court the statements made, but not at all as intended to exclude all other modes of giving evidence of statements made by the defendant in the course of his examination. We cannot give effect to the objection made without construing the statute as if it had said, which it does not, that the authenticated examination shall alone be received as evidence of the statements so made.

If, then, this view is correct, is there any rule of law by which his evidence should be excluded? I know of none. I take the general rule to be (apart from any express

statutory exceptions) that any statement made by a party relevant to the matter in hand may be given in evidence against him in any civil case and also in any criminal case, except where such statement is made upon oath improperly administered, or where such statement is not voluntary within the principle to which I have already referred. I think this view is strengthened by the provisions in the Bankruptcy Act, 1890, s. 27 [repealed. The point no longer calls for report].

It has been objected that the broad principle which I have expressed would recognise the admissibility of the evidence of any person as well as the shorthand writer as to the statements or admissions made by a bankrupt during his examination. This is quite true, it would. But this seems to me to be only an objection to the weight and reliability of the evidence, not to its admissibility, and I have no fear that, in the application in practice of the principle enunciated, both judges and juries may not well be trusted to discriminate between evidence of statements accurately recorded and formally authenticated and evidence of statements which do not fall within that category. In the result, therefore, the conviction will be affirmed.

POLLOCK, B., HAWKINS, CAVE, and **WILLS, JJ.,** concurred.

Conviction affirmed.

Solicitors : *Solicitor to the Treasury; E. F. S. Pearson*, Leeds.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

PLEDGE *v.* WHITE AND OTHERS

[House of Lords (Lord Halsbury, L.C., Lord Watson and Lord Davey), November 19, 21, 1895, March 26, 1896]

[Reported [1896] A.C. 187; 65 L.J.Ch. 449; 74 L.T. 323; 44 W.R. 589]

Mortgage—Consolidation—Redemption by assignee of the equities of redemption—Mortgages not united until after assignment by mortgagor.

The doctrine of consolidation of mortgages applies where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person, or where, after that state of things has once existed, the equities of redemption have become separated. The right to consolidate exists, therefore, notwithstanding that the mortgages which it is sought to consolidate were not united in title with the mortgage sought to be redeemed until after the assignment of the equities or redemption by the mortgagor to the person who seeks to redeem.

Vint v. *Padget* (1) (1858), 2 De G. & J. 611, followed.

Jennings v. *Jordan* (2) (1881), 6 App. Cas. 698, explained.

Decision of the Court of Appeal sub nom. *Pledge* v. *Carr*, [1895] 1 Ch. 51, affirmed.

Notes. The Law of Property Act, 1925, s. 93 (replacing the Conveyancing Act, 1881, s. 17), provides that unless all the mortgages were made before 1882, a mortgagor may redeem without submitting to consolidation unless a contrary intention appears in at least one of the deeds.

Referred to : *Riley* v. *Hall* (1898), 79 L.T. 244; *Sharp* v. *Rickards*, [1908-10] All E.R. Rep. 480.

As to consolidation of mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 320-326; and for cases see 35 DIGEST, 423-425. For the Law of Property Act, 1925, s. 93, see 20 HALSBURY'S STATUTES (2nd Edn.) 631.

Cases referred to:

(1) *Vint* v. *Padget* (1858), 1 Giff. 446; 31 L.T.O.S. 21; 4 Jur.N.S. 254; 6 W.R. 321; affirmed, 2 De G. & J. 611; 28 L.J.Ch. 21; 32 L.T.O.S. 66; 4 Jur.N.S. 1122; 6 W.R. 641; 44 E.R. 1126, L.JJ.; 35 Digest 423, *1613*.

(2) *Jennings* v. *Jordan* (1881), 6 App. Cas. 698; 51 L.J.Ch. 129; 45 L.T. 593; 30 W.R. 369, H.L.; 35 Digest 419, *1587*.

(3) *Minter* v. *Carr*, [1894] 3 Ch. 498; 63 L.J.Ch. 705; 71 L.T. 526; 7 R. 558, C.A.; 35 Digest 427, *1666*.

(4) *Bovey* v. *Skipwich* (1671), 1 Cas. in Ch. 201; 3 Rep. Ch. 67; 22 E.R. 762; 35 Digest 425, *1639*.

(5) *Tweedale* v. *Tweedale* (1857), 23 Beav. 341; 53 E.R. 134; 35 Digest 423, *1612*.

(6) *Titley* v. *Davies* (1743), 2 Y. & C. Ch. Cas. 399, n.; 63 E.R. 177, L.C.; 35 Digest 426, *1648*.

(7) *Selby* v. *Pomfret* (1861), 1 John. & H. 336; 30 L.J.Ch. 770; 9 W.R. 398; affirmed, 3 De G.F. & J. 595; 4 L.T. 314; 7 Jur.N.S. 835; 9 W.R. 583; 45 E.R. 1009, L.C.; 35 Digest 425, *1627*.

(8) *Neve* v. *Pennell*, *Hunt* v. *Neve* (1863), 2 Hem. & M. 170; 2 New Rep. 508; 33 L.J.Ch. 19; 9 L.T. 285; 11 W.R. 986; 71 E.R. 427; 35 Digest 425, *1624*.

(9) *Beevor* v. *Luck*, *Beevor* v. *Lawson* (1867), L.R. 4 Eq. 537; 36 L.J.Ch. 865; 15 W.R. 1221; 35 Digest 422, *1604*.

(10) *White* v. *Hillacre* (1839), 3 Y. & C. Ex. 597; 4 Jur. 102; 160 E.R. 839; 35 Digest 420, *1590*.

(11) *Harter* v. *Colman* (1882), 19 Ch.D. 630; 51 L.J.Ch. 481; 46 L.T. 154; 30 W.R. 484; 35 Digest 427, *1665*.

(12) *Tassell* v. *Smith* (1858), 2 De G. & J. 713; 27 L.J.Ch. 694; 32 L.T.O.S. 4; 4 Jur.N.S. 1090; 6 W.R. 803; 44 E.R. 1166, L.JJ.; 35 Digest 424, *1618*.

Appeal by the plaintiff in the action from a decision of the Court of Appeal (LORD HERSCHELL, L.C., and LINDLEY and A. L. SMITH, L.JJ.) reported sub nom. *Pledge* v. *Carr*, [1895] 1 Ch. 51, affirming a decision of ROMER, J., reported [1894] 2 Ch. 328, holding that the defendants were entitled to consolidate their mortgages on seven properties against the plaintiff, who sought to redeem only one of them.

Briefly, the facts were that James Banks had been the owner of all seven properties, and had mortgaged each of them by various deeds to various persons. He later assigned the equity of redemption in all seven properties to Brockman and Harrison, the predecessors in title of the plaintiff, but at the date of that assignment not all the mortgages were united in the same hands. The mortgages did later become united in the defendants' hands and the question arose whether the defendants were entitled to consolidate their mortgages. ROMER, J., and the Court of Appeal held that the defendants were entitled to consolidate their mortgages on all seven properties. The plaintiff appealed.

The facts appear more fully in the opinion of LORD DAVEY.

Levett, *Q.C.*, *Bramwell Davis*, *Q.C.*, and *Cator* for the appellant.

Cozens-Hardy, *Q.C.*, and *E. Ward* for the respondents.

Their Lordships took time for consideration.

Mar. 21, 1896. **LORD HALSBURY, L.C.**—I have had an opportunity of considering the opinion prepared by LORD DAVEY, and I am not prepared to dissent from it. I use that form of expression because I confess that I lament the conclusion to which it has been found necessary to come, although I believe that the strict principle upon which it rests is founded in our law at present; and in dealing with a technical system it is better to adhere to a principle when once established than to create greater confusion by dissenting from it. I think the principle laid down in *Vint*

A v. *Padget* (1) has been so firmly established now by authority in our technical system that I feel that more mischief would be done by dissenting from it than by acquiescing in it. For these reasons I am content with the opinion which my noble and learned friend has prepared, and shall assent to the motion that he will make.

B **LORD WATSON.**—I also have had an opportunity of carefully considering the opinion about to be delivered by LORD DAVEY. For my own part I should have desired, if possible, to decide otherwise, but I am compelled to say that I concur with the reasoning and the conclusion of my noble and learned friend.

LORD DAVEY.—The facts of this case are complicated, but they may be stated
C in a narrow compass sufficiently for elucidating the point of law which is raised. There are seven different properties which are involved in this appeal. There were originally eight, but one of the properties, known as 1 and 2, Shakespeare Terrace, has been dealt with in a separate suit (see *Minter* v. *Carr* (3)), and the rights of the appellant and respondents in respect of that property are not now in question.

D One James Banks was the original owner and mortgagor of all these seven properties. James Banks mortgaged 34, Bouverie Square, and 5 and 6, Shakespeare Terrace (which I will refer to as Nos. 1 and 2), to John Banks, by deeds dated respectively May 11 and Aug. 26, 1863. He mortgaged Pembury Villa (which I refer to as No. 3) on Oct. 12, 1863, to S. Hobday, and the other four properties (which I will refer to as Nos. 4, 5, 6, and 7) to other mortgagees by
E deeds dated from Oct. 18, 1865, to Nov. 24, 1866. He then made a second mortgage to Brockman of 4, 5, 6, and 7, by a deed or deeds dated Nov. 27, 1866. He then made a second mortgage of Nos. 1, 2, and 3, and a third mortgage of 4, 5, 6, and 7, to Brockman and Harrison, by one deed, dated Aug. 20, 1868. Or, in other words, on that date Banks assigned the equity of redemption in all seven properties to Brockman and Harrison. At that date, therefore, Brockman and Harrison might
F have redeemed 1, 2, or 3, without redeeming the other properties, but they could not have redeemed either 4, 5, 6, or 7 without redeeming all those four properties. Pledge, the present plaintiff and appellant, became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties on April 1, 1885. In the meantime, R. T. Brockman, by deeds dated from 1871 to 1873, became the transferee of the first mortgages on Nos. 1, 2, 4, and 5. The defendants
G and respondents are the surviving executors of R. T. Brockman, who is dead, and on Dec. 27, 1890, they became the transferees of the first mortgage on No. 3. From that date, therefore, the equity of redemption on all seven properties was vested in the appellant, subject to mortgages on the several properties all vested in the respondents.

In these circumstances, on Mar. 30, 1893, the appellant issued a writ in this
H action, by which he claims a right to redeem No. 2 alone on payment of what is due on the first mortgage of that property only. The respondents claim a right to consolidate their mortgages on all the seven properties, and say that the appellant cannot redeem No. 2 alone without redeeming the other six properties also. It was admitted at the Bar that the respondents had the right to consolidate their mortgages on Nos. 1 and 2, because the mortgages on those properties were vested
I in one mortgagee, John Banks, before the assignment of the equity of redemption in both to Brockman and Harrison, the appellant's predecessors in title; but the appellant contends that they are not entitled to consolidate their mortgages on 3, 4, 5, 6, and 7 with their mortgage on No. 2, because these mortgages did not become united in title with the mortgage which he desires to redeem on No. 2 until after the date on which the equity of redemption was assigned to his predecessors in title—namely, Aug. 20, 1868—and his counsel argues that the rights of the appellant and respondents must be determined by the state of circumstances at that date.

The question for your Lordships' decision is whether the respondents have the right of consolidation which they claim, notwithstanding that the mortgages which it is sought to consolidate were not united in title with the mortgage sought to be redeemed until after the assignment of the equity of redemption to the present appellant's predecessors in title. ROMER, J., by whom the action was tried, and the Court of Appeal, held that the case was covered by the decision of KNIGHT BRUCE and TURNER, L.JJ., in 1858, in *Vint* v. *Padget* (1), which it was not competent for them to question, and accordingly decided in favour of the respondents. The The appellant's counsel admit that they cannot distinguish the present case from that decision, but contend that it is wrong and ought to be reversed by your Lordships.

The equitable rule as to the consolidation of mortgages is not one of those doctrines of the Court of Chancery which has met with general approbation—at any rate as regards its later development. Originally it may have been a right of a mortgagee holding two separate mortgages on estates of the same mortgagor which have become absolute estates at law against the mortgagor and debtor personally to refuse to be redeemed as regards one estate without having his other debt also paid. But it has been long settled that the right of consolidation may be exercised by the transferee of the mortgages as well as by the original mortgagee, and may be exercised in respect of equitable mortgages as well as by a mortgagee holding the legal estate absolute at law; and, on the other hand, that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself. If *Vint* v. *Padget* (1) had been an isolated decision on a new point, then, notwithstanding the eminence of the learned judges who were parties to the decision, it may be that your Lordships would have felt disposed to review it, and if it did not appear to your Lordships a necessary or legitimate development of the doctrine, your Lordships would probably be disposed to express your dissent from it, as was done with regard to another decision of the same learned judges by this House, in *Jennings* v. *Jordan* (2). But it is obvious that the learned judges did not conceive themselves to be laying down new law. KNIGHT BRUCE, L.J., said that a long course and series of authorities binding on the court precluded the possibility of their thinking that there was in the case more than one arguable question, if any—namely, as to the materiality of notice of a second mortgage to a transfer of prior mortgages—and TURNER, L.J., said it was impossible to distinguish the case from *Bovey* v. *Skipwich* (4)—a case decided in the reign of Charles II, to which I will presently refer—on any other ground than as to notice being material.

In *Tweedale* v. *Tweedale* (5), decided in 1857, the year before *Vint* v. *Padget* (1), the union of two mortgages made to different mortgagees took place after the assignment of the equity of redemption of both mortgaged properties. LORD ROMILLY, M.R., held that the assignee could only stand in the position of mortgagor, and be entitled to his rights only; and if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not entitled to redeem one without redeeming the other. Indeed the contrary seems from the report to have been scarcely argued in that case.

Vint v. *Padget* (1) came before STUART, V.-C., in the first instance, and his judgment may be referred to as showing how entirely that experienced judge considered the point to be settled. He said:

> "In accepting by way of security the equity of redemption of two separate estates, Mr. Lee deliberately incurred the risk of their uniting in one hand, and when that union has taken place there is only one single debt; and in order to redeem he must pay off both mortgages, each of which affects the entirety of both estates."

The old case of *Bovey* v. *Shipwich* (4), referred to by TURNER, L.J., was a combined case of tacking (in the strict sense) and consolidation. There was—

first, a mortgage with conveyance of the legal estate in two properties; secondly, an assignment of the equity of redemption in the two properties to a second mortgagee; thirdly, a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held—first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgagee; and secondly, that, having done so, he might consolidate his third mortgage (which was on one estate only) with the first mortgage on both estates and hold the two estates as against the second mortgage until all that was due to him on both securities should be satisfied.

Titley v. *Davies* (6), before Lord Hardwicke, may be distinguished on the ground that Titley, the second equitable mortgagee of one of the estates, had before the assignment of the equity of redemption in another estate to Peyton acquired a right to redeem Shepheard, the first mortgagee on both estates, and thereby consolidate the two mortgages. It is not, therefore, in my opinion, a direct authority on the present case, in which the consolidation has taken place by purchase and transfer, and not by the exercise of an existing right to redeem.

In *Selby* v. *Pomfret* (7) (1861), before Wood, V.-C., and on appeal before Lord Campbell, L.C., the facts, so far as material for the present purpose, were—first, mortgage to defendants of leasehold premises in Mark Lane on June 26, 1858; secondly, mortgage to Stileman and Neale of leasehold premises in Herne Hill on Feb. 1, 1859; thirdly, mortgagor became bankrupt on Feb. 9, 1859; fourthly, transfer of the Herne Hill mortgage to defendants on Feb. 18, 1859. The Vice-Chancellor held that the defendants were entitled to consolidate the two mortgages against the assignees in bankruptcy of the mortgagor, and to retain the balance due on the Mark Lane mortgage, which was deficient, out of the surplus proceeds of sale of the Herne Hill mortgage. Lord Campbell, in affirming the Vice-Chancellor's decree, said (3 De G. F. & J. at p. 597):

> "It does seem strange that mortgagees after the bankruptcy of the mortgagor should be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the body of unsecured creditors. But it is settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is, upon the bankruptcy of the mortgagor, to be considered tabula in naufragio, and if the assignees do not immediately redeem, any mortgagee of the bankrupt, whose security is insufficient, may take an assignment of the mortgage and tack to it the debt due under the mortgage to himself. Therefore, the Vice-Chancellor truly observes,
>
> > 'The fact of the bankruptcy before the defendants took the transfer made no difference. Anyone might seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert.' "

And see *Neve* v. *Pennell* (8). Although the Lord Chancellor uses the word "tack," it is apparent from the facts of the case with which he was dealing that he meant tacking in the sense of consolidation. *Selby* v. *Pomfret* (7) may, no doubt, be distinguished from the present case on the ground that the assignment of the equity of redemption was by operation of law; but if there was no existing right of consolidation at the date of the bankruptcy the distinction seems to me unsubstantial, because the assignees of the bankrupt take his property subject only to existing equities. The statutory jus tertii of the creditors may be considered as entitled to consideration.

In *Beevor* v. *Luck* (9) (1867), Wood, V.-C., held that a mortgagee of one property might, as against the assignee of the equity of redemption of another property,

consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption of the second property only, overruling *White* v. *Hillacre* (10). The extent to which the right of consolidation was carried in this case was criticised by LORD SELBORNE, L.C., in this House, in *Jennings* v. *Jordan* (2), and so far as it held that mortgages on two properties could be consolidated against the assignee of the equity of redemption of one property only, where the union of the two mortgages did not take place until after the separation of the equities of redemption, *Beevor* v. *Luck* (9) must be held to be overruled. It was so considered by FRY, J., in *Harter* v. *Colman* (11).

The present case is free from any such difficulty. At the time when redemption is sought all the mortgages are presently redeemable by the same person. Pledge, the plaintiff in the action, became by one transaction the assignee of the entire equity of redemption of all the mortgages. An attentive consideration of LORD SELBORNE'S opinion has satisfied me that the noble and learned Lord did not intend to throw any doubt upon the application of the doctrine in such circumstances.

The actual point decided in *Jennings* v. *Jordan* (2) was that a mortgagee could not as against the assignee of an equity of redemption of one property consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the plaintiff on what was probably a misunderstanding of *Tassell* v. *Smith* (12). LORD BLACKBURN said (6 App. Cas. at p. 714):

> "I take it that the only question before this House is whether, where the mortgage on one property is not created till after the equity of redemption on the other property has been parted with, there is, as against the purchaser, an equity to consolidate the two."

Their Lordships also discussed the question whether, in a case where the equities of redemption have become separated, consolidation could take place against the assignee of one equity of redemption only by subsequent union of two mortgages, and they preferred the decision in *White* v. *Hillacre* (10) to that of WOOD, V.-C., in *Beevor* v. *Luck* (9). LORD SELBORNE expressed himself in the following words (6 App. Cas. at pp. 700, 701):

> "A mortgagee, who holds several distinct mortgages under the same mortgagor, redeemable, not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may within certain limits, and against certain persons (entitled to redeem all or some of them), consolidate them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all. This doctrine of consolidation is well established, and cannot now be altered except by the legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application, when all the mortgages, whether originally made to the same mortgagee, or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which, after that state of things has once existed, the equities of redemption have become separated by the act of the person in whom they had been combined, though it may perhaps be open to some objection on practical grounds, rests upon an intelligible principle."

After discussing the principle on which such an extension can be defended, LORD SELBORNE, continues (ibid.):

> "In the present case, the rights of redemption existing at the date of the settlement of 1838 could not, in my opinion, have been properly worked out (unless by some voluntary arrangement between the parties interested), otherwise than by consolidating all the mortgages now vested in the appellant

Jennings, which were prior in their creation to Dec. 3, 1838; as they have been, in fact, consolidated by the decree of the Court of Appeal. I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities (such as *Beevor* v. *Luck* (9)), which have held (contrary to the decision of ALDERSON, B., in *White* v. *Hillacre* (10)) that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him, is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages, which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do."

I understand LORD SELBORNE to be here speaking only of the case in which the equities of redemption have become separated, and his observations have no reference to a case such as that now before the House, in which all the equities of redemption have been assigned to, and are now vested in, one person. I do not think that anything was said in this House in *Jennings* v. *Jordan* (2) which throws any doubt or discredit on the decision in *Vint* v. *Padget* (1) and the other cases to the same effect.

At the time when this action was commenced the exact position contemplated by LORD SELBORNE had taken place—all the mortgages being united in a single hand and redeemable by the same person. It appears from the facts of *Jennings* v. *Jordan* (2) that the union of the mortgages which Jennings was held entitled to consolidate did not take place until after the settlement of the equity of redemption under which the respondent Jordan claimed. But, in my opinion, no reliance can be placed on that circumstance, as the facts show that it was a case of successive equities of redemption—one mortgage being on property A., and the other on A. and B.—and not of consolidation simply. I mention this to avoid misapprehension. It appears to me that the position of an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages, subject to which he has purchased, although it may be unreasonable to hold that he can be affected by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate the title to such other property, and cannot know in the latter case to what mortgages the property is subject.

If your Lordships affirm the decree now under appeal, the doctrine of consolidation will be confined within at least intelligible limits. It will be applicable where, at the date when redemption is sought, all the mortgages are united in one hand and redeemable by the same person, or where, after that state of things has once existed, the equities of redemption have become separated. If the purchaser of two or more equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage before consolidation takes place; but if for his own convenience he delays doing so, he runs the same risk as his assignor ran of the mortgages becoming united by transfer in one hand. I am of opinion that the application of the doctrine of consolidation to a case like the present has been too long considered part of the equitable jurisprudence of this country to be altered at the present time, and it is not so unreasonable as to demand a reversal of it by this House.

Appeal dismissed.

Solicitors: *A. R. & H. Steele*, for *John Minter*, Folkestone; *Talbot & Tasker.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

CONQUEST AND ANOTHER *v.* EBBETTS AND ANOTHER

[House of Lords (Lord Herschell, Lord Macnaghten and Lord Morris), June 16, July 30, 1896]

B

[Reported [1896] A.C. 490; 65 L.J.Ch. 808; 75 L.T. 36; 45 W.R. 50; 12 T.L.R. 599; 40 Sol. Jo. 700]

Landlord and Tenant—Repair—Breach of covenant—Damages—Method of ascertainment—Action against under-lessee—Under-lessor's own liability to head landlord to be taken into account.

C

In assessing the damages in an action brought by an under-lessor against an under-lessee for breach of a repairing covenant, account should be taken of any liability of the under-lessor under a repairing covenant in the head lease, at least if the under-lessee had notice of that liability. The proper measure of damages payable to the under-lessor will be the diminution in the value of his reversion, and in an action brought shortly before the expiration of the underlease, this may properly be taken to be the cost of executing the repairs, less a rebate for the period which the underlease has still to run. No account can be taken of the fact that the head landlord may be willing to accept a lesser sum by way of damages from the under-lessor because he intends to put the premises to some other use and does not wish that the repairs should be executed.

D

Dictum of Holt, C.J., in *Vivian* v. *Champion* (1705), 2 Ld. Raym. 1125, considered.

E

Decision of the Court of Appeal, [1895] 2 Ch. 377, affirmed.

Notes. The common law rule as to the measure of damages for breach of a repairing covenant has been modified by the Landlord and Tenant Act, 1927, s. 18 (1). The head landlord would now be precluded from recovering damages against the under-lessor if at or shortly after the end of the lease it is intended that the premises would be pulled down or such structural alterations made therein as would render valueless the repairs covered by the covenant. It is possible that in such circumstances the use to which the head landlord intends to put the premises might now be taken into account in assessing the damages payable by an under-lessee for breach of a repairing covenant in the underlease.

F

Considered: *Clare* v. *Dobson*, [1911] 1 K.B. 35. Applied: *Ellis* v. *Torrington* (1919), 89 L.J.K.B. 369. Considered: *Duke of Westminster* v. *Swinton*, [1948] 1 All E.R. 248; *Smiley* v. *Townshend*, [1950] 1 All E.R. 530. Applied: *Lloyds Bank, Ltd.* v. *Lake*, [1961] 2 All E.R. 30. Referred to: *Stephens* v. *Junior Army and Navy Stores*, [1914] 2 Ch. 516.

G

As to damages for breach of a repairing covenant, see 23 Halsbury's Laws (3rd Edn.) 587-591, and for cases see 31 Digest (Repl.) 371 et seq. For the Landlord and Tenant Act, 1927, s. 18, see 13 Halsbury's Statutes (2nd Edn.) 902.

H

Cases referred to:

(1) *Vivian* v. *Champion* (1705), 2 Ld. Raym. 1125; 1 Salk. 141; Holt, K.B. 178; 92 E.R. 245; sub nom. *Anon.*, 11 Mod. Rep. 45; 31 Digest (Repl.) 367, *4987*.

(2) *Doe d. Worcester Trustees* v. *Rowlands* (1841), 9 C. & P. 734, N.P.; 31 Digest (Repl.) 371, *5018*.

I

(3) *Turner* v. *Lamb* (1845), 14 M. & W. 412; 5 L.T.O.S. 287; 153 E.R. 535; 31 Digest (Repl.) 371, *5020*.

Also referred to in argument:

Wigsell v. *School for Indigent Blind* (1882), 8 Q.B.D. 357; 51 L.J.Q.B. 330; 46 L.T. 422; 30 W.R. 474; 17 Digest (Repl.) 93, *105*.

Smith v. *Peat* (1853), 9 Exch. 161; 2 C.L.R. 424; 23 L.J.Ex. 84; 22 L.T.O.S. 106; 31 Digest (Repl.) 371, *5022*.

A *Mills* v. *East London Union* (1872), L.R. 8 C.P. 79; 42 L.J.C.P. 46; 27 L.T. 557; 37 J.P. 6; 21 W.R. 142; 31 Digest (Repl.) 370, *5012*.
Henderson v. *Thorn*, [1893] 2 Q.B. 164; 62 L.J.Q.B. 586; 69 L.T. 430; 57 J.P. 679; 41 W.R. 509; 37 Sol. Jo. 457; 5 R. 404; 31 Digest (Repl.) 374, *5045*.

Appeal by the defendants from a decision of the Court of Appeal (Lindley, Lopes, B and Rigby, L.JJ.), reported [1895] 2 Ch. 377, affirming a decision of an official referee as to the amount of damages payable by them for the breach of a covenant to keep in repair.

The buildings in question were known as the Grecian Theatre, City Road, London, and they were occupied by one Booth for the purposes of the Salvation Army. The original lease of the premises was granted in 1840, by trustees for the parish of St. C Botolph, Bishopsgate, to one Rouse for sixty-one years from Michaelmas, 1837. The lease contained a usual repairing covenant by the tenant. Rouse, in March, 1851, granted an underlease to one Oliver for the original term less the last ten days thereof. The underlease contained a usual repairing covenant by the under-lessee, and also showed on the face of it that it was an underlease, as it contained several references to the superior landlord. It also reserved to the agents of the superior D landlord liberty to come in and do repairs. The respondents now represented Rouse; the appellant Conquest now represented Oliver. Booth was assignee of the underlease, which contained a covenant by the under-lessee to keep the premises in repair. The respondents sued Conquest and Booth for damages for alleged breach of the covenant.

Romer, J., in December, 1895, held that there had been a breach of the covenant, E and referred it to the official referee to assess the amount of the damages. The official referee assessed the damages at £1,305, which, it was admitted, was the sum which it would cost to put the premises in proper repair, allowing a discount for the period for which the underlease had yet to run. The defendants alleged that the damages had been assessed on a wrong principle, and appealed to the Court of Appeal, which dismissed the appeal. The defendants then appealed to the House of F Lords.

Haldane, Q.C., *C. H. Sargant*, and *Courthope-Munroe* for the appellants.
Jelf, Q.C., and *R. F. Norton* for the respondents.

The House took time for consideration.

G July 30, 1896. The following opinions were read.

LORD HERSCHELL.—The appellants in the present case contend that the damage for the admitted breach of a contract to keep certain demised premises in repair have been assessed on a wrong principle.

The facts may be very shortly stated. In May, 1840, the then Bishop of London H demised certain premises to Thomas Rouse for a term of sixty-one years from Michaelmas, 1837, at a rent of £350 a year. In March, 1851, a portion of these premises was demised to Benjamin Oliver, by way of underlease, for the original term less ten days at the same rent, being in effect an improved rent of about £100 a year. The covenants to keep the demised premises in repair and to deliver them up in good repair were in substantially the same terms in the lease and underlease. I The respondents are the present trustees under the will of Thomas Rouse, the original lessee. The one appellant is the personal representative of Oliver, the sub-lessee, and the other is an assignee of the sub-lease. The premises comprised in the sub-lease not having been kept in repair pursuant to the covenant contained in it, the action in which this appeal arises was brought.

The assessment of damages was referred to Mr. Ridley, one of the official referees, who fixed them at the sum of £1,305. At the time when the case was heard there were about three and a half years of the term unexpired. He arrived at the sum named by ascertaining how much it would require to put the premises in the state

of repair in which they would have been if the covenant had been observed, and then allowing a rebate from that sum in consideration of the fact that the lease had still some years to run. The Court of Appeal considered that, there having been notice to the sub-lessee of the original lease and of the covenants contained in it, it was right to take into account in assessing the damages the liability of the respondents on those covenants, and that the damages had been properly assessed on the basis of awarding to the respondents a sum which represented the diminution in the value of their reversion due to the breach of covenant by the appellants.

Where an action for non-repair had been brought during the currency of a lease, it was said by HOLT, C.J., in *Vivian* v. *Champion* (1), in answer to the objection that it was a hard action, for maybe the lessee might leave the premises in repair at the end of the term and that therefore it was usual to give but small damages :

> "We always inquire in these cases what it will cost to put the premises in repair, and give so much damages, and the plaintiff ought in justice to apply the damages to the repair of the premises."

In *Doe d. Worcester Trustees* v. *Rowlands* (2), COLERIDGE, J., said (9 C. & P. at p. 739) :

> "In estimating the damages in cases where the lease has a long time to run, it is not fair to take the amount that would be necessary to put the premises into repair as the measure of damages. . . . The true question, therefore, is, to what extent is the reversion injured by the non-repair of the premises? If the lease had ninety-nine years to run it could not make much difference in the value of the reversion whether the premises were now in repair or not. This lease, however, will expire in about six years."

I may observe that what the learned judge said with regard to a lease having ninety-nine years to run would not be applicable in all cases. There are circumstances in which it might be of the utmost importance to the reversioners that the buildings should be in a proper state of repair. HOLT, C.J.'s, statement of the law has been subjected to criticism in other cases, notably by PARKE and ALDERSON, BB., in *Turner* v. *Lamb* (3). I do not think that any hard and fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of a lease in respect of the breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. I quite agree with the criticism to which LORD HOLT'S view has been subjected if that learned judge intended to lay down that, whatever the circumstances and however long the term had to run, the damages must necessarily be what it would cost to put the premises into repair. On the other hand, I think it would be equally wrong to hold that this could never be the measure of damages whatever the circumstances and however nearly the term had expired.

But in the present case, if the test be applied of inquiring how much the value of the respondents' reversion has been diminished by the breach of covenant—a test for which I understand the appellants to contend—I cannot see that there has been any error in the assessment of damages. If the premises were now in good repair the reversion of the respondents would secure them the improved rent of £100 a year to the end of the term, without any liability on their part, unless it were to the extent to which repairs subsequently became necessary. As matters stand they can only receive this rent subject to the liability of restoring the premises to good repair, so that they may in that condition re-deliver them to their lessor. The difference between these two positions represents the diminution in the value of their reversion owing to the breach of covenant, and on this basis the damages seem to me to have been properly assessed.

A It was contended for the appellants that the respondents would not be bound in any case to spend upon the premises the sum necessary to put them in repair, or at the expiration of the term to pay that sum to their lessor. It was said that, owing to the nature of the premises and the changed circumstances of the neighbourhood, the freeholder would make an entirely different use of the site when the term he had created came to an end; that he would not desire to have the buildings then upon B his land put in good repair, and that he would arrive at some arrangement with his lessee by which he would accept from him a sum less than the cost of effecting these repairs. I do not think that the court would do right, in assessing the damages in the present case, to involve itself, at the instance of the appellants, in considerations of that character. The duty of the appellants as between themselves and the respondents was to fulfil the obligation of the covenant into which they entered and to C keep the premises in repair. If they had done so the present question would not have arisen. They have broken their covenant, and when sued for the breach they have, in my opinion, no right to demand that a speculative inquiry shall be entered upon as to what may possibly happen and what arrangements may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time. I think that the appeal should be dismissed with costs.

D

LORD MACNAGHTEN and **LORD MORRIS** concurred.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost; Clarke & Calkin.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

E

BIGGS *v.* HODDINOTT

F [COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Chitty and Henn Collins, L.JJ.), July 6, 1898]

[Reported [1898] 2 Ch. 307; 67 L.J.Ch. 540; 79 L.T. 201; 47 W.R. 84; 14 T.L.R. 504]

G *Mortgage—Collateral advantage—Validity—Unconscionable or oppressive bargain —Property encumbered until redemption—Licensed premises—Covenant to sell only mortgagee's beer.*

There is no general principle that a mortgagee cannot stipulate for a collateral advantage to himself. The real principle is that the mortgagee shall not impose on the mortgagor any unconscionable or oppressive bargain, and it is only on this broad principle that a stipulation in a mortgage which does not clog the equity H of redemption can be invalid.

A covenant contained in a mortgage of a hotel to a brewer which provided that during the continuance of the mortgage (which was expressed to be irredeemable for five years) the mortgagors would only sell the mortgagee's beer **held** to be enforceable by the mortgagee.

Jennings v. *Ward* (1) (1705), 2 Vern, 520, and *Re Edwards' Estate* (2) (1861), I 11 I.Ch.R. 367, distinguished.

Notes. The dictum of SIR NATHANIEL LINDLEY, M.R., that "a mortgagor may always redeem on payment of principal, interest, and costs and no bargain which prevents such redemption is valid" must be read subject to the qualification that the right to redeem may be postponed, so long as this would not be unreasonable or oppressive.

Applied: *Santley* v. *Wilde*, [1899] 2 Ch. 474. Explained: *Noakes & Co., Ltd.* v. *Rice*, [1900 3] All E.R. Rep. 34. Considered: *Bradley* v. *Carritt*, [1900-3] All

E.R. Rep. 633. Distinguished: *Morgan* v. *Jeffreys*, [1910] 1 Ch. 620. Considered: *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, [1911-13] All E.R. Rep. 970; *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1938] 4 All E.R. 618.

As to collateral stipulations in mortgages, see 27 HALSBURY'S LAWS (3rd Edn.) 236-237; and for cases see 35 DIGEST 354-356.

Cases referred to:

(1) *Jennings* v. *Ward* (1750), 2 Vern. 520; 23 E.R. 935; 35 Digest 356, *998*.

(2) *Re Edwards' Estate* (1861), 11 I.Ch.R. 367; 35 Digest 356, *996 iii*.

(3) *Potter* v. *Edwards* (1857), 26 L.J.Ch. 468; 5 W.R. 407; 35 Digest 354, *977*.

(4) *Mainland* v. *Upjohn* (1889), 41 Ch.D. 126; 58 L.J.Ch. 361; 60 L.T. 614; 37 W.R. 411; 35 Digest 355, *976*.

Also referred to in argument:

Chambers v. *Goldwin* (1804), 9 Ves. 254; 1 Smith, K.B. 252; 32 E.R. 366; 35 Digest 365, *1071*.

Leith v. *Irvine* (1833), 1 My. & K. 277; 39 E.R. 686, L.C.; 35 Digest 648, *3794*.

Bunbury v. *Winter* (1820), 1 Jac. & W. 255; 37 E.R. 372, L.C.; 35 Digest 354, *965*.

Cox v. *Champneys* (1822), Jac. 576; 37 E.R. 967; 35 Digest 525, *2560*.

Broad v. *Selfe* (1863), 2 New Rep. 541; 9 L.T. 43; 9 Jur.N.S. 885; 11 W.R. 1036; 35 Digest 314, *596*.

Eyre v. *Hughes* (1876), 2 Ch.D. 148; 45 L.J.Ch. 395; 34 L.T. 211; 24 W.R. 597; 2 Char. Pr. Cas. 33; 35 Digest 648, *3798*.

James v. *Kerr* (1889), 40 Ch.D. 449; 58 L.J.Ch. 355; 60 L.T. 212; 53 J.P. 628; 37 W.R. 279; 5 T.L.R. 174; 35 Digest 314, *595*.

Field v. *Hopkins* (1890), 44 Ch.D. 524; 62 L.T. 774, C.A.; 35 Digest 636, *3684*.

Salt v. *Marquess of Northampton*, [1892] A.C. 1; 61 L.J.Ch. 49; 65 L.T. 765; 40 W.R. 529; 8 T.L.R. 104; 36 Sol. Jo. 150, H.L.; 35 Digest 352, *954*.

Appeal by the defendants from a decision of ROMER, J., whereby he granted the plaintiff, who was the mortgagee of the defendants' hotel, an interim injunction restraining the defendants from selling any beer other than the plaintiff's upon the mortgaged premises during the continuance of the mortgage.

The plaintiff Biggs was a brewer at Cardiff, and the defendants Mr. and Mrs. Hoddinott were the owners of the Witchell Hotel, at Cadoxton, Glamorganshire, and carried on business there. By an indenture, dated Mar. 18, 1896, certain mortgages on the Witchell Hotel were transferred to the plaintiff, and a further advance by him was secured, amounting in all to £7,654. The defendants covenanted in the usual way for payment of the principal with interest at £5 per cent. on Sept. 18 next, and they also jointly and severally covenanted that they and their respective executors, administrators, and assigns, owners or tenants for the time being of the said premises, would during the continuance of the security, take of and deal with the plaintiff and his successors for the time being in the brewery business only for all beers and stout, or any other description of malt liquors (except bottled beers) which should be vended to be consumed on or off the hotel and premises, and would not sell or permit the sale or consumption on the premises of any such liquors other than such as should have been purchased or taken of the plaintiff, his administrators, or assigns. There was also a covenant by the plaintiff that during the continuance of the security he would supply the mortgagors with beer, etc., of the kind and quality which goods of a similar nature were for the time being supplied to his ordinary customers at certain schedule prices. The deed also contained a covenant by the plaintiff that, so long as the mortgagors observed the covenants on their part therein contained, he would not call in the principal moneys owing thereon before Mar. 18, 1901. It was also provided that, notwithstanding the proviso for redemption contained in the deed, the mortgagors should not be entitled to require or compel the mortgagee to receive the principal moneys before that date.

In April, 1898, the defendants ceased to purchase their beer from the plaintiff, and expressed an intention of not purchasing any more malt liquors from him, as

A they had been advised that they were not bound by their covenant to do so. They also claimed to be entitled to redeem the mortgage at once, and on May 4, 1898, they tendered to the plaintiff the amount of the principal and interest then due on the mortgage, together with six months' interest in lieu of notice, but the plaintiff refused to accept it. On May 10 the defendants issued an originating summons asking for a B declaration that they were entitled to redeem the mortgage at once on payment of principal and interest including six months' interest in lieu of notice. On May 23 the plaintiff issued the writ in this action claiming an injunction restraining the defendants during the continuance of the mortgage, their servants or agents, from selling or permitting the sale or consumption upon the mortgaged premises, of any beer or other malt liquors (other than bottled beer) which had not been purchased C from the plaintiff, and damages. On June 10 the plaintiff moved for an interim injunction in the terms of his claim, and the defendants' summons was adjourned into court, and came on for hearing with the motion.

On the hearing of the defendants' summons, ROMER, J., held that the defendants were not entitled to redeem until the expiration of the five years; and on the plaintiff's motion granted an injunction restraining the defendants during the continuance of the mortgage, their servants or agents, from selling or permitting the sale D or consumption upon the mortgaged premises of any beer or other malt liquors (other than bottled beer) which had not been purchased from the plaintiff. The defendants appealed from the order made on the plaintiff's motion.

Farwell, Q.C., and *Ingpen* for the defendants.
Levett, Q.C., and *R. F. Norton* for the plaintiff.

E

SIR NATHANIEL LINDLEY, M.R.—We have listened to a very ingenious and learned argument with a view to induce us to lay down a proposition of law which would be very unfortunate for business men. The proposition is, that while two people are engaged in a mortgage transaction they cannot enter into any other F transaction with each other, and that any such transaction must be entered into before or after the mortgage, so that it cannot be said that the mortgagee gets any collateral advantage out of the mortgage.

Counsel for the defendants did not attempt to uphold this on any rational principle, but relied on authority. Of course we must follow the authorities whether we like them or not, but do they support that proposition? *Jennings* v. *Ward* (1) was the G first case relied on. That was a redemption suit, and the stipulation which was in question seriously interfered with the right of redemption of the mortgaged property on payment of principal, interest, and costs, and SIR JOHN TREVOR, M.R., ordered redemption without regard to that stipulation. He said (2 Vern. at p. 520):

> "A man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement."

H

That language has found its way into the books, and it has been understood as if he meant exactly what he said without regard to the circumstances of that case, and it has been said that a mortgagee cannot have principal, interest, and costs, and also some collateral advantage. But when the authorities are considered, it is found that that general proposition has been departed from again and again. Take the I case of West India mortgages, in which it has been often decided that a mortgagee who was not in possession might stipulate that he should be appointed consignee for the mortgagor. The proposition as stated in *Jennings* v. *Ward* (1) is too wide. If properly limited it is good law and good sense, and when one looks at the cases where it has been applied and those where it has not, one sees what it means.

The principle is this: A mortgage is regarded in equity as a security for the money advanced, and a mortgagor may always redeem on payment of principal, interest, and costs; and no bargain which prevents such redemption is valid. There is another principle which is not peculiar to mortgages, and that is that an unconscionable

bargain will not be enforced; and there is no case of any bargain being set aside which does not come under one of these two heads. A

I think the decision of ROMER, J., was right; and to say, as we are asked to do, that a covenant like this one is a collateral advantage and must be disregarded as unconscionable would be to lay down a proposition which would shock any business man, and we are not driven to do it by authority and are not going to say that. The only way of making that out would be this, which was the view taken by HARGREAVE, J., in *Re Edwards' Estate* (2), that any stipulation in a mortgage for the benefit of the mortgagee is, because it is in a mortgage, presumed to be due to pressure upon the mortgagor by the mortgagee. The decision there was right, that the agreement in the mortgage which was relied on was invalid as preventing redemption; but what the judge said as to a stipulation being unreasonable because it was found in a mortgage is going too far. The decision of ROMER, J., was right, and the appeal will be dismissed. B C

CHITTY, L.J.—This is a mortgage for a term of years effected in the usual way, and it contains a covenant by the mortgagors during the continuance of the security to take all their beer from the mortgagee, and a covenant by the mortgagee to supply it. It is contended that the covenant by the mortgagors is void in equity. D

The first observation I desire to make is that it in no way affects the equity of redemption, as redemption can take place just as if the covenant was not in the deed. There is no stipulation that damages for breach of the covenant shall be covered by the security, so this is not a case where the equity of redemption is affected. In equity a mortgage has always been looked upon as only a security for money, and here the right of the mortgagors to redeem on payment of principal, interest, and costs is maintained. It is said that a general principle has been established that a mortgagee shall not stipulate for any collateral advantage to himself, and that there are authorities which show that. That has not been made out. I think the real principle is that the mortgagee shall not impose on the mortgagor any unconscionable or oppressive bargain. There is nothing of that kind in this case. The arrangement is for the common benefit of both parties. Though the mortgagee does by the operation of the covenant get an opportunity for the sale of his beer, the mortgagors get presumably good beer supplied upon the usual terms. It would be contrary to good sense to say that this trade contract, entered into by two business men with their eyes open, should be set aside on the ground of its being contrary to some fanciful doctrine of equity. E F G

Then, as regards the authorities, *Jennings* v. *Ward* (1) was relied on. There there was a bill for the redemption of a mortgage, and what the Master of the Rolls said was that redemption must be decreed without regard to a certain agreement which he considered unconscionable, and which he set aside as being "unreasonable," as appears from the registrar's book which is in court. The statement by HARGREAVE, J., in *Re Edwards' Estate* (2), to the effect that the presumption is that a mortgagor is under pressure when he borrows money on mortgage, is not a universal principle, and that that is so is established by many authorities. The first great departure from it is to be found in the case of West India mortgages. There a mortgagee was allowed to act as consignee for the mortgagor so long as he was not mortgagee in possession. The fact was that this supposed rule, which was founded upon the dicta and not the decisions of judges, was found not to work in these cases, as the West India planters could not get the money unless they consented to the mortgagee being consignee. H I

Potter v. *Edwards* (3) is a clear authority the same way. In that case £700 was advanced, and the mortgage was for £1,000. It has been attempted, I think, to explain what was a plain transaction by a fiction, and the theory was that the parties went through a supposed payment and a repayment in the nature of commission. The real bargain was an advance of £700 and undertaking to give security for £1,000. In one sense there was an advantage to the mortgagee, as he was getting £300 and

also interest on his security for £1,000. *Mainland* v. *Upjohn* (4) is another decision to the same effect.

The decision of HARGREAVE, J., in *Re Edwards' Estate* (2) was right, because in that case not only was there an unconscionable bargain, but the stipulation directly clogged the equity of redemption. The mortgagee in that case could either purchase part of the property or remain mortgagee, so that there was a direct clog on the redemption as, if he became the purchaser, the mortgagor had no right to redeem that part of the estate which came within the option.

It is unnecessary to add any more. In this case the covenant does not fall within any such supposed rule of equity as the defendants have contended for.

HENN COLLINS, L.J. –I am of the same opinion. Were it not for a line of authorities, I do not think that anyone would say that this was other than a fair and reasonable arrangement. It is a contract between a brewer and a publican by which the brewer becomes the transferee of a mortgage on the licensed house, and stipulates that the publican is to take his beer from him. But it is said that mortgages have been the subject of a long series of decisions, and no doubt equity judges have tried to find some principle which would satisfactorily explain the decisions of their predecessors and those which they were about to give themselves, and it is no wonder that in doing that they sometimes laid down some general principle which when applied to other cases was too wide. The decisions were given to remedy some hard case, and then the judges afterwards tried to reduce them to a general rule which would meet all cases. In dealing with hard cases as they come one after another, the only safe thing is to do as ROMER, J., did here, and see how far the decisions have gone in each particular case.

It is clear that when a person enters into a mortgage contract he is only a borrower upon security, and any stipulation in the deed which is inconsistent with that must be treated as if it were not there. And HARGREAVE, J., in *Re Edwards' Estate* (2), probably had in his mind the principle that, the contract being one of loan on security, any stipulation inconsistent with that must be regarded as unfair, and be rejected. But the proposition which he laid down in such a general form, that no onerous contract entered into between the mortgagor and mortgagee as part of the agreement for the loan was valid, was not necessary for the decision of the case which he had before him, for in that case the stipulation interfered with the right of the mortgagor to redeem on payment of principal, interest, and costs.

On what principle can it be said that a stipulation in a mortgage deed which does not clog the equity of redemption is invalid? I think only on the broad principle that effect will not be given to anything which is oppressive and unconscionable. In the case before us the provision is a perfectly reasonable one, and it does not make the mortgage anything but a security for a debt. The mere fact that a stipulation for the benefit of the mortgagee is contained in the mortgage deed does not necessarily make it invalid.

The only ground for saying that it does is what was said in *Jennings* v. *Ward* (1), that a man shall not have interest for his money and at the same time a collateral advantage to himself. This case is not covered by the decision in that case. There was sufficient there to warrant the judge in treating the clause as in fact an agreement for purchase at a given sum, notwithstanding that there was in form a mortgage. Nothing more than that was necessary for the determination of that case, and there is nothing here which goes so far as that. The agreement is one which does not fetter the redemption, and there is nothing unreasonable in it. I agree with the decision of ROMER, J.

Appeal dismissed.

Solicitors: *Riddell, Vaizey & Smith*, for *J. H. Jones*, Cardiff; *Bower, Cotton & Bower*, for *Stephens, David & Co.*, Cardiff.

[*Reported by* W. C. BIGG, ESQ., *Barrister-at-Law.*]

A

SIMPSON *v.* GODMANCHESTER CORPORATION AND ANOTHER

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Shand and Lord Davey), May 18, 20, 21, July 27, 1897]

[Reported [1897] A.C. 696; 66 L.J.Ch. 770; 77 L.T. 409; 13 T.L.R. 544] B

Easement—River—Right to open sluices to prevent flooding of neighbouring land.

The exercise, during a period extending beyond the years of prescription, continuously, openly, as a matter of right, and without interruption, by the owner of land adjacent to a river, of a practice to go on the land of another and open the sluices of locks on the river when a flood was imminent so as to protect his land and the hereditaments thereon from being flooded can constitute a good easement in law. This is so even though land not included in the dominant estate is benefited by the practice, for an easement which is serviceable and beneficial to the dominant estate does not cease to exist because its exercise by the owner of the dominant estate confers, or tends to confer, some benefit on other lands or tenements. C D

Easement—Prescription—Period of 40 years—Scope of Prescription Act, 1832, *s.* 2—*Burden of proof of "consent or agreement."*

By s. 2 of the Prescription Act, 1832, where a way "or other matter" shall have been enjoyed for 40 years the right thereto shall be deemed absolute and indefeasible, "unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing." E

Held: (i) the section was not confined to rights of way and watercourses, but included easements of every description: opinion of Erle, C.J., in *Webb* v. *Bird* (1) (1861), 10 C.B.N.S. 268, not approved; (ii) the burden of showing that there was a "consent or agreement" is on the party alleging it in opposition to a claim of right. F

Notes. Considered: *Re Ellenborough Park*, *Re Davies*, *Powell* v. *Maddison*, [1955] 2 All E.R. 38. Referred to: *Copeland* v. *Greenhalf*, [1952] 1 All E.R. 809.

As to easements generally, see tit. Easements and Profits a Prendre, 12 Halsbury's Laws (3rd Edn.) 517 et seq., and for cases see 19 Digest (Repl.) 1. For the Prescription Act, 1832, see 6 Halsbury's Statutes (2nd Edn.) 669. G

Cases referred to:

(1) *Webb* v. *Bird* (1862) 13 C.B.N.S. 841; 31 L.J.C.P. 335; 8 Jur.N.S. 621; 143 E.R. 332, Ex. Ch.; 19 Digest (Repl.) 69, *384*.

(2) *Ackroyd* v. *Smith* (1850), 10 C.B. 164; 19 L.J.C.P. 315; 15 L.T.O.S. 395; 14 Jur. 1047; 138 E.R. 68; 19 Digest (Repl.) 11, *20*.

(3) *Tapling* v. *Jones* (1865), 20 C.B.N.S. 166; 11 H.L.Cas. 290; 5 New Rep. 493; 34 L.J.C.P. 342; 12 L.T. 555; 29 J.P. 611; 11 Jur.N.S. 309; 13 W.R. 617; 114 E.R. 1067, H.L.; 19 Digest (Repl.) 137, *886*. H

(4) *Dalton* v. *Angus* (1881), 6 App. Cas. 740; 46 J.P. 132; 30 W.R. 191; sub nom. *Public Works Comrs.* v. *Angus & Co.*, *Dalton* v. *Angus & Co.*, 50 L.J.Q.B. 689; 44 L.T. 844, H.L.; 19 Digest 6, *4*.

(5) *Tulk* v. *Moxhay* (1848), 2 Ph. 774; 1 H. & Tw. 105; 18 L.J.Ch. 83; 13 L.T.O.S. 21; 13 Jur. 89; 41 E.R. 1143, L.C.; 40 Digest (Repl.) 342, *2774*. I

Also referred to in argument:

Rangeley v. *Midland Rail. Co.* (1868), 3 Ch. App. 306; 37 L.J.Ch. 313; 18 L.T. 69; 16 W.R. 547, L.JJ.; 19 Digest (Repl.) 12, *25*.

Beeston v. *Weate* (1856), 5 E. & B. 986; 25 L.J.Q.B. 115; 26 L.T.O.S. 272; 20 J.P. 452; 2 Jur.N.S. 540; 4 W.R. 325; 119 E.R. 748; 19 Digest (Repl.) 63, *349*.

A *Baylis* v. *Tyssen-Amhurst* (1877), 6 Ch.D. 500; 46 L.J.Ch. 718; 37 L.T. 493; 11 Digest (Repl.) 8, *49*.
Keppell v. *Bailey* (1834), 2 My. & K. 517; Coop. temp. Brough. 298; 39 E.R. 1042, L.C.; 19 Digest (Repl.) 22, *89*.
Johnson v. *Barnes* (1873), L.R. 8 C.P. 527; 42 L.J.C.P. 259; 29 L.T. 65, Ex. Ch.; 11 Digest (Repl.) 14, *148*.
B *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 52 L.J.Q.B. 193; 48 L.T. 239; 47 J.P. 276; 31 W.R. 293, H.L.; 19 Digest (Repl.) 61, *341*.
Labrador Co. v. *R.*, [1893] A.C. 104; sub nom. *Labrador Co.* v. *R.*, *R.* v. *Labrador Co.*, 62 L.J.P.C. 33; 67 L.T. 730, P.C.; 19 Digest (Repl.) 58, *319*.
A.-G. v. *Horner* (1885), 11 App. Cas. 66; 55 L.J.Q.B. 193; 54 L.T. 281; 50 J.P. 564; 34 W.R. 641; 2 T.L.R. 202, H.L.; 26 Digest (Repl.) 511, *1887*.
C *Chamber Colliery Co.* v. *Hopwood* (1886), 32 Ch.D. 549; 55 L.J.Ch. 859; 55 L.T. 449; 51 J.P. 164; 2 T.L.R. 507, C.A.; 19 Digest (Repl.) 77, *438*.
Phillips v. *Halliday*, [1891] A.C. 228; 61 L.J.Q.B. 210; 64 L.T. 745; 55 J.P. 741, H.L.; 19 Digest (Repl.) 500, *3335*.
Campbell v. *Wilson* (1803), 3 East, 294; 102 E.R. 610; 19 Digest (Repl.) 70, *388*.
D *Great Eastern Rail. Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; 54 L.J.Ch. 162; 52 L.T. 270; 49 J.P. 260; 33 W.R. 81, H.L.; 33 Digest 524, *18*.

Appeal from a decision of the Court of Appeal (LORD HERSCHELL, A. L. SMITH, and RIGBY, L.JJ.), reported [1896] 1 Ch. 214, affirming a decision of WRIGHT, J., sitting as an additional judge of the Chancery Division, in a suit instituted by the appellant, Leonard Taylor Simpson against the respondent corporation to restrain E the latter from forcing open certain locks on the river Ouse of which he claimed to be the owner as the proprietor of the navigation of that river.

Hopkinson, *Q.C.*, and *Simpson* for the appellant.
Crackanthorpe, *Q.C.*, and *Method* for the respondents.

F The House took time for consideration.

July 27, 1897. The following opinions were read.

LORD WATSON.—Although there is a considerable amount of evidence, oral and documentary, the material facts in this case hardly admit of dispute. The G reiterated arguments of the appellant's counsel have failed to satisfy me that the inferences drawn from those facts by WRIGHT, J., and the Court of Appeal are in any respect erroneous.

By letters patent from the Crown, dated Dec. 11, 1638, certain rights of navigation in the river Ouse, between St. Ives and St. Neots, were granted to Arnold Spencer, who had previously spent considerable sums in making that part H of the river navigable, and his heirs and assigns. In virtue of the powers conferred upon them, the grantees have maintained three locks upon the river, with gates or sluices, to which the present action relates, one of these being at Godmanchester, another at Houghton, and a third at Hemingford. It appears that all these locks had been erected and existed in some form or other long before the year 1689, and that they were reconstructed in an improved shape about the year 1834. It I also appears that these locks, when closed, did not raise the flow of the river above the level at which it had been previously kept by old mill-dams in their vicinity, which extended across the channel. The respondents, the corporation of Godmanchester, are in that capacity the owners of lands abutting upon or adjoining the river Ouse, which are liable to be submerged when the river is in flood. Some of these lands are and have been occupied by the corporation for municipal purposes; others have been in use to be let to tenants; while between four and five hundred acres, forming the common lands of the borough, have been used and occupied, partly by the corporation, in the exercise of rights reserved to

it, and partly by corporators who are burgesses of Godmanchester, and live in commonable houses. A

It is established by a large and consistent body of evidence, and it has not been seriously disputed, either in the courts below or at the Bar of the House, that the corporation have been in use, for a period extending far beyond the years of prescription, continuously, without interruption and as a matter of right, to open the gates or sluices of the locks already mentioned whenever a flood was imminent, with the object and result of permitting the flood-water to escape down the river. The appellant maintained, in argument, that the practice had its origin in, and dates from as early a period as, the year 1689. Recent evidence, going back for more than forty years, shows conclusively that the sluices were opened by the corporation for the purpose of draining or protecting those lands and tenements which are vested in them. There are a series of entries in the books of the corporation, beginning in 1736 and ending in 1893, which appear to me to show that during the whole of that period the sluices were regularly opened in time of flood, and for the same purpose as in more recent times. Prior to 1736 there are two entries, one in 1713, and another as early as 1648; and the latter of these, taken in connection with documentary evidence, to which I shall have subsequent occasion to refer, leads, in my opinion, to the inference that the practice began and was followed as matter of right by the corporation a considerable time before the year 1689. B C D

The appellant, in February, 1893, acquired by purchase the entire rights of navigation which had been granted to Arnold Spencer and his heirs and assigns by the letters patent 1638. He brought the present suit in November, 1894, and he claims an injunction to restrain the corporation, their agents, servants, and workmen, from trespassing upon, forcing open, or otherwise interfering with or injuring his locks at Godmanchester, Houghton, and Hemingford, or any one of them, and also a decree for damages. After proof had been taken the action was dismissed with costs by WRIGHT, J., whose order was unanimously affirmed by the Court of Appeal. E F

The argument addressed to us for the appellant was of a very discursive character, but the main, if I may so call them, and certainly the only, points deserving notice, which were advanced and repeated in a great variety of shapes, were these three: (i) that the right which had been exercised and is now asserted by the respondent corporation is truly in the nature of a right in gross, and cannot be the subject of a proper easement; (ii) that an easement of the nature said to have been exercised by the corporation, and such as now claimed by them, cannot be legally constituted in favour of the lands vested in the corporation as the dominant tenement, inasmuch as other lands than those of the corporation to which no such easement is attached, are benefited by its exercise; and (iii) that the exercise of the right claimed by the corporation is solely attributable to an indenture of 1689 between them and the then owner of the navigation, and that the transactions embodied in that deed constitute a personal contract which is not binding upon the appellant, who purchased for value the right of navigation without notice of its existence. G H

I failed to appreciate it at the time, and even now I am not certain that I understand, the reasoning by which the appellant endeavoured to show that the right exercised by the corporation was in the nature of an easement in gross. It was not disputed that the right to open a sluice upon the servient land of another person may be legally conferred upon the owner of a separate and dominant tenement for the purpose of enabling him to relieve his dominant lands of flood-water. In this case all these requisites are to be found. The servient estate consists of these three sluices (which the appellant maintains for the purpose of the navigation) and the navigable water upon which they operate. The dominant tenement consists of the municipal property which is vested in the respondents; and the right which they claim has, according to the evidence, invariably been exercised I

A in the interest and for the benefit of that estate, and not in the interest and for the benefit of any other estate or its proprietor. If the appellant had been able to show that the corporation had carried their operations beyond what was necessary to protect their own lands, so as to clear other lands of flood-water when their own were neither flooded nor threatened with inundation, the appellant would have been entitled to restrain the respondents from doing more than was reasonably B necessary in order to protect their dominant lands. But he has made no such complaint; and there is no evidence in this case which would support it.

The second point appeared to me to be equally devoid of substance. It was broadly and boldly maintained that no burden imposed upon a servient tenement however beneficial to the dominant estate, can in law be regarded as an easement if its exercise for the benefit of the dominant estate has the effect of conferring C some benefit upon some other land which is not included in that estate, and has no similar right of easement. In the case of many easements it is from their nature possible to confine their benefit to the dominant tenement; but in cases where the easement relates to water, or to light or air, it would be simply impossible to do so. If the law were as contended for by the appellant, a servitude of right to take water from the lands of A. for the use of the lands of B. could not be D acquired either by grant or prescription, if owing to the position and levels of the lands of B. it were necessary to discharge the water or its surplus into the lands of C., to the advantage of their owner or occupant. In like manner there could be no servitude of light and air in favour of the windows of a particular house, if the maintenance of the right happened to be of some advantage to the windows of an adjoining house which did not participate in the easement. But the pro- E position is as destitute of foundation in authority as it is, in my opinion, unreasonable. It is no doubt one of the essential characteristics of a legal easement that its exercise shall be for the use and benefit of the dominant estate. But there is no law to the effect that an easement, which is serviceable and beneficial to that estate shall cease to exist, whenever, from the very nature of the right its exercise by the dominant estate confers, or tends to confer, some benefit upon other lands F or tenements. The appellant's counsel, as might have been expected, cited no decision in support of their doctrine, and no judicial opinion in which it was discussed.

[HIS LORDSHIP then dealt with the appellant's third contention and said that, in view of its terms, the deed of 1689 could not be regarded as a covenant constituting G the right of the corporation, or as affording the measure of that right. It was a document which did nothing more than recognise that there was an existing right of servitude which the parties did not intend to disturb—a right resting upon continuous enjoyment by the corporation, in its own interest and that of its burgesses, in virtue of prossession which had never been disputed or resisted by the owners of the navigation, and that right had since been confirmed by unchal- H lenged possession for more than 200 years.] I, therefore, move that the order of the Court of Appeal should be affirmed with costs. **LORD HALSBURY, L.C.,** asks me to state that he approves of the views which I have expressed, and that he also concurs in the opinion which is about to be delivered by LORD DAVEY.

LORD SHAND.—I also am of opinion that the judgment of the Court of Appeal I should be affirmed and this appeal dismissed. I have had an opportunity of considering not only the opinion which has now been delivered by LORD WATSON, but also that which LORD DAVEY is about to read, and I entirely adopt the grounds of judgment which are stated by those learned Lords.

LORD DAVEY.—This case is an illustration of the inconvenience arising from the laxity of pleading permitted by modern practice. If the present respondents had been obliged to state their case with legal precision in their defence, I believe that a great deal of uncertainty and expenditure of time at the trial might have

been avoided. After the trial had lasted for four days it was adjourned for more than a month to enable the respondents to formulate the easement which they claimed, and it was only then that they put their claim into a formal legal shape. By their re-amended defence the respondents say that, as owners of certain hereditaments they have on their own behalf or for or on behalf of their tenants, occupiers of the said hereditaments, or on behalf of the persons entitled to rights of common on the east and west common allotments for 250 years, or for more than forty years before the acts complained of by the plaintiffs, enjoyed as of right and without interruption the right of opening and keeping open the gates of the sluices or locks at Godmanchester, Houghton, and Hemingford in time of flood, or upon every likelihood and appearance of flood, in order to prevent damage or injury to the hereditaments mentioned. And they claim such easement as well by virtue of the Prescription Act as under the deed of Dec. 3, 1689, or under a lost grant.

There is really no dispute as to the facts, and the only question is, whether in law the facts establish the title of the respondents to the easement claimed by them. That the corporation have lands part of their ancient possessions which are exposed to floods is not denied. The extracts from the books of the corporation show that from the beginning of the eighteenth century at least, and probably earlier, the corporation have been in the habit of opening the sluices to let go the water in time of flood, and on various occasions have asserted their right to do so against persons who shut down the sluice-gates which had been opened by their order. The entries relied on for the purpose of showing that it was done by permission of the owners of the navigation appear to me to indicate the contrary. In these circumstances every presumption ought to be made to support the usage. The arguments on behalf of the appellant have covered rather a wide range, and I am sure that the appellant's counsel did full justice to their client's case. In substance the appellant's points seem to be—(i) that the easement claimed by the corporation is too wide, and not sufficiently connected with the enjoyment of their lands; (ii) that it is not shown to what lands in particular it is claimed as appurtenant; and (iii) that the proper inference from the evidence is that the exercise by the corporation of the alleged easement was under the written agreement contained in the deed of 1689.

I cannot doubt that the easement, as finally alleged by the respondents, was a good easement in law. It is, in fact, a claim to divert the water which either has flooded, or, if undiverted, would flood, their lands, and to come on the appellant's land for the purpose of regulating the flow of water with that object. It appears to me directly connected with the enjoyment of the respondents' lands by the occupiers thereof. The appellant, however, argues that the right claimed is to protect, not only the respondents' lands, but the lands of other proprietors from floods. The answer is: That is not the right claimed, and we are not dealing here with any excess in the exercise of the easement, but with the question whether the corporation have the right which they claim.

The appellant's counsel quoted several cases, of which *Ackroyd* v. *Smith* (2) may be taken as an example. It was there held that you cannot annex to land rights by way of easement unconnected with the enjoyment of land as ex gratia a right of way to be used for all purposes. There is no doubt about this sound principle of law; but it appears to me to have nothing to do with the present case, in which the claim is only for the protection of the respondents' own lands. If the appellant means that the exercise by the respondents of their easement has the effect of also protecting the other lands in the district, that probably is so from the nature of the case. But it is no objection to the exercise of a lawful right, that it may indirectly benefit some other persons or subjects which do not enjoy the same right. If I have one ancient light in my house, I can prevent my opposite neighbour from building on his land so as to obstruct that window, and thereby gain the benefit of an unobstructed access of light to my other windows, which are

A modern, or my next door neighbour may be benefited by the opposite land not being built on, although he has no right. This was decided in *Tapling* v. *Jones* (3). LORD CRANWORTH there says (11 H.L.Cas. at p. 314):

> "The plain principle seems to me to be, that no one can interfere with the absolute and indefeasible right of another, unless when such interference is
B made necessary by the wrongful act of the person possessing the right."

This easement is claimed as appurtenant to all the ancient possessions of the corporation, including the east and west common lands, all of which are more or less benefited. For the purpose of the defence it is not necessary for the respondents to say whether the easement can be claimed as appurtenant to all these lands, as it is admitted that they have some lands which are protected from flood water
C by the exercise of the easement. But I ought to say that I see no difficulty in the corporation prescribing, as owners of the soil of the commons (as they seem to be), on behalf of themselves and all the other persons having rights of common there. Nor do I regard the fact that the commons lie below Godmanchester Lock as presenting any difficulty. It is quite conceivable that the regulation of the flow of water through the upper lock, and the prevention of flood water above
D that lock, may be of the utmost importance to the lands below, and, indeed, that this is so is shown by the evidence. It is not, perhaps, very important whether the easement is claimed under the Prescription Act, 1832, or by the fiction of a lost grant. But I agree with the opinion expressed by LORD SELBORNE in *Dalton* v. *Angus* (4), that s. 2 of the Act of 1832 is not confined to rights of way and water-
E courses, but includes easements of every description, notwithstanding the contrary opinion expressed by ERLE, C.J., in *Webb* v. *Bird* (1).

As this easement has been enjoyed for upwards of forty years, it is, therefore, absolute and indefeasible, to use the words of s. 2,

> "unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

F The appellant says that it was, and his counsel put their argument in this way. They say that the covenant contained in the deed of Dec. 3, 1689, was binding, not only upon the covenantor at law, but also in equity on every assign from him who took with notice of the covenant upon the principle of *Tulk* v. *Moxhay* (5). I assume, without deciding, that this is so. But they further say that it must be
G presumed that every owner of the navigation before the appellant had notice of the covenant, while it is proved that the appellant bought without notice. I do not think that any such presumption ought to be made. The words of the statute are "unless it shall appear," etc., and I think that the burden of proof is on those who set up a written consent in opposition to an absolute and indefeasible right. The appellant offered no evidence in support of his suggestion, as he perhaps
H might have done, by calling the late or some former owners of the navigation, and matters capable of proof ought not to be presumed. As a matter of fact, I see no reason to suppose (if one is to guess) that the deed of 1689 was either the commencement or the origin of the right claimed by the corporation, and I entirely concur with what was said by LORD WATSON on the effect and construction of that deed. For these reasons I am of opinion that the appeal should be dismissed with
I costs.

Appeal dismissed.

Solicitors: *Batten, Profitt & Scott; Grubbe & Co.*, for *Hunnybun & Sons*, Huntingdon.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* TOD HEATLEY AND ANOTHER

[COURT OF APPEAL (Lindley, A. L. Smith and Rigby, L.JJ.), February 18, 1897]

[Reported [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P. Jo. 164]

B

Nuisance—Land—Permitting foul matter to be on land—Duty of landowner—Enforcement—Injunction.

There is a duty at common law cast on the owner or occupier of land to abate a nuisance arising on the land, as where, for instance, the land becomes covered with filth, offal, and refuse. If a landowner is in breach of this duty he may, on the application of the local authority, be restrained by an injunction from allowing the land to be and to remain in such a state.

C

Nuisance—Statutory nuisance—Foul matter on land—Remedy—Injunction restraining landowner from allowing land to remain in such a state.

By s. 2 (1) of the Public Health (London) Act, 1891, any accumulation or deposit which was a nuisance or injurious or dangerous to health was a nuisance which was liable to be dealt with summarily under the Act. Section 13 authorised the local authority to take proceedings in the High Court for the abatement of a nuisance if, in their opinion, summary proceedings would not afford an adequate remedy. Section 35 empowered the vestry to serve notice on the owner of any obnoxious matter, or the occupier of the premises on which it existed, to remove the same, and if the notice was not complied with, then to remove the matter themselves, and to recover in a summary way the expenses from the former owner of the matter removed, or from the owner or occupier of the premises. Section 138 enacted that all powers, rights, and remedies, given by the Act, should be in addition to and not in derogation of any other powers, rights and remedies conferred by any other Act of Parliament, law, or custom; and all such other powers, rights, and remedies, might be exercised and put in force in the same manner and by the same authority as if the Act had not been passed.

D

E

F

A landowner having permitted his land to be used in such a way as to constitute a continuing nuisance.

Held: the Attorney-General on the relation of the local authority was entitled to an injunction to restrain the landowner "from allowing the land to be and to remain in such a state as to be a nuisance or injurious to health."

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Notes. The Public Health (London) Act, 1891, was repealed by the Public Health (London) Act, 1936. The equivalent provisions to ss. 2 (1), 13, 35, and 138 of the Act of 1891 are s. 82 (1) (c); Sched. 5, para. 21; Sched. 5, paras. 16, 18; and s. 306 (2) (b), of the Public Health (London) Act, 1936, and ss. 92 (1) 100, 93 and 96, and 328 of the Public Health Act, 1936.

H

Explained: *Barker* v. *Herbert*, [1911-13] All E.R. Rep. 509. Considered: *Edwards* v. *Birmingham Navigations*, [1924] 1 K.B. 341. Applied: *Clayton* v. *Sale U.D.C.*, [1925] All E.R. Rep. 279; *Wringe* v. *Cohen*, [1939] 4 All E.R. 241; *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349; *Neath R.D.C.* v. *Williams*, [1950] 2 All E.R. 625. Referred to: *A.-G.* v. *Roe*, [1914-15] All E.R. Rep. 1190; *Nicholson* v. *Southern Rail. Co. and Cheam U.D.C.*, [1935] All E.R. Rep. 168; *Cushing* v. *Walker & Son (Warrington and Burton), Ltd.*, [1941] 2 All E.R. 693; *Hall* v. *Beckenham Corpn.*, [1949] 1 All E.R. 423; *Davey* v. *Harrow Corpn.*, [1957] 2 All E.R. 305.

I

As to nuisances generally, see tit. Nuisance in 28 HALSBURY'S LAWS (3rd Edn.) 126; and for cases see 36 DIGEST (Repl.) 247. As to statutory nuisances under the Public Health Acts, see 31 HALSBURY'S LAWS (3rd Edn.) 363 et seq. and cases there cited. For Public Health Act, 1936, and Public Health (London) Act, 1936,

see HALSBURY'S STATUTES (2nd Edn.) vol. 12, p. 1061, and vol. 19, p. 302, and vol. 15, p. 887.

Cases referred to:

(1) *R.* v. *Watts* (1703), 1 Salk. 356; 91 E.R. 311; sub nom. *R.* v. *Watson*, 2 Ld. Raym. 856; 26 Digest (Repl.) 495, *1791.*

(2) *R.* v. *Bradford Navigation Co.* (1865), 6 B. & S. 631; 34 L.J.Q.B. 191; 29 J.P. 613; 11 Jur.N.S. 766; 13 W.R. 892; 122 E.R. 1328; 38 Digest (Repl.) 34, *176.*

(3) *Co. of Proprietors of Margate Pier and Harbour* v. *Margate Town Council* (1869), 20 L.T. 564; 33 J.P. 437; 36 Digest (Repl.) 273, *258.*

Also referred to in argument:

Clark v. *Chambers* (1878), 3 Q.B.D. 327; 47 L.J.Q.B. 427; 38 L.T. 454; 42 J.P. 438; 26 W.R. 613; 36 Digest (Repl.) 31, *135.*

White v. *Jameson* (1874), L.R. 18 Eq. 303; 38 J.P. 694; 22 W.R. 761; 36 Digest (Repl.) 314, *614.*

Gandy v. *Jubber* (1864), 5 B. & S. 78; 3 New Rep. 569; 33 L.J.Q.B. 151; 9 L.T. 800; 28 J.P. 517; 10 Jur.N.S. 652; 12 W.R. 526; 122 E.R. 762; on appeal (1865), 5 B. & S. 485; 9 B. & S. 15; 13 W.R. 1022, Ex. Ch.; 31 Digest (Repl.) 382, *5098.*

Saxby v. *Manchester and Sheffield Rail. Co.* (1869), L.R. 4 C.P. 198; 38 L.J.C.P. 153; 19 L.T. 640; 17 W.R. 293; 36 Digest (Repl.) 315, *624.*

R. v. *Pedly* (1834), 1 Ad. & El. 822; 3 Nev. & M.K.B. 627; 3 L.J.M.C. 119; 110 E.R. 1422; 36 Digest (Repl.) 318, *641.*

Thames Conservators v. *Port of London Sanitary Authority*, [1894] 1 Q.B. 647; 63 L.J.M.C. 121; 69 L.T. 803; 57 J.P. 335; 10 T.L.R. 160; 38 Sol. Jo. 153, D.C.; 36 Digest (Repl.) 333, *765.*

Action brought by the Attorney-General at the relation of the vestry of the united parishes of St. Margaret and St. John the Evangelist, Westminster, for an injunction to restrain the defendants from allowing a piece of land at the corner of St. Ann's Lane and Great Peter Street, Westminster, within the united parishes, to be and remain in such a state as to be a nuisance or injurious to health.

The writ was issued on Jan. 1, 1896, against the defendant Grant Tod Heatley under the mistaken belief that he was the owner of the land, and against Henry Hayes, the tenant, a showman. The land formerly belonged to Tod Heatley, but had since come into the possession by purchase of the defendant Sir Henry Moore Brownrigg, Bart. The plaintiffs also claimed an injunction to restrain Tod Heatley from allowing the land to be used for the purposes of a fair or a show, and Hayes from so using the land.

On Jan. 11, 1896, Hayes retired from the property, and no judgment was asked as against him. The plaintiffs also gave notice to the defendant Tod Heatley that no judgment would be asked as against him, but that he might appear and ask for his costs. On Jan. 27, 1897, Brownrigg was made a defendant.

In 1882 the buildings upon the land had been pulled down, and the site was then surrounded by a hoarding. No new buildings had yet been erected there, and the plaintiffs alleged that the hoarding round the land had fallen out of repair, and that dead cats and dogs, offal, and all kinds of filth and refuse were thrown upon the land, and that persons getting through the hoarding used the land for other objectionable purposes; also that squatters with caravans had settled on the land, and that it had been and was being used by showmen, who attracted noisy, dirty and riotous crowds by playing hand organs and other loud instruments. The plaintiffs complained that the condition of the land and the uses to which it was being put were such as to constitute a serious nuisance to the inhabitants of the parishes, and to be injurious to the health of the people living near the land. It appeared that the gradual accumulation of garbage and rubbish had caused the

land to be raised some two feet above the adjoining roadway, so that in wet weather foul water poured on to it.

Under s. 13 of the Public Health (London) Act, 1891, the sanitary authority was empowered to take proceedings in the High Court to enforce the abatement or prohibition of a nuisance. By s. 35 notice might be served upon the owner of the premises on which obnoxious matter was, requiring him to remove the same, and if the notice was not complied with, the sanitary authority might remove the matter and recover the expenses of so doing from the owner. The plaintiffs contended that an injunction to restrain the defendant

> "from allowing the land to be and remain in such a state as to be a nuisance or injurious to health"

was the sole possible remedy under the circumstances. On Jan. 11, 1896, the agent for the defendant Brownrigg wrote to the solicitor to the vestry stating that in future no shows would be allowed on the land, but pointing out that it was impossible for the owner of the land, not being also the occupier, to prevent people from throwing refuse over the hoarding, or breaking it up, and suggesting that the vestry should send their dustmen to visit the land periodically, and keep it clean; also that they should use their influence with the police to stop the damage to the hoarding, and the deposit of filthy matter.

The action came on for trial before KEKEWICH, J., on Nov. 24, 1896, when his Lordship said that the defendant Tod Heatley had been made a defendant in the belief that he was the owner of the land, which he was not. He must, therefore, have his costs. With regard to the defendant Brownrigg, his Lordship's view was that there was an imperative duty cast upon the owner of land not to use his property so that it should be injurious to his neighbours, but that, having regard to the powers conferred upon the vestry by ss. 13 and 35 of the Act of 1891, and also considering the very serious outlay and difficulty that would be occasioned to the defendant if an injunction were granted in the terms asked for, his Lordship, in his discretion, declined to grant it. From that decision the plaintiffs now appealed.

Warrington, *Q.C.*, and *Morton Smith* for the plaintiffs.
Renshaw, *Q.C.*, and *Ingpen* for the defendant, Brownrigg.

LINDLEY, L.J.—Looking at the matter from the point of view of the public, that is to say, with reference to the duty of the defendant, and the right of the Attorney-General, as representing the public, the case appears to me to be one of the simplest possible description. The defendant is the occupier or possessor of a vacant piece of land. I only call attention to the fact that he is occupier or possessor because we are not embarrassed here by any question such as that which arises sometimes when there is a dispute whether it is the duty of the reversioner, or tenant, or tenant for life, or somebody of that kind, to keep premises in proper order. We are freed from that consideration. We have only got the owner of a vacant piece of land to deal with.

Is it, or is it not, a common law duty of the owner of a vacant piece of land to prevent that land from being a public nuisance? It appears to me it is a common law duty. I turn to the books to which we are accustomed to go for information about such matters as this, viz., the criminal law books, and I will take HAWKINS' PLEAS OF THE CROWN, which is one of the best. He says in his chapter on Nuisances (8th Edn.) vol. 1 at p. 692:

> "It seems that a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the king's subjects, or by neglecting to do a thing which the common good requires."

If, therefore, the owner of a piece of land does permit it to be in such a state, so smothered or covered with filth, that it is a public nuisance, he commits an

A indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say: "I did not put the filth on, but somebody else did." He must provide against this if he can. His business is to prevent his land from being a public nuisance.

One very early authority, or illustration of that doctrine, is to be found in *R.* v. *Watts* (1). In that case (1 Salk. at pp. 356, 357) there was an

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> "indictment for not repairing a house standing upon the highway, ruinous, and like to fall down [near the highway] which the defendant occupied, and ought to repair ratione tenuræ suæ. The defendant pleaded Not Guilty, and the jury found a special verdict, viz., that the defendant occupied, but was only tenant at will, and whether he was liable was the question."

C The court said (ibid. at p. 357):

> "The ratione tenuræ is only an idle allegation, for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance; and as the danger is
D the matter that concerns the public, the public are to look to the occupier and not to the estate, which is not material in such a case as this to the public."

That principle has always been followed, so far as I know, in criminal cases, and also on information by the Attorney-General representing the public. I cannot,
E therefore, for a moment entertain the slightest doubt but that it is the common law duty of the defendant to prevent his piece of land from continuing as a public nuisance. That it is a public nuisance is beyond all controversy. There is no real question at all about that. Under the circumstances why is not the Attorney-General entitled to an injunction to restrain the defendant from committing a breach of that duty to the public? It appears to me that, unless there are instances
F to the contrary, which I will consider presently, it is almost a matter of course that the Attorney-General should on behalf of the public have an injunction. The mere fact that it puts the wrong-doer to expense, or that it is difficult for him to abate the nuisance, affords no defence in point of law, or any reason at all why the rights of the public should not be enforced.

So much for the common law aspect of the case. But the common law aspect
G of the case is that which we are to regard by reason of s. 138 of the Act of Parliament which has been so much referred to, I mean the Public Health (London) Act, 1891, to which I will refer presently at a little more length, gives the sanitary authority, who are here the vestry, power to remove nuisances, and to clean streets, and to do all sorts of things, for the benefit of the public, and I have no doubt, under the circumstances which have been referred to, that they could
H proceed against the defendant criminally. But that is an extremely inconvenient mode of proceeding. They have found that so in practice. What does s. 138 say? It enacts that:

> "All powers, rights, and remedies, given by this Act shall be in addition to and not in derogation of any other powers, rights, and remedies conferred by any Act of Parliament, law, or custom, and all such other powers, rights, and
I remedies may be exercised and put in force in the same manner and by the same authority as if this Act had not passed."

Attending only to the rights of the public, the Attorney-General, as representing the public, has, therefore, saved to him all his rights and all his remedies. Having regard to that section in the Act, no other section in it may oust the jurisdiction of the court to grant an injunction if a proper case in other respects is made out.

What are the alleged reasons for our not interfering? They are that the vestry is empowered by this Act of Parliament to clean such places as this vacant piece

of land of the defendant at the expense of the ratepayers, and even, under s. 35, at the expense of the defendant himself. I think that that is so. Let us consider upon what principle of justice can the expense of keeping the land clean be thrown upon the ratepayers. It is, as I have already said, the common law duty of the owner to prevent it from being a nuisance. Why should the ratepayers pay for it being done? There is a clause in s. 35 under which I think the vestry might have taken proceedings. That is an awkward section. It is inconvenient in practice. I do not say that it cannot be done, but it is a piece of machinery which would have to be put in force constantly, and instead of having one declaration or one injunction there would have to be a number of different orders, assuming, of course, that the defendant did not obey and perform the duty which lies upon him. It would be an extremely inconvenient procedure to have recourse to.

I think that the existence of that power ought to influence us in considering whether we should grant an injunction. Let us look at the matter from a practical point of view. The defendant takes this position which one would expect from any gentleman. He has fought for his rights. He finds the law is against him. He says: "Do not grant an injunction against me; I will make some arrangement with the vestry by which they shall keep this place clean at my expense." That was perfectly right and proper. Nobody wants to put him to greater inconvenience than necessary. Therefore, I do not think that it is necessary now, for the sake of the public or anybody else, to grant an injunction. But he must accept the consequences of being in the wrong, and that which we propose to do is to discharge the order, and make a declaration that the Attorney-General is entitled to an injunction. The defendant must pay the costs which have been incurred—not the whole costs, but the costs of the action, so far as it was dismissed against him without costs, and also the costs of this appeal.

A. L. SMITH, L.J.—This is an application by way of appeal from my brother KEKEWICH. The proceeding in the action is a proceeding by the Attorney-General at the relation of the inhabitants of the united parishes of St. Margaret and St. John the Evangelist, Westminster, as represented by the vestry. The application is made to restrain a nuisance in one of those parishes, or both, on behalf of those parishes. It is proved undoubtedly that a public continuing nuisance to the danger of the inhabitants of the district exists upon the land of Sir Henry Brownrigg. The fact being absolutely proved, I need not deal with that part of the case any further. The point, however, is taken that Sir Henry Brownrigg is under no duty to abate that nuisance, and that point has been argued.

It seems to me, in addition to what my learned brother LINDLEY has said, that it is perfectly clear from one or two cases on this point, that where an owner and occupier, which Sir Henry Brownrigg is, is possessed of land, and upon it there is a continuing public nuisance which is dangerous to the health of the inhabitants, there is a duty cast upon the owner of that land to abate that nuisance. The judgment of LORD BLACKBURN in *R.* v. *Bradford Navigation Co.* (2) is very apposite to the point I am now upon. That was the case of an indictment against the company of proprietors of the Bradford Navigation for a public nuisance. I find that it was

> "an indictment for a public nuisance by collecting, impounding, and keeping exposed on July 1, 1864, and thence continually until Aug. 10, 1864, in the Bradford Canal, at Bradford, in the West Riding of Yorkshire, large quantities of foul liquid, filth, sewage, and polluted water."

The case was set down for trial and judgment was given for the Crown, subject to a Special Case. It was tried before MARTIN, B. The defence set up to that indictment was that a beck, which they had been allowed to take into their canal had been polluted by someone else and that it was in that way that the canal had

got into the state of public nuisance for which the indictment was brought. In this state of things, BLACKBURN, J., said (6 B. & S. at p. 651):

> "There is no precise authority in point; and we must have recourse to the general principle of law. Persons who maintain their property so as to be a public nuisance are indictable."

What did Sir Henry Brownrigg do in the case now before us? Is he maintaining his property so as to be a public nuisance? Of course, he is. I have no doubt that as to this part of the case it is perfectly true that he is indictable. BLACKBURN, J., continued thus (ibid.):

> "And the question in the present case which concerns the occupiers, the lessees of the canal, is whether, they having maintained and kept part of it in such a state as to be a public nuisance, there is anything which prevents them from being indictable."

The learned judge points out that, if the statute had compelled the company to take that beck, that might be an answer to the indictment, because they would be doing what the statute compelled them to do. But he further points out that, inasmuch as the statute only authorised them to take that beck into their canal, that was no answer to the position that they were in. They had a public indictable nuisance upon their premises, and he was of opinion, like the rest of the court, that the indictment was good and held that the defendants must be convicted.

When I come to read the other case to which we have been referred, *Co. of Proprietors of Margate Pier and Harbour* v. *Margate Town Council* (3), before LUSH and HAYES, JJ., I find that there there was an indictment against the local body for having a nuisance of seaweed upon their foreshore. It was a continuing public nuisance. LUSH, J., says (20 L.T. at p. 568):

> "I have no doubt, whatever, that it is the duty of the appellants to prevent the accumulation of seaweed so that it shall not become a nuisance, and that whether produced by natural or artificial causes they are bound to remove all matter in the harbour which is a nuisance or injurious to health."

This authority, and the authority to which LINDLEY, L.J., has referred, of *R. v. Watts* (1), appear to me to dispose of the first point taken, namely, that there is no duty cast upon Sir Henry Brownrigg to prevent this piece of land from continuing to be a public nuisance, dangerous to health.

What is the next point that is taken? It is said that the vestry ought to have done what is required under the Public Health (London) Act, 1891. But if that is the defence, does not that correspond exactly to the defence raised in *R.* v. *Bradford Navigation Co.* (2). It was raised, and this is how BLACKBURN, J., dealt with it. He said (6 B. & S. at p. 652):

> "Inconvenience to the public and to the company may be occasioned if from want of pure water the supply of water in the canal runs short, but that can afford no justification for the defendants creating a nuisance. It throws on them the necessity of taking legal steps to compel the local board of health to do their duty in cleansing the beck, or, if that be found an inefficient remedy, to obtain a private Act of Parliament for the purpose."

Supposing that the argument on behalf of Sir Henry Brownrigg was right, namely, that it was the duty of the vestry to cleanse this piece of land, what answer is that to the information of the Attorney-General, who says that there is a public nuisance on the defendant's land which he is bound to abate? None whatever, and, as BLACKBURN, J., points out, if it be in fact the duty of somebody else, it is the defendant's duty to make them perform their duty. It is no answer to the information of the Attorney-General on behalf of the public to say that somebody else ought to do the cleansing.

I doubt very much myself whether or not counsel for the defendant, with all his ingenuity, gets this cleansing within the Public Health (London) Act, 1891. Although I am not necessarily deciding it absolutely, I doubt very much whether the plaintiffs, the vestry, can be forced to do what it is contended they could be forced to do. But, be that as it may, that, as I have already pointed out, is no answer to the information of the Attorney-General, because, if you read s. 13 and s. 138 of the Act, one or the other, or both, it seems to me that the jurisdiction of the court on information by the Attorney-General is absolutely left untouched. Section 13 says,

> "The sanitary authority may, if in their opinion summary proceedings would afford an inadequate remedy [which, in their opinion, in this case it does] cause any proceedings to be taken against any person in the High Court to enforce the abatement or prohibition of any nuisance liable to be dealt with summarily under this Act."

That would seem to show their position if they go to the Attorney-General and get him to take proceedings as he has done in the present case. If not, s. 138, which I am told was not called to the attention of KEKEWICH, J., seems to me to be conclusive on the subject. Therefore, so far as this relation by the Attorney-General is concerned, we may deal with this case as if this Act had not been passed, as the legislature says. Therefore, there being this continuing public nuisance upon the land of Sir Henry Brownrigg, he is bound on the information of the Attorney-General to abate it, and an injunction ought to go. I am of opinion, therefore, that the appeal should be allowed.

RIGBY, L.J.—In this case down to the present time Sir Henry Brownrigg has denied his liability to abate the nuisance occurring on his property. It is argued, in addition to that denial of liability, that, because the vestry also deny liability, he is to leave it in some way or other, or, at any rate, an injunction should not be granted against him.

On those points I think that he is entirely in the wrong. There is a common law liability cast on the owner or occupier of land to abate a nuisance arising upon his land; that is to say, he is bound to abate it whenever he becomes aware that there is a nuisance. Immediately he becomes aware that there is a nuisance, at once the duty arises. In some cases a man subjects himself to indictment—as, for instance, being not the owner, but a tenant at will only, as in *R.* v. *Watts* (1)—if he allows a nuisance in the shape of a dangerous thing to remain upon the land of which he is occupier. Counsel for the defendant tried to distinguish that case because of the ownership. I do not think that the tenant at will is owner in any sense, or that it makes a substantial difference. He is there as tenant at will, and there is the dangerous structure. If it falls down, it may injure someone passing by. I cannot, in point of principle, distinguish a case of dangerous structure and a nuisance in the nature of injurious effluvium that comes from the land. It seems to me, when you take the common law point of view, that there is only the alternative of allowing the nuisance to go on indefinitely or making liable the only person who can abate the nuisance, whether the owner or occupier. I have no doubt about the existence of that common law liability.

In reference to the next point, that the position is altered by the statute, reading s. 138—which by the way does not appear to have been called to KEKEWICH, J.'s, attention—it appears to me that that argument, without further inquiry, must fail. The statute says that you are to have the same remedies as though the Act had never been passed—that is to say, you are to have all your common law remedies as though this statute, at any rate, was not in existence. That means that you are to disregard for the purpose of remedy everything that there is in this statute. I do not mean to say, if it were clearly shown that the vestry had been acting in a vexatious manner, that that might not be taken into consideration. I

A asked for any clear admission that had ever been made by Sir Henry Brownrigg that he was liable, and there is none to be found.

Under these circumstances we do not need to consider the difficulty in which he may be placed if an injunction is granted. He has not tried to do anything practicable to get rid of this nuisance. He has based his defence upon the ground that he is not liable, and that the vestry is. Seeing that we may expect a B man of his position to realise what is reasonable—there are decided cases against him—being assured that the vestry have the matter under their consideration, and seeing that both sides are not unlikely to come to a reasonable settlement of the difficulty now that the rights are established, I think that declaring the Attorney-General entitled to an injunction, and giving liberty to apply, is the best way of settling the contention. No doubt it will lead to something which will C render an injunction unnecessary.

Appeal allowed.

Solicitors: *J. C. F. Warrington Rogers; Last & Sons.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

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Re HOLLIS' HOSPITAL TRUSTEES AND HAGUE'S CONTRACT

[CHANCERY DIVISION (Byrne, J.), March 23, 25, April 12, July 5, 1899]

[Reported [1899] 2 Ch. 540; 68 L.J.Ch. 673; 81 L.T. 90; F 47 W.R. 691; 43 Sol. Jo. 644]

Perpetuities—Common law condition—Charitable trust—Reverter clause—Operation if property applied for other than trust purposes.

Sale of Land—Title—Doubtful title—Title not to be forced on purchaser.

By indentures of lease and release of May 18, 1726, certain hereditaments were G assured to one J. W. to have and to hold unto the said J. W. his heirs and assigns to the use of one T. H., sen., and certain other persons therein named, being the trustees of a charity known as H.'s Hospital upon the trusts therein mentioned for the maintenance and management of the hospital, subject to the following proviso: "Provided always, and it is hereby agreed by and between the said parties to these presents, that if at any time hereafter the premises H hereby conveyed, or any part thereof, or the rents, issues, and profits of the same, or of any part thereof, shall be employed or converted to or for any other use or uses, intention or purposes, than as are hereinbefore mentioned and specified, then and from thenceforth all and every the buildings, lands, and premises hereinbefore conveyed to the uses and upon the trusts hereinbefore mentioned shall revert to the right heirs of the said T. H., sen., party hereto, I anything herein contained to the contrary thereof in any wise notwithstanding." One E. H. had entered into a contract with an agent acting for the majority of the trustees of the charity for the purchase of a portion of their freehold property. E. H. was willing to accept the title and a draft conveyance had been approved, when one of the trustees wrote to E. H.'s solicitors, stating in effect that, as heir-at-law of T. H., sen., he had not concurred in the sale of the property, and calling attention to the above reverter clause in the title deeds. E. H. took out this summons against the trustees asking for a declaration that a good title had not been shown to the hereditaments contracted to be sold.

Held: the proviso constituted a common law condition subsequent; the rule against perpetuities applied to such a condition; and the title was not one which should be forced on a purchaser.

Notes. Considered: *Re Ashforth, Sibley* v. *Ashforth*, [1904-7] All E.R. Rep. 275. Followed: *Re Da Costa, Clarke* v. *Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337. Referred to: *Knightsbridge Estates Trust, Ltd.* v. *Byrne*, [1938] 2 All E.R. 444; *Hopper* v. *Liverpool Corpn.* (1944), 88 Sol. Jo. 213.

As to application of rule against perpetuities to common law conditions, see 29 HALSBURY'S LAWS (3rd Edn.) 292, 293; and as to a doubtful title on a sale of land see ibid., vol. 34, p. 315. For cases see 37 DIGEST 72, 73, and 40 DIGEST (Repl.) 159-164.

Cases referred to:

(1) *Ruddall and Miller's Case* (1586), 1 Leon. 298; 74 E.R. 271; sub nom. *Rudhall* v. *Milward*, Moore, K.B. 212; sub nom. *Rudhall's Case*, Sav. 76; 44 Digest 435, *2622*.

(2) *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535; 63 L.J.Ch. 908; 71 L.T. 489; 10 T.L.R. 636; 11 R. 1, H.L.; 43 Digest 22, *139*.

(3) *Re Macleay* (1875), L.R. 20 Eq. 186; 44 L.J.Ch. 441; 32 L.T. 682; 23 W.R. 718; 37 Digest 73, *138*.

(4) *Dunn* v. *Flood* (1883), 25 Ch.D. 629; 53 L.J.Ch. 537; 49 L.T. 670; 32 W.R. 197; on appeal (1885), 28 Ch.D. 586; 54 L.J.Ch. 370; 52 L.T. 699; 33 W.R. 315, C.A.; 37 Digest 73, *136*.

(5) *Re Thackwray and Young's Contract* (1888), 40 Ch.D. 34; 58 L.J.Ch. 72; 59 L.T. 815; 37 W.R. 74; 5 T.L.R. 18; 40 Digest (Repl.) 162, *1252*.

(6) *Pegler* v. *White* (1864), 33 Beav. 403; 3 New Rep. 557; 33 L.J.Ch. 569; 10 L.T. 84; 10 Jur.N.S. 330; 12 W.R. 455; 55 E.R. 423; 40 Digest (Repl.) 161, *1248*.

Also referred to in argument:

Re Ailesbury Settled Estates (1893), 62 L.J.Ch. 1012; 69 L.T. 493; 42 W.R. 45; 9 T.L.R. 616; 37 Sol. Jo. 715; 3 R. 704; 40 Digest (Repl.) 235, *1975*.

Vendor and Purchaser Summons.

By indentures of lease and release dated Aug. 26 and 27, 1703, Thomas Hollis (father of Thomas Hollis, sen.), of his charitable mind and disposition to the intent to find and provide habitations for sixteen poor persons from time to time and for ever to be elected of the poor of Sheffield or within two miles round as thereby directed and to raise moneys necessary for keeping the fabric in which such habitations were made at all times thereafter in repair, conveyed certain hereditaments in Sheffield then converted into sixteen small apartments or habitations, with other hereditaments to certain persons therein named, their heirs and assigns for ever to their use and behoof upon trust and subject to the powers, declarations, and agreements therein mentioned and expressed. By an indenture of assignment dated Jan. 24, 1704, Thomas Hollis, the father, assigned to Thomas Hollis, sen., his executors, administrators and assigns, certain government terminable annuities amounting to £90 per annum and by deed poll, dated Jan. 26, 1704, Thomas Hollis, sen., declared that the same annuities were so assigned to him upon trust that he should pay the same towards maintaining the almshouses and for several other purposes in the said deed mentioned. By a writing or codicil under his hand and seal, dated Feb. 21, 1715, annexed to the deed of assignment of Jan. 24, 1704, Thomas Hollis, the father, revoked several payments in that deed contained, and left his son, Thomas Hollis, sen., liberty to continue or discontinue them as he, his executors, or administrators, should think fit, without being accountable to any.

Thomas Hollis, the father, died, and the before-mentioned annuities were turned into South Sea Annuities and South Sea Stock, which annuities and stock were sold by Thomas Hollis, sen., for £1,500. Thomas Hollis, sen., for the augmentation of the charities and for the better settlement thereof, added to the £1,500 the sum of

£610, and with those two sums purchased certain messuages, lands, and tenements from Sir John Statham and Thomas Turner. At the date of the next mentioned indentures the hereditaments originally conveyed by the indentures of lease and release of August, 1703, had become legally vested in Thomas Hollis, sen., and ten other persons (including Thomas Hollis, the younger), by way of survivorship or otherwise. By indenture of lease for a year, dated May 17, 1726, and made between Thomas Hollis, sen., of the one part, and John Williams, of the other part, Thomas Hollis, sen., in consideration of 5s., bargained and sold the hereditaments so purchased by him from Sir John Statham and Thomas Turner (which included the property comprised in the contract, the subject of the present application) to John Williams, to have and to hold unto John Williams, his executors, administrators, and assigns, from the day next before the day of the date of that indenture for a year at a peppercorn rent if demanded, to the intent and purpose that by virtue of that deed and of the statute for transferring of uses into possession John Williams might be in the actual possession of all and singular the premises aforesaid, and be thereby enabled to accept a grant and release of the reversion and inheritance thereof to him, his heirs and assigns, for ever, to and for such uses, trusts, intents, and purposes as in and by such release should be limited, expressed, and declared concerning the same. There was a similar indenture of lease to John Williams mutatis mutandis by the then trustees of the almshouses and premises comprised in the release of 1703.

By an indenture dated May 18, 1726, and made between Thomas Hollis, sen., of the first part, the ten named persons (including Thomas Hollis the younger) therein mentioned (being the ten persons in whom, jointly with Thomas Hollis, sen., the property originally devoted to charity by the father of Thomas Hollis, sen., was then legally vested) of the second part, John Williams, of the third part, and Isaac Hollis, William Stead, Daniel Bridges and John Crooks, of the fourth part, after reciting the deeds and matters before referred to, it was witnessed that for the support and maintenance of the charity, and for the better accomplishment and performance of the trusts and powers in them reposed by former conveyances, Thomas Hollis, sen., and the ten persons parties of the second part, nominated, elected, and chose the four persons parties of the fourth part, to be trustees, to be added to the surviving trustees, in the room of such others of the trustees as were dead, and it was further witnessed that in consideration of 5s., a price to the old trustees paid by John Williams, the old trustees granted, aliened, released, and confirmed unto John Williams (in his actual possession of the tenements and hereditaments next thereinafter mentioned, then being by force of bargain and sale for one year bearing date the day before the date of that indenture in consideration of money and by force of the statute for transferring of uses into possession) and to his heirs the hereditaments by the indenture of release of August, 1703, conveyed by Thomas Hollis (father of Thomas Hollis, sen.), to hold unto Thomas Williams, his heirs and executors for ever, to the use and behoof of Thomas Hollis, sen., and the fourteen other persons, the old and new trustees, their heirs and assigns for ever, upon the trusts and to and for the several and respective uses, intents, and purposes thereinafter limited, expressed and declared of and concerning the same. And it was thereby further witnessed that Thomas Hollis, sen., for the better support and maintenance of the charity and for the augmentation thereof, and in consideration of 5s. paid by John Williams, granted, aliened, released, and confirmed (in his actual possession of the hereditaments thereinafter mentioned, then being by force and virtue of the indenture of bargain and sale for one year, bearing date the day next before the date of that indenture in consideration of money and by force of the statute for transferring of uses into possession) and to his heirs, all the hereditaments purchased by Thomas Hollis, sen., from Sir John Statham and Thomas Turner, to have and to hold unto John Williams, his heirs and assigns for ever, to the use and behoof of Thomas Hollis, sen., and the other old and new trustees, their heirs and assigns for ever, nevertheless upon the several and respective trusts, and to and

for the several respective intents and purposes thereinafter limited, expressed, and declared of and concerning the same. A

Then followed a declaration of the trusts of all the hereditaments conveyed to the effect that the old and new trustees, and the survivors and survivor of them, their heirs and assigns, or the heirs and assigns of such survivor, should place and put sixteen poor persons that should be of the age of fifty years at least and single, of the town of Sheffield or within two miles round, in the sixteen apartments or B dwellings (being the hereditaments originally conveyed by Thomas Hollis, the father of Thomas Hollis, sen.), with divers provisions for the government of the charity, and filling up vacancies, and upon this further trust that they, the old and new trustees, their heirs and assigns, or the major part of them, their heirs or assigns, should pay, apply, employ, and lay out the rents, issues, and profits of all and singular the premises thereinbefore granted and released as therein mentioned for C the benefit of the objects of the charity, including paying a schoolmaster and schoolmistress for the teaching of fifty poor artificers' and tradesmen's children, and that they the trustees should lay out and expend such other parts of the rents, issues, and profits that should or might arise or grow out of the thereby granted and released premises in the necessary support and reparations of the tenements and D apartments and what could be spared thereof (if any) to be kept in store against any extraordinary occasion for repairing, or to be laid out in such other manner as the trustees or the major part of them, their heirs or assigns, should think fit. Then followed provisions for the appointment of new trustees, for keeping accounts, for laying out the balance, with power to deduct out of the rents, issues, and profits £5 to defray charges of keeping and settling accounts, and to eat and drink in commemoration of the benefactors of the charity. E

Then was the provision upon which the question in the present case arose:

> "Provided always, and it is hereby declared and agreed by and between the said parties to these presents, that if at any time hereafter the premises hereby conveyed, or any part thereof, or the rents, issues, and profits of the same, or of any part thereof, shall be employed or converted to or for any other use or uses, F intention or purposes, than as are hereinbefore mentioned and specified, then and from thenceforth all and every the buildings, lands, and premises hereinbefore conveyed to the uses and upon the trusts hereinbefore mentioned shall revert to the right heirs of the said Thomas Hollis, sen., party hereto, anything herein contained to the contrary thereof in any wise notwithstanding."

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There followed certain powers for Thomas Hollis, sen., during his life, and after his decease for John Hollis, Thomas Hollis, jun., Isaac Hollis, and Richard Solby, four of the trustees (being probably all related to Thomas Hollis, sen.), and the survivors and survivor of them at any time or times during their lives or the life of the survivors or survivor of them to nominate the persons to receive the benefit of the almshouses, and to appoint schoolmasters and schoolmistresses, and a power H for Thomas Hollis, sen., in his lifetime to revoke, add, alter, or diminish all or any of the charities or sums thereinbefore appointed in such manner as he should see fit, and a power for the trustees to pay their costs, charges, and expenses, and to lease for terms not exceeding twenty-one years, and to lease certain closes purchased of Thomas Turner for 800 years or any less term to build on, and a covenant with John Williams, his heirs and assigns, against incumbrances. I

By an agreement dated Oct. 3, 1898, a contract was entered into by an agent acting on behalf of a majority of the trustees of Hollis' Hospital, to sell to Ernest Hague certain freehold property, situate at Castle Dye, near Sheffield, containing 25a. 1r. 17p., for £5,750. Matters had proceeded so far that the purchaser was satisfied to accept the title, and the draft conveyance had been approved by the trustees' solicitor, when a letter, dated Nov. 16, 1898, was received by the purchaser's solicitors, written by William Henry Anthony, one of the trustees who had not concurred in the sale, to the effect that as the heir-at-law of Thomas and John

A Hollis, he thought it his duty to intimate to them that he was no party to the sale of the property, and to call their attention to the clause in the title deeds as to the property reverting to the heir-at-law, in case of its being devoted to any other purpose than that intended by the settler. This summons was taken out under the Vendor and Purchaser Act, 1874 [repealed by Law of Property Act, 1925], by Ernest Hague, for the purpose of determining whether or not a good title had been B shown. W. H. Anthony declined to appear with his co-trustees upon the summons.

O. L. Clare for W. H. Anthony.
Farwell, Q.C., and *Bristowe* for Hague.
Levett, Q.C., and *Stewart Smith* for the trustees other than W. H. Anthony.

C *Cur. adv. vult.*

July 5, 1899. **BYRNE, J.,** after stating the facts, continued.—It is contended on behalf of the purchaser that a good title cannot be made by reason of the clause in the deed of May 18, 1726, providing for the reverter to the right heirs of Thomas Hollis, sen., inasmuch as the sale will be a breach of the condition, and, alternatively, that the title shown is not one which ought to be forced upon a purchaser. D It is contended, on behalf of the vendors, that is, the trustees other than W. H. Anthony, that the condition is void as tending to a perpetuity, and that, whether the clause in question be construed as operating by way of shifting use, as they say it should be, or by way of condition subsequent.

The effect of the method of conveyance adopted was as follows. The lease for a year operated, and the bargainee, John Williams, was in possession by the Statute E of Uses. The release operated by enlarging the estate or possession of the bargainee to a fee. This was at the common law and the use being declared in favour of persons other than the bargainee the statute again intervened and annexed or transferred the possession of the release to the use of the trustees to whom the use was declared: see BUTLER'S NOTES TO COKE UPON LITTLETON (18th Edn.) 272a, note vi. 2. I think the clause about which the contest arises is, in terms and form, a true F express common law condition subsequent, being aptly worded, and being in favour of the heirs of Thomas Hollis, sen. It is true that words of an express condition may in certain cases be intended as a limitation, and the rule is that it shall not ordinarily be so construed, and there does not appear to be any reason in the present case why it should be construed as a limitation rather than a condition: see G SHEPPARD'S TOUCHSTONE (7th Edn.), by PRESTON, p. 124, note 16. It was conceded in argument that, if the clause in question ought to be construed as a limitation or as creating a shifting or springing use, it would be void as infringing the rule against perpetuities, and it was argued that the clause ought to be construed as one intended to shift the use which was vested by virtue of the release in the trustees upon the happening of the contemplated event in the heirs of the original bargainor, and H that it was not possible for it to operate otherwise, having regard to the fact that the estate to be defeated was one existing only by virtue of the statute. I do not think that this argument can prevail. It is laid down in SHEPPARD'S TOUCHSTONE, p. 120, that a condition may be annexed to a limitation of uses and thereby the same (viz., the uses or estates arising from the uses) may be made void, to which statement a note is appended by MR. PRESTON:

I "and shall be executed by statute 27 Hen. 8, so that the donor and his heirs may take advantage of the condition, Sav. 77. See further in Vin. Abr. Condition (N.)."

In *Rudhall's Case* (1), William Rudhall, Serjeant-at-law, being cestui que use in fee, devised certain lands before the Statute of Uses by his will in writing to Charles his younger son and the heirs male of his body with remainder to John his eldest son in fee, with the condition that neither the said Charles nor any of his heirs of his body should aliene or discontinue any of the said lands, but only to the jointure

of his wife for the time being and for the use of the said jointures of the said wives of the said heirs for term of lives of the said wives. And after the said William Rudhall died, and Charles his son entered and after the year 4 Edw. 6 by his indenture leased the land to the defendants for term of their lives rendering the ancient rent to him, his heirs and assigns. Then, 1 Eliz., the said Charles levied a fine to certain persons and their heirs with proclamations, which was to the use of the said Charles and Alice his wife, and the heirs male of the body of Alice by him begotten, and for default of such issue, to the use of the heirs of the said Charles begotten, and for default of such issue, to the use of the right heirs of the said William Rudhall, the father. And it was averred that the use of this fine was for the jointure of the said Alice for term of her life. And the plaintiff, as heir of Serjeant Rudhall, entered for the condition broken. And in this case three doubts arising, one, if it was condition or limitation of estate in use; another, if the condition was broken; and the third, if the heir of the cestui que use should take advantage of condition broken by the Statute of Uses. And it appears that this is condition, because condition destroys the estate and returns the land to the donor and his heirs; and limitation of estate is when the first estate is destroyed, and new estate limited by way of remainder or otherwise. And here is condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed, and then arises for consideration if the condition is broken; and it appears that lease for lives of the defendants, reserving the ancient rent being made according to the statute, is not a discontinuance. For the statute has given power to make such estates that they are legal, and legal estates cannot make injurious discontinuances. Therefore, the condition in this respect is not broken, but the limitation of other uses by which other heirs are inheritable than were at first, is to break the condition. For the limitation of use on fine in special tail is contrary to the will of Serjeant Rudhall, and the limitation of the fee to the heirs of Serjeant Rudhall is other limitation to heirs than as he himself limits, for he limits the fee to John Rudhall, his eldest son and his heirs, and it might be that John Rudhall and his heirs are heirs of the half blood to the direct heirs of Serjeant Rudhall, whence it is other inheritance than as was in the first limitation which is breach of the condition. And as to the taking advantage of condition annexed to the use, it appears that the Statute of Uses has given this advantage when the uses and possessions are united, that the heir of the father enter, by which it appears by the opinion of all the justices that the entry was allowable, and the plaintiff shall recover. And it was adjudged that his entry was allowable, for the condition was broken by limitation of use in special tail and of the other remainder in fee in the heirs of the father; but lease for life according to the statute is not discontinuance, and therefore no breach of condition. Also this entry for condition is guaranteed (?) by the Statute of Uses, and also it was agreed that this was condition and not limitation. I have translated the report out of the Law French, and I think that the case (which is also reported, Moore 212 and Leonard 298) is an authority for the statement in Sheppard's Touchstone.

The next question is whether or not the condition, being an express common law condition subsequent, is void for perpetuity. I have not been referred to any case deciding the question, nor have I since the argument, after a considerable search, been able to find any authority in the reports enabling me to say that the point has ever been judicially decided. For the exposition of our very complicated real property law it is proper in the absence of judicial authority to resort to text-books which have been recognised by the court as representing the views and practice of conveyancers of repute. Except in the comparatively recent, although most valuable book, of Mr. Challis, to which I shall have to refer more fully later on, I cannot find any definite statement of opinion adverse to the views expressed by Mr. Sanders and by Mr. Lewis in their well-known treatises, and I will first refer to Sanders on Uses and Trusts (5th Edn.) vol. 1, at pp. 206, 207, and also at p. 213. [His Lordship read the passages and continued:] I find in Lewis on Perpetuity the opinion of the learned author expressed in clear and unambiguous language.

A [HIS LORDSHIP referred to pp. 615, 616, of the edition of 1843, and continued:] Among quite modern text writers I find a similar expression of opinion: see the work of the learned American authority MR. GRAY, who has written on the LAW OF PERPETUITY, at p. 215, where he states his view in spite of the fact that there are American authorities tending the other way, the point not having been taken or argued in such authorities, and see also MARSDEN ON PERPETUITIES, at p. 4.

B I have purposely avoided referring to certain dicta in recent cases until I come to examine MR. CHALLIS' argument, which was in fact the basis of the argument put forward on the part of the purchaser in the present case. That argument and the learned author's expression of opinion are to be found at pp. 174, 175, 176, 177, of CHALLIS ON REAL PROPERTY (2nd Edn.). [HIS LORDSHIP read the passage and continued:] Pausing at the introductory paragraphs, I do not propose to embark C upon a consideration of the origin and development of the rule or rules against perpetuities about which there has been and will continue to be grave differences of opinion among real property lawyers. I find a clear and well-recognised rule certainly applicable to all ordinary methods of disposition in vogue since the Statute of Uses, and what I have to do is to see whether or not that rule applies to prevent the effectuating by means of a common law condition what is forbidden by the law D in the case of all other methods of disposition of property. MR. CHALLIS is right, of course, when he says that when any part of the common law requires amendment the legislature alone is competent to apply the remedy. But the courts have first to find what is the common law, that is, the principle embodied in what is called the common law, and to apply it to new and ever-varying states of facts and circumstances. The common law is to be sought in the expositions and declarations of it E in the decisions of the courts and in the writings of lawyers. New statutes and the course of social development give rise to new aspects and conditions, which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing restraints upon alienation. I may give, by way of illustration, what was said by LORD MACNAGHTEN, in *Nordenfelt* v. *Maxim Nordenfelt* F *Guns and Ammunition Co.* (2), [1894] A.C. at pp. 564, 565. [HIS LORDSHIP read the passage, and continued:]

Might it not be said from MR. CHALLIS' point of view that if it was the common law in the reign of Queen Elizabeth that all restraints of trade, general or partial, were void, that they must still be void? The answer appears to be that the principle G was that restraints of trade are contrary to public policy, and that is the principle still. It is the application of it that has varied. An illustration of a void condition, because impossible of fulfilment, is given in SHEPPARD'S TOUCHSTONE, p. 133, viz., if one give or grant land on condition that a man shall go to Rome in eight days. That which was impossible at the time when the illustraton was given has now become possible owing to a change of circumstances, and, though the old principle H stands, the application of it has changed. In reference to the suggestion as to devising a novel restriction to be applied to novel forms of limiting, etc., I may point out that in the present case the object of the grantor could not have been obtained without adopting a novel form of assurance. He wanted to vest the estate in himself jointly with others. It is right to mention that the present case being one of a gift for charitable purposes, the question could not have arisen had the deed I been dated ten years later than it was, having regard to the provisions of the Charitable Uses Act, 1735, which provides that the gift or conveyance must be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor or of any person or persons claiming under him. I think that some of MR. CHALLIS' criticisms of the dicta of SIR GEORGE JESSEL, M.R., in *Re Macleay* (3), are not quite reasonable. The use of the expression "tenant in tail," at p. 190 of the LAW REPORTS is an obvious slip either verbal or clerical for "tenant in fee," as is clear by reference to p. 187, where the learned judge says:

"Looking at the will, I have no doubt that there is a condition annexed to the gift in fee," A

and this is followed in the next sentence by the remark:

"First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness." B

This being so, I find in the passage I have read, coupled with the passage at p. 190, referred to by MR. CHALLIS, a clear expression of opinion by SIR GEORGE JESSEL that, had the condition in question not been limited in point of time, as it was, it would have been void for remoteness. The decision of NORTH, J., in *Dunn* v. *Flood* (4) (25 Ch.D. 629) as to the remoteness of the power of re-entry in that case was obiter in the sense that it was unnecessary for the purposes of the decision to C determine it, although it was a question raised and argued; but I think that MR. CHALLIS, in saying that nothing was said or offered to support the obiter dictum, appears to have overlooked the observation of BAGGALLAY, L.J., where he says (28 Ch.D. at p. 592):

"This right of re-entry was held by NORTH, J., to be void for remoteness. We have not heard the counsel for the defendant, but as at present advised, I concur D with NORTH, J., that this right could not be enforced, being void under the rule against perpetuities."

I must also notice that MR. CHALLIS makes no reference whatever to the opinions of SANDERS and LEWIS which I have quoted. The result appears to be that there are expressions of opinion by SIR GEORGE JESSEL, NORTH, J., and BAGGALLAY, L.J., E and the opinions of two great real property lawyers and text writers in favour of the invalidity of such a condition as the one in question, besides the opinions of two modern text writers, while on the other hand, there is nothing definite except the opinion and reasoning of MR. CHALLIS in his work on Real Property. It is to be noticed that MR. CHALLIS puts forward the surmise that at the present day the courts would not acquiesce in the conclusion he draws without great reluctance. F and in reference to his appeal to arguments to be derived from history, I may refer to his own observations at p. 394.

I am of opinion that the condition in question is obnoxious to the rule against perpetuities. But this still leaves another question for consideration, viz.: Is the title one which ought to be forced upon a purchaser? The rule which should be followed in such cases is that stated by CHITTY, L.J., in *Re Thackwray and Young's* G *Contract* (5) (40 Ch.D. at pp. 38, 39, 40). I have not in the present case any decisions or dicta of judges to lead me to a contrary conclusion to that to which I have come, and the question is one of general law upon which I have dicta of eminent judges and opinions of text writers of authority which I consider justify the view I have expressed. At the same time, the point is one of some obscurity and difficulty, and one which cannot be said to have been the subject of direct H judicial decision. Moreover, regard must be had to the fact that the person claiming to be heir-at-law of Thomas Hollis, sen., has given a notice which must be taken to be notice of his intention to claim the benefit of the breach of condition, if broken, and he has declined to argue, or to be bound by the present decision, so that the purchaser, if he completes, will be in danger of immediate litigation, an element which must have very great weight in considering whether or not the title ought to I be forced on a purchaser: see *Pegler* v. *White* (6), and FRY ON SPECIFIC PERFORMANCE (3rd Edn.), p. 408. Upon a consideration of all the circumstances, I do not think I ought to say that such a title has been shown as ought to be forced upon the purchaser, if he is unwilling to complete.

Solicitors: *Torr & Co.*, for *Anthony & Imlach*, Liverpool; *Johnson, Weatherall & Sturt*, for *Burdekin & Co.*, Sheffield; *R. Sutton Clarke.*

[*Reported by* H. M. CHARTERS MACPHERSON, ESQ., *Barrister-at-Law.*]

Re AN ARBITRATION BETWEEN GONTY AND MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RAIL. CO.

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), August 4, 1896]

[Reported [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 45 W.R. 83; 12 T.L.R. 617]

Compulsory Purchase—Railway—Part of land required by railway—Right of acquirement where severance possible without material detriment to remainder —Determination of existence of material detriment—Matters to be taken into account—Manchester, Sheffield, and Lincolnshire Railway Act, 1893 (56 & 57 *Vict*, *c.* lxxix), *s.* 42—*Railway Clauses Consolidation Act*, 1845 (8 *Vict.*, *c.* 20), *s.* 68.

A railway company's private Act, which incorporated the Lands Clauses Acts and Part 1 of the Railway Clauses Act, 1845, provided that the owners of factories specified in the schedule whereof parts only should be required for the purposes of the Act might be required to sell to the company such parts only, without the company being compellable to purchase the whole or any greater portion of the premises, if such parts could, in the opinion of the authority to whom the question of disputed compensation might be submitted, be "severed from the remainder of such properties without material detriment thereto." The company gave notice to treat for a portion of the premises of one of these factories which included the only access from a public highway to the remainder of the premises. This land was required merely for the purpose of building a railway viaduct across it. Before the umpire to whom the question of compensation was submitted, the company undertook to grant to the owner of the factory a perpetual right of way under one of the arches of the viaduct, then in course of erection, which would give him practically the same access to the remainder of his premises as he had enjoyed before.

Held: in deciding whether severance of the acquired land could take place without material detriment to the remainder of the property the umpire was entitled to take into account all the circumstances, including the nature of the proposed use by the railway of the acquired land, the obligation of the company under s. 68 of the Railways Clauses Consolidation Act, 1845, to provide an accommodation way for the owner of the acquired land and (per LORD ESHER, M.R.), the undertaking by the company to grant a perpetual right of way which (per LORD ESHER, M.R., and A. L. SMITH, L.J.) they had power to grant.

Notes. Considered: *Caledonian Railway* v. *Turcan*, [1898] A.C. 256; *South Eastern Rail. Co.* v. *Associated Portland Cement Manufacturers*, [1908-10] All E.R. Rep. 353; *South Eastern Rail. Co.* v. *Cooper*, [1923] All E.R. Rep. 111. Referred to: *Stretford U.D.C.* v. *Manchester, South Junction and Altrincham Railway* (1903), 1 L.G.R. 683; *Grand Central Railway* v. *Balby-with-Hexthorpe U.D.C.*, *A.-G.* v. *Grand Central Railway*, [1912] 2 Ch. 110; *Birkdale District Electric Supply Co.* v. *Southport Corpn.*, [1926] A.C. 355; *British Transport Commission* v. *Westmorland County Council*, *British Transport Commission* v. *Worcestershire County Council*, [1957] 1 All E.R. 353.

As to the compulsory acquirement of part of premises, see 10 HALSBURY'S LAWS (3rd Edn.) 68-73; and for cases see 11 DIGEST (Repl.) 138-140. For Lands Clauses Consolidation Act, 1845, see 3 HALSBURY'S STATUTES (2nd Edn.) 890, and for the Railways Clauses Consolidation Act, 1845, see ibid., vol. 19, p. 590.

Cases referred to:

(1) *Mulliner* v. *Midland Rail. Co.* (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 27 W.R. 330; 11 Digest (Repl.) 122, *145*.

(2) *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 36 W.R. 795, C.A.; 11 Digest (Repl.) 123, *148*. A

(3) *Foster* v. *London, Chatham and Dover Rail. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 43 W.R. 116; 11 T.L.R. 89; 39 Sol. Jo. 95; 14 R. 27, C.A.; 11 Digest (Repl.) 123, *151*.

(4) *R.* v. *Inhabitants of Leake* (1833), 5 B. & Ad. 469; 2 Nev. & M.K.B. 583; 1 Nev. & M.M.C. 544; 110 E.R. 863; 26 Digest (Repl.) 298, *198*. B

Also referred to in argument:

Wilkinson v. *Hull, etc., Rail. and Dock Co.* (1882), 20 Ch.D. 323; 51 L.J.Ch. 788; 46 L.T. 455; 30 W.R. 617, C.A.; 11 Digest (Repl.) 117, *101*.

Re Byles and Ipswich Dock Comrs. (1855), 11 Exch. 464; 25 L.J.Ex. 53; 26 L.T.O.S. 151; 156 E.R. 913; 11 Digest (Repl.) 202, *702*. C

Appeal from a decision of the Queen's Bench Division (Pollock, B., and Bruce, J.) upon a Special Case stated by the umpire in an arbitration under the Lands Clauses Acts.

In March, 1895, the Manchester, Sheffield, and Lincolnshire Rail. Co., acting under their private Act, the Manchester, Sheffield, and Lincolnshire Railway Act, 1893, served upon the plaintiff a notice to treat for the purchase of a part of a factory owned by him at Leicester. By the Act of 1893, the Lands Clauses Acts and Part 1 of the Railways Clauses Consolidation Act, 1845, were incorporated in the Act, and it was also provided as follows: D

"Section 42. Whereas in the construction of the railways and works hereby authorised or otherwise in exercise of the powers of this Act it may happen that portions only of the houses or other buildings or manufactories shown on the deposited plans may be sufficient for the purposes of the same, and that such portions may be severed from the remainder of the said properties without material detriment thereto: therefore notwithstanding s. 92 of the Lands Clauses Consolidation Act, 1845, the owners of and other persons interested in the houses or other buildings or manufactories described in the schedule to this Act and whereof parts only are required for the purposes of this Act may, if such portions can in the opinion of the jury, arbitrators or other authority to whom the question of disputed compensation shall be submitted be severed from the remainder of such properties without material detriment thereto, be required to sell and convey to the company the portions only of the premises so required without the company being obliged or compellable to purchase the whole or any greater portion thereof, the company paying for the portions required by them, and making compensation for any damage sustained by the owners thereof and other parties interested therein by severance or otherwise. . . ." E F G

The plaintiffs' factory was one of those described in the schedule to the Act.

The amount of compensation to be paid by the railway company was disputed, and the matter was submitted to arbitration. In September, 1895, the arbitrators appointed an umpire, who in February, 1896, made his award in the form of a Special Case for the opinion of the court in which he stated that the only means of access for vehicles to the factory from a public highway was from a public highway called Bath Lane, and that this access was included in the portion of land required by the company. The Special Case then contained the following paragraphs: H I

"(3.) If the company take the portion of the said land comprised in the said notices to treat given under s. 42 aforesaid there will be no access for vehicles to and from the said land from and to Bath Lane aforesaid, except over the land so taken by the company. (4.) The company's railway is carried over the portion of the said land for which notices to treat have been given by a viaduct which is in course of construction . . . and sufficient access for vehicles to and from the remainder of the said land, from and to Bath Lane aforesaid, can be provided

A through an archway of the said viaduct. The sole purpose for which the railway company will use, or are likely to use, the land is to carry the viaduct over which the running lines of the company pass, and no other, and save for letting out for non-railway purposes, the company are not likely to require any further or other use of the land. (5.) The company contended that the provision of such access was an accommodation work, which in the event of their taking the said B portion of land, they would be bound to make and maintain under s. 68 of the Railway Clauses Consolidation Act, 1845, and (whether they would or would not be so bound) they offered and undertook by their counsel to make and at all times thereafter maintain for the accommodation of the owners and occupiers of the said remainder of the said land such an access to and from the same from and to Bath Lane aforesaid, by means of a roadway under one of the arches C of the said viaduct as shown on the plan annexed hereto, and being of the full height and width of such arch, and having a gradient of not more than one in eighteen, and to execute any assurance necessary to secure to the owners a perpetual easement of such right of passage under such viaduct from and to such land. (6.) The landowner contended that in determining under s. 42 of the company's said Act whether the said portions of the said land could be severed D from the remainder thereof without material detriment thereto, I was bound to consider only the effect which the taking of the said portions required by the company and the severing of the same from the remainder would have upon such remainder, and that I was not authorised by the Act to take into consideration any offers, whether of works, easements, or other matters made by the company with the object of neutralising such effect; and the landowner E further contended that the company could not in law fulfil their undertaking to convey the said easement in perpetuity; and lastly, it was contended that, even if such access was provided for the owner, there would still be material detriment to the remainder of the said property. (7.) I heard this question before taking evidence as to value, and after hearing counsel and evidence thereon I decided as follows: (i) If the land taken by the company under their notice to treat pre- F vents all access to the claimant's works through or under the viaduct, the company must purchase the entire property. (ii) If the company have power to give the access offered by their counsel through the archway, which has been constructed, from the street to the claimant's yard, I hold that there is not such material detriment to the property as to entitle the claimant to claim that the G company must purchase the whole. (iii) Believing that there is nothing to prevent the roadway offered by the company from being accepted by the claimant as a means of access, I propose to hear the parties on that basis as to the compensation to be paid by the company for the land they take, and for the damage sustained by the claimant in consequence thereof."

H The umpire then made an alternative award on the basis of the two contentions of the plaintiff and the company, and proposed the following question for the opinion of the court: Was I entitled to take into consideration the matters mentioned in paras. 5, 6 and 7, in forming an opinion whether the said portion of the land could be severed from the remainder thereof without material detriment thereto?

By s. 68 of the Railways Clauses Consolidation Act, 1845, it is provided:

I "The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say,) Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof. . . ."

The Queen's Bench Division (POLLOCK, B., and BRUCE, J.) were of opinion that, in considering whether any material detriment would be caused by the severance, the umpire was not entitled to take into consideration the undertaking given by the company, and that s. 68 was not applicable to the case of a factory. The company appealed.

Eldon Bankes (*C. A. Russell* with him) for the company.

Lawson Walton, *Q.C.*, and *Everard* for the plaintiff.

LORD ESHER, M.R.—I think that s. 42 of the Manchester, Sheffield, and Lincolnshire Railway Act, 1893, ought to be construed in such a way as to meet the grievance which existed as the law stood before the passing of that Act. Under s. 92 of the Lands Clauses Consolidation Act, 1845, if a railway company took compulsorily even the smallest portion of a house or factory, it was left to the option of the landowner to compel the company to purchase the whole of the house or factory, although the severance would cause no material detriment to the remainder. It was a serious grievance, because it practically prevented railway companies from carrying on their undertakings in the best way for the good of the public. How was that grievance met by s. 42? The section seems to me to take away from a landowner, unless certain conditions are fulfilled, the power of compelling a railway company which has taken a portion of his house or factory to take the whole.

Who is to say whether those conditions are fulfilled or not? Not the landowner, but the tribunal to whom the question of disputed compensation shall be submitted. That tribunal, either arbitrators or jury, or as the case may be, is directed by s. 42 to decide whether, assuming that the acquired portion of land is taken, the taking of it will cause material detriment to the remainder. If it should decide that no material detriment will be thereby caused, then the landowner is deprived of the power granted by s. 92 of compelling the railway company to take more land than is included in their notice to treat. Considering that s. 42 of the special Act is intended to meet an acknowledged grievance on the part of railway companies, it seems to me that the court should construe it as largely as it reasonably can in order to meet that grievance. I am, therefore, of opinion that the arbitrators or the jury, as the case may be, are entitled under the section to take into account all the circumstances and the mode and manner in which the piece of land required by the company is to be taken.

The landowner in the present case contended that the taking by the railway company of the piece of land which they required was detrimental to his factory, because it cut off from the factory all access to a public highway. The answer of the railway company was that they did not propose to take the land so as to cut off that access to the factory. They undertook by counsel before the umpire to enter into a binding obligation by deed to grant to the landowner, in the place of his former access to his factory, a perpetual easement and right of way under the railway exactly equivalent to, or which should in the opinion of the umpire be the equivalent of, his original access. But there is more than that. The company are carrying their railway on a viaduct over the piece of land which they propose to take, and one of the arches of the viaduct will go across the road now being used by the landowner as access to his factory. That archway will be so high and so wide and the gradients of the road underneath it will be altered, if at all, so slightly, that anyone would say that the road over which it is proposed to grant a perpetual right of way will be practically identical with that which the landowner is now using.

These being the facts, it seems to me that no unbiased person could honestly say that any real detriment was being caused to the remainder of the factory. It was argued that the umpire could not take into account the way in which the company propose to take this piece of land, but it seems to me that to allow that argument would be to do away altogether with the benefit intended to be given by s. 42. In the next place it was contended that the railway company have no power in law to grant this perpetual right of way. If such a grant were inconsistent with the pur-

A poses for which the piece of land is being taken, that is to say, if it were inconsistent with the purposes of the railway, then the company would have no power to make it, and if they had no power in law to make the grant, I think that the umpire could not properly take into account the undertaking which they have given. But with the exception of *Mulliner* v. *Midland Rail. Co.* (1), the cases that have been cited, and in particular *Grand Junction Canal Co.* v. *Petty* (2), are direct authorities that the B railway company has power in law to grant the proposed right of way, because the grant will not be inconsistent with any purpose for which they are taking the land on which the right of way is to be given. I, therefore, think that, in giving this undertaking before the umpire, the company have entered into an obligation to carry it out which would be enforced if necessary by the court.

There is another point that has been discussed. I think that under s. 68 of the C Railways Clauses Consolidation Act, 1845, the railway company could be compelled to carry out, quite apart from their undertaking, the very same works which they have undertaken to execute. However, I desire to say that I base my decision upon the undertaking given by the company, and my answer to the question put by the umpire would be the same if no such section as s. 68 had existed. The fact of the matter coming within s. 68 only makes the case stronger. I think that the umpire D was entitled to take into account the mode in which the railway was to be carried across the piece of land taken by the company and also the undertaking given by them. Taking that into account, he was entitled to say that the severance of the piece of land in question would not cause any material detriment to the remainder of the plaintiff's factory. Under these circumstances the appeal must be allowed.

E **A. L. SMITH, L.J.**—The question in this case is whether the umpire was entitled to take into account, in considering the question of material detriment, the fact that the works executed or about to be executed by the company would leave an access to the landowner's premises which would be, if not exacty the same, at least similar to that which he formerly had. If it had not been for s. 42 of the special Act, the F railway company could have been compelled by the landowner under s. 92 of the Lands Clauses Consolidation Act, 1845, to take the whole of this factory. But by s. 42 it is provided that he shall no longer have that power of compelling the company to purchase more land than they want, unless he can satisfy the tribunal that has to decide the amount of compensation to be paid by the company that the severance proposed will cause material detriment to the remainder of the property.

G How is that tribunal, which in the present case is an umpire, to decide whether the severance will cause material detriment to the remainder? The first thing is to find out how the severance is to take place. The umpire must consider whether the company are going to make a tunnel under the piece of land they require, or an open cutting, or an embankment, whether they are going to cut the road in two, or whether they are going merely to build a viaduct over it. If he is entitled to look H into such matters as these in order to find out how the severance is to take place, why should he not take into account, in considering the question of material detriment, the fact that the archway which is to be built will be of a certain size, and that a right of passage underneath it will be given to the landowner? It seems to me that that is the only rational way of interpreting the section. It is clear that s. 42 was passed for the benefit of the company. To hold that the mere fact of severance I is evidence of material detriment would, in my opinion, destroy the efficacy of the section. Therefore, I think that the question left by the umpire must be answered in the affirmative. In his award the umpire has come to the conclusion that, if the company are entitled in law to do what they have done and have undertaken to do, then the severance will cause no material detriment to the remainder of the property, and consequently the owner cannot compel the company to purchase the whole of it.

With regard to *Mulliner* v. *Midland Rail. Co.* (1), I do not think that it has any application to the present case. If it is to be cited as a case which decides that a railway company has no power to give a right of way under a railway embankment

from one side to the other, I should disagree with it. But it seems to be obvious that if a railway company make an embankment across a large field, for instance, they have power to agree to make an arch under the railway to give access from one part of the field to the other. I, therefore, do not think that the effect of the decision in *Mulliner* v. *Midland Rail. Co.* (1) is quite that which is suggested. Two of the other cases cited, namely, *Grand Junction Canal Co.* v. *Petty* (2) and *Foster* v. *London, Chatham and Dover Rail. Co.* (3) were founded upon a proposition laid down by PARKE, J., in *R.* v. *Inhabitants of Leake* (4). That was a case of the dedication as a public highway of the surface of land vested in trustees for certain public purposes, and PARKE, J., used these words (5 B. & Ad. at p. 478):

> "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

I do not think that it would necessarily be incompatible with the objects of a railway company that they should give access underneath their railway from land on one side of the line to land on the other. But, as has been pointed out by the Master of the Rolls, the company in this case would be liable under s. 68 of the Railways Clauses Consolidation Act, 1845, to make accommodation works to give access to the remainder of the plaintiff's land. I think that this appeal must be allowed.

RIGBY, L.J.—I quite agree that we ought to answer in the affirmative the question that the umpire has left to the court. The matters mentioned in paras. 5, 6, and 7 of the Special Case may be shortly stated as follows. The railway company contended that in the event of their taking the portion of land for which they gave notice to treat, they would be bound under s. 68 of the Railways Clauses Consolidation Act, 1845, to make and maintain accommodation works for providing access for the owner to the remainder of his land. They further contended that an access by means of a roadway under the arch of the viaduct that is being built would be such an accommodation work as is provided for in s. 68. That is the effect of para. 5. Then para. 6 gives the contention of the landowner, and para. 7 tells us what the umpire did. In considering this case I do not at all rely upon the alternative undertaking that was given by the company. I treat their liability under s. 68, as the substantial and important one, namely, that they were bound by that section to make and maintain a sufficient and convenient access to the portion of the factory which they did not require to purchase. It appears that the company have actually entered into possession of the piece of land comprised in their notice to treat, and have actually constructed a great part of the viaduct which is to be built across it, including the archway under which they proposed to give access to the remainder of the land. Not only does this archway give physical and visible access to the land, but it is clear that the access is just such an access as under s. 68 the company would be bound to give. It is not a question merely of their being willing to do this or that; they have actually done something which they would have been bound by Act of Parliament to do. Looking at the dimensions of the roadway and considering its maximum gradient, I do not feel the slightest doubt that if the question had been brought before justices under s. 69, they would have held that this access is an accommodation work sufficient for the accommodation of the landowner. If that is so, I think that it is such a thing as the company would be bound to give and the landowner be bound to accept as a sufficient access to the remainder of the land. The railway company would under these circumstances be bound to grant that access in perpetuity. I think, therefore, that it was the duty of the umpire to take these facts into account in forming the opinion which he arrived at, namely, that, supposing the access were legally secured in perpetuity to the land-

owner, there would be no material detriment to the remainder of the property by reason of the severance of the piece of land included in the notice to treat.

With reference to the cases that have been cited, I think it is unnecessary to add anything with regard to *Grand Junction Canal Co.* v. *Petty* (2) and *Foster* v. *London, Chatham and Dover Rail. Co.* (3). Those cases speak for themselves. *Mulliner* v. *Midland Rail. Co.* (1) seems to me to have no sort of reference to a case like the present. In that case the land was purchased out and out by the railway company for the purposes of the railway, and a railway station built on it. It was vested in the railway company for the purposes of the railway and for no other purpose. I conceive that the decision of SIR GEORGE JESSEL, M.R., was in accordance with the law, and I do not know that it has ever been seriously disputed. No doubt attempts have been made, as in the present case, to extend that decision further than was intended by SIR GEORGE JESSEL, and such attempts have failed. His decision was that a piece of land taken by the railway company for the purposes of their railway, and required for those purposes cannot be alienated by the company without the authority of an Act of Parliament. That is undoubted law. But then the Master of the Rolls went a little further, and held that not only was the company unable in law to alienate the land, but that it was also unable to create a perpetual right of way over it. That seems to me to be a reasonable deduction from the proposition that the land could not be alienated. That was all that was intended to be decided in *Mulliner* v. *Midland Rail. Co.* (1), and that case has no application to that which is now before us. I quite agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower*, for *Sir Thomas Wright & Son*, Leicester; *Cunliffes & Davenport*, for *John Storey*, Leicester.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

Re DAINTREY. Ex parte MANT AND MANT

[QUEEN'S BENCH DIVISION (Wright and Bigham, JJ.), March 28, August 10, 1899]

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Sir Francis Jeune, P., and Romer, L.J.), November 10, 1899]

[Reported [1900] 1 Q.B. 546; 69 L.J.Q.B. 207; 82 L.T. 239; 7 Mans. 107]

By s. 38 of the Bankruptcy Act, 1883 [re-enacted by s. 31 of the Bankruptcy Act, 1914]: "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively . . ."

Before Dec. 24, 1892, the bankrupt owed £86 to M. On that date he committed an act of bankruptcy. On Dec. 31, 1892, the parties entered into a contract by which the bankrupt sold his business to M. in consideration of the

payment to him by M. of a share of the profits in respect of business transacted for persons for whom the bankrupt had until then been acting, "such sum to be payable for three years only and to be ascertained annually on Jan. 1 in each year." M. began to carry on the business. On Jan. 17 a receiving order was made against the bankrupt. The bankrupt was adjudicated bankrupt in August, 1893. No profits had been made in the business by M. before the date of the receiving order, but after that date and before and after the date of adjudication profits were made which amounted to £300 by the end of the three years specified in the agreement. M. had not proved in the bankruptcy for the bankrupt's debt to him of £86, but when the trustee in the bankruptcy claimed the £300 as part of the bankrupt's estate M. deducted the £86 and paid the balance to the trustee.

Held: (i) the date with reference to which the account under s. 38 was to be taken was the date of the receiving order; (ii) although at that date there was no ascertained existing liability to the bankrupt on the part of M., nor any sum due, certain or uncertain, under the contract of Dec. 31, 1892, but merely a possibility of liability contingent on things being done which M. had not by contract bound himself to do, M. was entitled to set off the debt of £86 against the £300.

Notes. Applied: *Tilley* v. *Bowman, Ltd.*, [1908-10] All E.R. Rep. 952; *Re Taylor, Ex parte Norvell*, [1910] 1 K.B. 562. Considered: *Paddy* v. *Clutton*, [1920] 2 Ch. 554; *Re Ellis' Trustee* v. *Dixon-Johnson*, [1924] 2 Ch. 451; *Re National Benefit Assurance Co., Ltd.*, [1924] All E.R. Rep. 426. Applied: *Re City Life Assurance Co.*, [1925] All E.R. Rep. 453. Considered: *Re City Equitable Fire Insurance Co., Ltd. (2)*, [1930] All E.R. Rep. 315; *Re Fenton Textile Association, Ltd.*, [1930] All E.R. Rep. 15; *Kitchen's Trustee* v. *Madders*, [1949] 2 All E.R. 54. Distinguished: *Re A Debtor (No. 66 of 1955), Ex parte The Debtor* v. *The Trustee of the Property of Waite*, [1956) 3 All E.R. 225. Referred to: *Lord* v. *Great Eastern Rail. Co.*, [1908] 2 K.B. 54.

As to mutual dealings and set-off in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480-485; and for cases see 4 DIGEST (Repl.) 423 et seq. For the Bankruptcy Acts, 1883 and 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 303, 321.

Cases referred to:

(1) *Re Hearn, Ex parte Blagden* (1815), 19 Ves. 465; 2 Rose, 249; 34 E.R. 589, L.C.; 4 Digest (Repl.) 427, *3793*.

(2) *Shipman* v. *Thompson* (1738), 7 Mod. Rep. 246; Willes, 103; Cooke, Pr. Cas. 151; 87 E.R. 1219; 24 Digest (Repl.) 787, *7758*.

(3) *Wood* v. *Smith* (1838), 4 M. & W. 522; 7 Dowl. 214; 1 Horn. & H. 401; 8 L.J.Ex. 57; 150 E.R. 1536; 4 Digest (Repl.) 445, *3917*.

(4) *Groom* v. *Mealey* (1835), 2 Bing. N.C. 138; 1 Hodg. 212; 2 Scott, 171; 4 L.J.C.P. 274; 132 E.R. 54; 4 Digest (Repl.) 450, *3947*.

(5) *Beckwith* v. *Bullen* (1858), 8 E. & B. 683; 27 L.J.Q.B. 162; 30 L.T.O.S. 284; 4 Jur.N.S. 558; 6 W.R. 286; 120 E.R. 254; 29 Digest (Repl.) 98, *442*.

(6) *Hulme* v. *Muggleston* (1837), 3 M. & W. 30; 6 Dowl. 112; Murp. & H. 344; 7 L.J.Ex. 20; 150 E.R. 1043; 4 Digest (Repl.) 440, *3886*.

(7) *Bittleston* v. *Timmis* (1845), 1 C.B. 389; 2 Dow. & L. 817; 14 L.J.C.P. 117; 4 L.T.O.S. 413; 135 E.R. 591; 4 Digest (Repl.) 439, *3881*.

(8) *Peat* v. *Jones & Co.* (1881), 8 Q.B.D. 147; 51 L.J.Q.B. 128; 30 W.R. 433, C.A.; 4 Digest (Repl.) 434, *3854*.

(9) *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1882), 9 Q.B.D. 648; 51 L.J.Q.B. 576; 47 L.T. 369; 31 W.R. 80, C.A.; affirmed (1884), 9 App. Cas. 434; 53 L.J.Q.B. 497; 51 L.T. 637; 32 W.R. 989, H.L.; 10 Digest (Repl.) 990, *6813*.

(10) *Ex parte Groome* (1744), 1 Atk. 115; 9 Mod. Rep. at p. 471; 26 E.R. 75; 4 Digest (Repl.) 290, *2647*.

(11) *Dickson* v. *Evans* (1794), 6 Term Rep. 57; 101 E.R. 433; 4 Digest (Repl.) 447, *3928.*

(12) *Collins* v. *Jones* (1830), 10 B. & C. 777; 109 E.R. 638; 4 Digest (Repl.) 441, *3892.*

(13) *Naoroji* v. *Chartered Bank of India* (1868), L.R. 3 C.P. 444; 37 L.J.C.P. 221; 18 L.T. 358; 6 W.R. 791; 4 Digest (Repl.) 441, *3890.*

(14) *Astley* v. *Gurney* (1869), L.R. 4 C.P. 714; 38 L.J.C.P. 357; 18 W.R. 44, Ex. Ch.; 4 Digest (Repl.) 441, *3895.*

(15) *Re Douglas, Ex parte Ryder* (1871), 6 Ch. App. 413; 40 L.J.Bcy. 63; 24 L.T. 80; 19 W.R. 554, L.JJ.; 4 Digest (Repl.) 448, *3940.*

(16) *Re Deveze, Ex parte Barnett* (1874), 9 Ch. App. 293; 43 L.J.Bcy. 87; 29 L.T. 858; 22 W.R. 283, L.C. & L.JJ.; 4 Digest (Repl.) 433, *3844.*

(17) *Elliott* v. *Turquand* (1881), 7 App. Cas. 79; 51 L.J.P.C. 1; 45 L.T. 771; 30 W.R. 477, P.C.; 4 Digest (Repl.) 443, *3907.*

(18) *Re Milan Tramways Co., Ex parte Theys* (1884), 25 Ch.D. 587; 53 L.J.Ch. 1008; 50 L.T. 545; 32 W.R. 601, C.A.; 10 Digest (Repl.) 989, *6807.*

(19) *Re Gillespie, Ex parte Reid* (1885), 14 Q.B.D. 963; 54 L.J.Q.B. 342; 52 L.T. 692; 33 W.R. 707; 2 Morr. 100; 4 Digest (Repl.) 447, *3927.*

(20) *Palmer* v. *Day & Sons*, [1895] 2 Q.B. 618; 64 L.J.Q.B. 807; 44 W.R. 14; 11 T.L.R. 565; 39 Sol. Jo. 708; 2 Mans. 386; 15 R. 523; 4 Digest (Repl.) 443, *3909.*

(21) *Elgood* v. *Harris*, [1896] 2 Q.B. 491; 66 L.J.Q.B. 53; 75 L.T. 419; 45 W.R. 158; 12 T.L.R. 504; 40 Sol. Jo. 743; 8 Asp.M.L.C. 206; 1 Com. Cas. 400; 3 Mans. 332; 4 Digest (Repl.) 444, *3912.*

(22) *Eberle's Hotels and Restaurant Co., Ltd.* v. *Jonas* (1887), 18 Q.B.D. 459; 56 L.J.Q.B. 278; 35 W.R. 467; 3 T.L.R. 421, C.A.; 4 Digest (Repl.) 442, *3903.*

(23) *Sovereign Life Assurance Co.* v. *Dodd*, [1892] 1 Q.B. 405; 61 L.J.Q.B. 364; 40 W.R. 443; 8 T.L.R. 385; affirmed, [1892] 2 Q.B. 573; 62 L.J.Q.B. 19; 67 L.T. 396; 41 W.R. 4; 8 T.L.R. 684; 36 Sol. Jo. 644; 4 R. 17, C.A.; 4 Digest (Repl.) 434, *3846.*

(24) *Rose* v. *Hart* (1818), 8 Taunt. 499; 2 Moore, C.P. 547; 129 E.R. 477; 4 Digest (Repl.) 436, *3859.*

(25) *Smith* v. *Hodson* (1791), 4 Term Rep. 211; 100 E.R. 979; 4 Digest (Repl.) 439, *3875.*

(26) *Re Prescot, Ex parte Prescot* (1753), 1 Atk. 230; 26 E.R. 147, L.C.; 4 Digest (Repl.) 437, *3862.*

(27) *Gibson* v. *Bell* (1835), 1 Bing. N.C. 743; 1 Hodg. 136; 1 Scott, 712; 131 E.R. 1303; 4 Digest (Repl.) 440, *3883.*

(28) *McKinnon* v. *Armstrong Bros. & Co.* (1877), 2 App. Cas. 531; 36 L.T. 482, H.L.; 4 Digest (Repl.) 440, *3887.*

(29) *Young* v. *Bank of Bengal* (1836), 1 Moo. Ind. App. 87; 1 Deac. 622; 1 Moo. P.C.C. 150; 18 E.R. 34, P.C.; 4 Digest (Repl.) 442, *3897.*

(30) *Booth* v. *Hutchinson* (1872), L.R. 15 Eq. 30; 42 L.J.Ch. 492; 27 L.T. 600; 21 W.R. 116; 4 Digest (Repl.) 434, *3853.*

(31) *Re Lankester, Ex parte Price* (1875), 10 Ch. App. 648; 33 L.T. 113; 23 W.R. 844, L.JJ.; 4 Digest (Repl.) 433, *3845.*

(32) *Jack* v. *Kipping* (1882), 9 Q.B.D. 113; 51 L.J.Q.B. 463; 46 L.T. 169; 30 W.R. 441, D.C.; 4 Digest (Repl.) 435, *3855.*

(33) *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (1885), 30 Ch.D. 216; 54 L.J.Ch. 460; 53 L.T. 65; 33 W.R. 513, C.A.; 10 Digest (Repl.) 990, *6814.*

(34) *Re Pollitt, Ex parte Minor*, [1893] 1 Q.B. 455; 62 L.J.Q.B. 236; 68 L.T. 366; 41 W.R. 276; 9 T.L.R. 195; 37 Sol. Jo. 217; 10 Morr. 35; 4 R. 253, C.A.; 4 Digest (Repl.) 428, *3802.*

(35) *Re Mid-Kent Fruit Factory, Ltd.*, [1896] 1 Ch. 567; 65 L.J.Ch. 250; 74 L.T. 22; 44 W.R. 284; 40 Sol. Jo. 211; 3 Mans. 59; 4 Digest (Repl.) 442, *3902.*

(36) *Whitaker* v. *Hall* (1822), 1 Gl. & J. 213; 4 Digest (Repl.) 432, *3829.*

(37) *Graham* v. *Russell* (1816), 5 M. & S. 498; 3 Price, 227; 2 Marsh. 561; 105 E.R. 1133, Ex. Ch.; 4 Digest (Repl.) 438, *3870.*

Appeal by Messrs Mant and Mant, solicitors, of Petworth, Sussex, from a decision of the Queen's Bench Division (WRIGHT and BIGHAM, JJ.), on an appeal from a decision of the judge of the Brighton County Court directing them to pay to the trustee in bankruptcy of C. J. Daintrey, a solicitor, also of Petworth, a sum in respect of a share of the profits of business transacted by them and due to the debtor under an agreement between them and the debtor, dated Dec. 31, 1892.

Before Dec. 24, 1892, Daintrey owed Mant and Mant £86, money paid by them at his request. On Dec. 24, 1892, Daintrey committed an act of bankruptcy, of which, however, Mant and Mant had no notice. On Dec. 31, 1892, Daintrey sold his practice to Mant and Mant. The agreement for the sale was in writing, and it was described as "Heads of agreement as to the acquisition by Mant and Mant of the practice hitherto carried on by Daintrey at Petworth." The price to be paid by Mant and Mant for the purchase of the business was to be

> "a sum equivalent to the usual agency share of profits in respect of business transacted for persons for whom Daintrey is now acting . . . such sum to be payable for three years only, and to be ascertained annually on Jan. 1 in each year."

Mant and Mant took possession of the practice and commenced to carry on the business. On Jan. 17, 1893, a receiving order was made against Daintrey, and then for the first time Mant and Mant discovered that he had committed an act of bankruptcy. Daintrey was adjudicated bankrupt in August, 1843. No profits had been made in the business by Mant and Mant before the date of the receiving order, but since that date profits had been made both before and after the date of adjudication, and at the end of three years the sum of £300 was due and payable by Mant and Mant under the agreement. In other words, the price to be paid for the purchase of the business was then ascertained at the sum of £300. Mant and Mant had not proved for their claim of £86 in Daintrey's bankruptcy, but the trustee having called on them to pay the £300, as part of the bankrupt's estate, they deducted the £86 due from Daintrey to them and paid the balance. The trustee objected to this deduction, alleging that the £300 ought to be paid in full, and that Mant and Mant were only entitled to take a dividend on the claim for £86.

The case was heard by the Divisional Court on Mar. 28, 1899, when judgment was reserved. Judgment was delivered on Aug. 10, 1899, when the following judgments were read.

WRIGHT, J.—Judgment in this case has been long delayed from various causes, but mainly because of the difficulty and great importance in bankruptcy of some of the questions which have to be determined. The learned and experienced judge below has not been able to give us any assistance beyond the statement that he is much puzzled, and we ourselves have not succeeded in agreeing upon a conclusion on some of the points in the case.

The question is whether there ought to be a set-off pro tanto of a debt due from the bankrupt before his bankruptcy against a debt due to the bankrupt's estate which did not come into existence as a debt, demand, or liability until after the date of the receiving order, but was until after that date a mere possibility of indebtedness. In considering this question, there are three things which it is specially important to observe. The first is that there is nothing to show any connection between the cross-demands. They are in respect of entirely separate and independent transactions. The second is that Mant and Mant were not under

any obligation to carry on the business which they had bought. They might not choose to do any business, or none might be offered to them, or there might not be any profit. The third is that the question arises, not in an action, but in a proceeding in the bankruptcy. The question, of course, does not depend on the general law of set-off, which until 1879 depended on the statutes 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4, and since the repeal of those Acts by the Civil Procedure Acts Repeal Act, 1879, and the Statute Law Revision and Civil Procedure Act, 1883 [repealed], depends on the saving clauses of the repealing Acts. There cannot in the present case be a set-off by virtue merely of that law for two reasons. One is that it applies only to set-off in an action. The other is that the general law of set-off has always been held to be applicable only where the cross-demands are in the same right, or in cases within the special exception as to executors which was contained in the repealed Acts.

In the present case, in the events which happened, the contract of Dec. 31, 1892, became, by force of the Bankruptcy Act, 1883, transferred to and vested in the trustees retrospectively as from the date of the act of bankruptcy. At that date there was no existing liability on the part of Mant and Mant to pay anything or to restore anything. There never was any right of action in the bankrupt on the contract, or against the trustee for the debt. The cross-demands, therefore, are not mutual, and are not in the same right: see, for example, per LORD ELDON in *Ex parte Blagden* (1), *Shipman* v. *Thompson* (2), *Wood* v. *Smith* (3) (4 M. & W. at p. 525, per PARKE, B.), *Groom* v. *Mealey* (4) (see 4 M. & W. 526, n.), and *Beckwith* v. *Bullen* (5). There are cases, such as *Hulme* v. *Muggleston* (6) and *Bittleston* v. *Timmis* (7), in which this difficulty has been overcome by the adoption in actions of the doctrines of bankruptcy law, but such cases depend on that law and not on the statutes of set-off. The present case, therefore, must be determined solely upon the proper construction of the Bankruptcy Act, 1883, s. 38 [re-enacted in s. 31 of Bankruptcy Act, 1914 : 2 HALSBURY'S STATUTES (2nd Edn.) 321].

On this section it must first be observed that, although by its terms the enactment seems to be confined to set-off as between the bankrupt and a person proving or claiming to prove in the bankruptcy, yet it is settled that the same right of set-off may be claimed in an action brought or in other proceedings taken in the bankruptcy by a trustee or liquidator: *Peat v. Jones & Co.* (8) and *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (9). There is no difference for this purpose between the language of the Bankruptcy Act, 1869, and that of the Act of 1883. It is, therefore, no ground of objection to Mant and Mant's claim of set-off that they are asserting it, not by way of proof, but in answer to the trustee's application for an order for payment of the £300.

The first question to be determined is: What is the date with reference to which the account is to be taken under the section and the set-off made? Until this question is answered it is impossible to say what claims on either side are to be taken into account. Is the date to be the date of the commencement of the bankruptcy as defined by s. 43, or the date of the receiving order, or the date of adjudication, or the date when the particular creditor comes in to prove, or the date when an action is brought or other proceeding taken by the trustee against him? It is obvious that the question whether and how far the set-off is to be allowed may have to be answered differently according as one or other of these dates is to be adopted. In the present case, if the date is the date of adjudication, Mant and Mant can utilise their own claim to defeat a part of the claim against them under the agreement, but it may be otherwise if the date is the date of the receiving order.

Under the earlier statutes, such as 4 & 5 Anne, c. 4, and 5 Geo. 2, c. 30, s. 28, it was settled in *Ex parte Groome* (10), by LORD HARDWICKE, that the line was to be drawn at the date of the commission, which was then the commencement of the bankruptcy, although the assignees' title might, and usually of course did, relate back to an earlier time; and *Dickson* v. *Evans* (11) (6 Term Rep. at p. 58,

per LORD KENYON, C.J.) was to the same effect. The Bankruptcy Act, 1825, s. 50, confined the set-off of mutual credits to such as had arisen before the commission (*Collins* v. *Jones* (12)), and that enactment continued in force until 1849. The Bankruptcy Law Consolidation Act, 1849, abolished fiats and substituted petitions followed by adjudications. There was no enactment like that in s. 11 of the Act of 1869 or in s. 43 of the Act of 1883, making the bankruptcy relate back to and commence at the act of bankruptcy on which the petition was founded, or any prior act of bankruptcy, the common-law doctrines of relation of title being apparently thought sufficient. The set-off section (s. 171) contained no indication of the date with reference to which the account was to be taken. On the Act of 1849 *Naoroji* v. *Chartered Bank of India* (13), where the headnote (L.R. 3 C.P. 444) is wrong as to the facts—the best report is in 18 L.T. 358—and *Astley* v. *Gurney* (14) were decided. In the former case BOVILL, C.J., said (L.R. 3 C.P. at p. 449):

> "The turning point is what was the state of things at the time of the bankruptcy, or that which is for this purpose equivalent thereto, at the execution of the deed?"

BYLES and MONTAGUE SMITH, JJ., agreed, and from their judgments it is plain that they meant that in case of bankruptcy the line was to be drawn at the date of adjudication. In the latter case the "time of the bankruptcy" is said to be the material date, and evidently that is intended to mean the date of adjudication. So, in *Re Douglas, Ex parte Ryder* (15), JAMES and MELLISH, L.JJ., decided that under a deed under the Bankruptcy Act, 1861, which provided for distribution as if there had been an adjudication at the date of the deed, the line must be drawn at that date.

The Act of 1869, like the Act of 1849, did not explicitly define the date with reference to which the account was to be taken. By s. 11 it enacted in general terms that the bankruptcy should be deemed to have relation back to, and to commence at, the completion of the act of bankruptcy on which the adjudication was made, or the first act of bankruptcy committed within twelve months before adjudication. By s. 15 it vested in the trustee all the property which belonged to the bankrupt at the commencement of the bankruptcy, but by s. 31 the debts, etc., provable in the bankruptcy were debts, etc., to which the bankrupt was subject at the date of the order of adjudication, or might during the bankruptcy become subject by reason of any obligation incurred before that date. By s. 39 it provided for set-off as follows:

> "Where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively. . . ."

In 1874 this section was considered by LORD SELBORNE, L.C., and JAMES and MELLISH, L.JJ., in *Re Deveze, Ex parte Barnett* (16), where the bankrupt owed a creditor £3,010 and the creditor owed the bankrupt £88, secured by a lien on goods of the creditor. The question was whether the trustee was entitled to get paid the £88 in full by enforcing his lien, and it was held that the debts were pro tanto reciprocally cancelled by the bankruptcy, and the lien ceased with the cancellation of the debt for which it was a security. There the creditor had come in to prove for his £3,010, and LORD SELBORNE, L.C., seems to have considered that the set-off took effect at the time of his so coming in. He said (9 Ch. App. at p. 295):

> "when there have been mutual credits . . . and a proof is to be made in bankruptcy, there is to be a rule of set-off, not, as I understand it, at the

option of either party, but an absolute statutory rule—'the balance of such account, and no more, shall be claimed or paid on either side respectively.' . . . Barnett & Co. come in to prove, and the statute expressly says that the amount of their proof shall be ascertained by writing off the small debt from the larger. . . ."

MELLISH, L.J., said (ibid. at p. 297):

"The simple question is whether, upon the construction of this clause, the set-off is not made equivalent to payment. I doubt whether it does not affect it even before either party has come in to prove; but, at any rate, when the party does come in to prove, the statute sets the one debt against the other, and that is equivalent to payment. It, in fact, is equivalent to saying, where there are mutual debts, that a party, by coming in and claiming to prove, necessarily causes a payment or satisfaction of his debt so far as the set-off extends. . . ."

In 1881 the question was expressly raised in the Privy Council in *Elliott* v. *Turquand* (17) whether the account for the purposes of set-off under s. 39 of the Act of 1869 must not stop and be taken as at the date of the act of bankruptcy. It was held that in a case of continuous mutual dealings and accounts the line is not ipso facto drawn as at the act of bankruptcy, but the account must be continued at least until the party claiming the benefit of s. 39 has notice of an act of bankruptcy.

In 1884, in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.*, the question was whether the Supreme Court of Judicature Act, 1875, had imported into liquidations the bankruptcy rule of set-off. In holding that it had that effect, LORD SELBORNE, L.C., said of s. 39 (9 App. Cas. at p. 438):

"Your Lordships observe that it is not that it *may be*—it is not a thing which is optional, but it is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account; that only is regarded as the claim which it is competent for the creditor to make when he comes in to prove under the bankruptcy."

The terms of this observation seem expressly to limit the set-off to cases of proof, but this cannot be the real meaning, because the decision of the House was in affirmance of the judgment of the Court of Appeal allowing a set-off, not upon a proof in the liquidation, but in an action by the liquidator.

In the same year, in *Re Milan Tranways Co., Ex parte Theys* (18), in the Court of Appeal, LORD SELBORNE said (25 Ch.D. at p. 591)—and this was the ground of decision of the case:

"Under s. 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate, as the case may be."

FRY, L.J., said of s. 39 (ibid. at p. 594):

"That section refers to the state of things at the time of the bankruptcy. . . . That has been the uniform rule."

These cases seem to be decisive that under the Act of 1869 the account was to be taken with reference to the time of the bankruptcy, but they do not explicitly determine whether that expression meant the date of adjudication or the date of the act of bankruptcy to which the bankruptcy related and at which it commenced by virtue of s. 11 of that Act; and *Elliott* v. *Turquand* (17) remains the only express authority on that point.

The Act of 1883 differs from the Act of 1869 in the fundamental particular of the introduction of receiving orders preliminary to adjudication. It differs also in this, that whereas in the Act of 1869 the provision that a bankruptcy shall be deemed to have relation back to and to commence at the date of the act of bankruptcy (or some earlier act of bankruptcy) was contained in a section (s. 11) which was placed among the general provisions at the beginning of the Act so as apparently to govern the whole Act, the corresponding provision (s. 43) of the Act of 1883 is placed in a fasciculus of clauses under the heading of "Property available for Payment of Debts" [as is now s. 37 (1) of the Bankruptcy Act, 1914]. Further, the language of s. 38 of this Act [Act of 1914, s. 31] differs from the language of s. 39 of the Act of 1869.

It is necessary briefly to consider the general framework of the Act of 1883 in order to determine what is the effect of these alterations. By s. 5, on proof of an available act of bankruptcy the court may upon petition make a receiving order "for the protection of the estate" [Act of 1914, s. 3]. By s. 9 [Act of 1914, s. 7] on the making of a receiving order an official receiver

> "shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy"

without leave; but this section has not the effect of divesting the property of the debtor. If no arrangement is approved by the creditors, adjudication follows, and thereupon (s. 20) the property of the debtor vests in the trustee (or official receiver) for division among the creditors [Act of 1914, s. 18]. By s. 37 the debts provable in the bankruptcy are the debts

> "to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order" [Act of 1914, s. 30 (3)].

Then follows s. 38 [Act of 1914, s. 31], providing for set-off in case of

> "mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under such receiving order."

In s. 39 of the Act of 1869 the words were:

> "Between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy."

Except as above mentioned, this section is in all material respects verbatim the same as s. 39 of the Act of 1869. By s. 43 (under the heading "Property available for Payment of Debts") [Act of 1914, s. 37]:

> "The bankruptcy of a debtor . . . shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him"

—or the earliest act of bankruptcy within the preceding three months. (Under the Act of 1869 it was twelve months.) By s. 44 [Act of 1914, s. 38] the property divisible among the creditors is the debtor's property at the commencement of the bankruptcy or acquired before his discharge. By s. 45 [Act of 1914, s. 40] executions pending at the time of the bankruptcy are not protected unless completed before the receiving order and before notice of act of bankruptcy or of petition. By s. 49 [Act of 1914, s. 45] bona fide transactions before the receiving order are protected—not, as in the Act of 1869, before adjudication. By s. 168 [Act of 1914, s. 167] "property" includes contingent interests arising out of or incident to property.

If these provisions [of the Act of 1883] are considered without reference to authority, it seems to me that they ought to be understood as fixing the date with

reference to which the account is to be taken for the purposes of set-off at the date of the receiving order, which for nearly all the purposes of the Act, except the commencement of the title of the trustee, is made the material date. Prima facie it would seem that the line which is drawn for defining what debts are to be provable in the bankruptcy must be also the line for defining what cross-claims are to be set-off in the case of a creditor whose set-off is not stopped at an earlier date by notice of an act of bankruptcy. If the line were to be drawn at different times for the two purposes of proof and set-off, the result might be unjust. If it were drawn for the purposes of set-off at the "commencement of the bankruptcy," as defined by s. 43, there would be three months (under the Act of 1869, s. 11, it would have been twelve months) during which one side of a cross-account would be growing for purposes of proof, and yet the other side would be cut short for purposes of set-off. If it were not drawn until adjudication, the injustice would be the other way, but it might be equally great.

I cannot find any case on the construction of the Act of 1883 which is opposed to this view, nor any in which it is expressly adopted. In 1885, in *Re Gillespie, Ex parte Reid* (19) the only point decided by CAVE, J., was that a creditor of the bankrupt, if he accepts after notice of the bankruptcy a bill belonging to the bankrupt's estate, cannot claim to set-off his own demand against his new liability on the bill, and, although the decisions upon the Act of 1869 are cited and relied on, it does not seem that the question whether the line should be drawn at the date of the commencement of the bankruptcy, as defined by s. 43, or at the date of the receiving order, or at the date of adjudication, was considered at all. It, however, rather appears that the receiving order was regarded as "the bankruptcy." In *Palmer* v. *Day & Sons* (20) it was assumed, apparently without discussion, that the date of the receiving order was for the purposes of that case the material date. In *Elgood* v. *Harris* (21) the "date of the bankruptcy" is treated as the critical date, but there is nothing to indicate what this means. There seems to be no other reported case upon the Act of 1883 in which any reference is made to the question as arising in bankruptcy. In liquidation the date is in several cases—for example, *Eberle's Hotels and Restaurant Co., Ltd.* v. *Jonas* (22) (18 Q.B.D. at p. 463, per FRY, L.J.)—assumed to be the date of the winding-up; and no doubt, as CHARLES, J., thought in *Sovereign Life Assurance Co.* v. *Dodd* (23), the date of the petition for winding-up is, by virtue of s. 84 of the Companies Act, 1862 [see now the Companies Act, 1948, s. 229], the critical date in liquidation.

On the whole, it appears to me that, whereas under the earlier Bankruptcy Acts the date with reference to which the account was to be taken for purposes of set-off was the date of the commission, and under the Act of 1869 it was the date of adjudication, under the Act of 1883 it is the date of the receiving order, which is substituted for adjudication as the epoch down to, but not beyond, which debts are provable. On this point my learned brother agrees.

The next question is whether in the present case on Jan. 17, 1893, the date of the receiving order, there were mutual demands or sums due which were then capable of being made the subjects of an account for the purposes of set-off under s. 38. It is, of course, immaterial whether the amount of the demand on either side was then ascertained or not. If there was then an existing liability such as is capable of being brought into an account, it is in general immaterial whether its amount could have been then ascertained, provided it can be ascertained when the account is taken. A liability to do or pay something in futuro will suffice, although the time for doing or paying it has not arrived. In the present case there was at that date no existing liability at all, but merely a contract under which there was a possibility of liability contingent upon things being done which Mant and Mant had not by the contract bound themselves to do, and contingent upon those things, if done, resulting in a profit. Such a contingent liability, if it had attached to the bankrupt, might have been matter of set-off, because by the express provisions of s. 37 it is made the subject of estimation, and the estimated

sum would have been a debt provable against the bankrupt, unless declared by the court incapable of estimation. But there is no corresponding enactment compelling or enabling a valuation to be made of a merely possible or contingent liability of another person to the bankrupt, and in the absence of any such enactment the difficulty is to see how an account of "sums due" taken with reference to a particular date can include anything in respect of such a merely possible liability.

From the earliest times there have been numerous, and sometimes conflicting, decisions as to the commensurability of cross-demands of various kinds, but in nearly all, if not all, of them there has been an actual existing liability on each side, absolute or defeasible, and the question has usually been whether the cross-liabilities are commensurable, so as to be capable of being made the subjects of an account. It is not necessary to consider in detail the numerous decisions of this kind which are collected in the notes to *Rose* v. *Hart* (24) (2 Smith, L.C. (10th Edn.), p. 288) and *Smith* v. *Hodson* (25) (2 Smith, L.C. (10th Edn.), p. 143), but there are some cases to which reference may be made, though in considering them the successive variations and enlargements of the enactments as to set-off in the Acts of 1825 and 1869 must be borne in mind, as well as the fact that until the Bankruptcy Act, 1861 [repealed], s. 153, unliquidated damages even for breach of contract were not in general provable in the bankruptcy. It must also be borne in mind with reference to cases relating to insurance that the earlier Acts contained a special provision enabling proof to be made on policies of insurance which had not matured. In *Ex parte Prescot* (26) the bankrupt owed money to a creditor, who was liable to the bankrupt on a bond conditioned for the payment of money at a date subsequent to the commission. The creditor applied for leave to set-off, instead of proving for his own claim. LORD HARDWICKE said it was a new case, to be determined on principles of equity, and he held it a mutual credit because of the immediate obligation of the bond.

In each of the series of cases which terminated with *Rose* v. *Hart* (24) there was on the one side at the time of the bankruptcy a money debt, and on the other side an existing liability on the part of the creditor to account for goods held by him as a bailee, and the only contest was whether the bailment was such as implied a pecuniary liability, the amount of which could be ascertained by calculation: see per TINDAL, C.J., in *Gibson* v. *Bell* (27), where an important mistake in *Rose* v. *Hart* (24) is pointed out. In *Smith* v. *Hodson* (25) and several other cases the liabilities of accommodation acceptors, though unripe at the bankruptcy, and though defeasible in case the holder had recovered from the drawer, or the claim of an indorsee of a bill which at the time of the bankruptcy was under discount with his bankers, and, therefore, not at that time held by him, had before the Bankruptcy Act, 1825, been held matters of set-off; and in *Collins* v. *Jones* (12), which has been approved in the House of Lords—*McKinnon* v. *Armstrong Bros. & Co.* (28)—it was settled that under the Bankruptcy Act, 1825, s. 50, a person who before bankruptcy of the acceptor of a bill or maker of a note had a title to the bill or note and is the holder of it at the time when the account for the purpose of set-off is taken does not lose his right of set-off merely because the bill or note was not in his possession at the time of the bankruptcy. In *Young* v. *Bank of Bengal* (29) the creditor held securities belonging to the bankrupt which were to be applied only for a particular purpose and upon a particular contingency, and for that reason the creditors' liability to account for them was held not matter of set-off, although that liability existed at the time of the bankruptcy. In *Naoroji* v. *Chartered Bank of India* (13) the creditor held bills for collection for the bankrupt, and his liability to account for the proceeds was held to be matter for set-off, although the authority to collect was revocable, and the pecuniary liability, therefore, defeasible. In *Astley* v. *Gurney* (14) the creditor held bills of lading to be returned to the bankrupt, but before bankruptcy the bankrupt authorised the sale of the goods; and it was held that the liability to return the bills which existed before authority given to sell was not commensurable with the creditor's money

A debt to the bankrupt, and could not have been set-off, but that on an irrevocable authority being given to sell there was a commensurable pecuniary liability.

Under the wider language of the Act of 1869, MALINS, V.-C., in *Booth* v. *Hutchinson* (30), decided that in an action for rent brought by a bankrupt's trustee the defendant could set-off unliquidated damages for breach of an agreement to finish a house, although the amount could not be ascertained until after the B bankruptcy. In 1875 *Re Lankester, Ex parte Price* (31) came before JAMES and MELLISH, L.JJ. This, perhaps, is the nearest of all the reported cases to the present one. There an insurance company insured a life, lent money to the assured on his policy, and went into liquidation. The assured became bankrupt. On the liquidator proving in the bankruptcy for the loan, the assured's trustee sought to C set-off the value of the policy as valued in the liquidation. It was held that there was no set-off in the bankruptcy, on the ground that there was nothing due on the policy, and the valuation of it in the liquidation did not make the amount of that valuation a sum due. At 33 L.T. 114 MELLISH, L.J., is reported as saying:

> "There must be made out that the value of the policy is a sum 'due' which can be set-off against some claims on the other side, and under the mutual D credit clause."

In that case there was at the time of the bankruptcy a certain existing liability to make a payment at an uncertain future time, and it was held not the subject of a set-off because there was no sum due which could be ascertained or made the subject of an account or set-off. In the present case there is even a greater difficulty of the same kind, and the further one, that at the date of Daintrey's E bankruptcy there was no existing or certain future liability at all.

In *Peat* v. *Jones & Co.* (8) the Court of Appeal (SIR GEORGE JESSEL, M.R., BRETT and COTTON, L.JJ.) approved the decision of MALINS, V.-C., in *Booth* v. *Hutchinson* (30), and held that there might be a set-off of a claim for unliquidated damages for breach of a contract made before the bankruptcy. This was followed in *Jack* v. *Kipping* (32) in relation to a claim for unliquidated damages for fraudulent F representation inducing a contract of sale; and, in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (9) in relation to unliquidated damages for non-delivery of goods. In *Re Asphaltic Wood Pavement Co., Lee and Chapman's Case* (33), at the time of the liquidation the company was under contract to keep streets in repair at fixed prices if so required, and the other party was liable for the contract price of laying the streets, and it was held that the cross-claims were the subjects of G set-off, although there had been no breach before bankruptcy of the company's obligation. In *Eberle's Hotels and Restaurant Co., Ltd.* v. *Jonas* (22) it was held that there could be no set-off between the liquidating company's liability to pay money and the other party's liability to account for cigars deposited as security for a specific debt, LORD ESHER observing (18 Q.B.D. at p. 467) that

> H "an account cannot be taken and a balance struck in respect of a debt on one side and a liability to restore goods on the other."

Such claims are incommensurable.

In *Re Pollitt, Ex parte Minor* (34) and *Re Mid-Kent Fruit Factory Ltd.* (35) it was held that a money debt due from the bankrupt could not be set-off against an advance of money made by the bankrupt for a specific purpose. In *Palmer* v. I *Day & Sons* (20), which was much relied on by counsel for Mant and Mant, the only point was the old one, whether the bankrupt's liability for money was commensurable with the other party's liability as a bailee of pictures for sale, and *Naoroji* v. *Chartered Bank of India* (13) was followed. In *Elgood* v. *Harris* (21) an underwriter's trustee in bankruptcy sued to recover salvage moneys received by the defendant after the bankruptcy which belonged to the bankrupt's estate. The defendant sought to set-off the bankrupt's liabilities to him on other policies. It was held by HENN COLLINS, J., that there was no set-off. The salvage was not due at the time of the bankruptcy, but accrued afterwards by operation of law;

and it did not result from any credit given by the bankrupt before bankruptcy. The defendant at the time of the bankruptcy had nothing of the bankrupt's in his hands, nor was he then under any contract or liability of which the salvage could be considered to be the proceeds.

I have cited all the modern cases except one which seem to have any bearing on the question, and there seems to be nothing in any of them which supports the claim of set-off in a case like the present one. The only case which to my mind causes any difficulty is *Sovereign Life Assurance Co.* v. *Dodd* (23). There the company had, in 1879, issued to Dodd so-called "endowment" policies which bound them to pay £2,000 in May, 1888, to him or his executors, the only condition being that the premiums should be paid. Early in 1887 he borrowed money from the company upon mortgage of the "policies." Afterwards the company was wound-up on petition. The "policies" matured after petition, but before the order to wind-up, all premiums having been duly paid, some of them after petition. The liquidators brought an action for the money lent, and Dodd pleaded a set-off of the £2,000 which had become payable to him before action. It was objected that inasmuch as the winding-up order related back to the petition, there was not at the commencement of the liquidation any liability on the policies, but only a liability contingent on future payment of premiums. CHARLES, J., allowed the set-off, saying ([1892] 1 Q.B. at p. 411):

> "There was no new transaction. The loans on the one hand and the insurance on the other were both prior in date to the winding-up petition, and there was, when the petition was presented, a debt due from the defendant, and a contract with him which would probably result—and has in fact resulted—in a debt due to him . . . there was also a subsisting contract with the company that they would on a day certain, which arrived before the winding-up order, pay the defendant his policy moneys less the amount of his loan. The only element of uncertainty was the possibility that the defendant would not pay his premiums. This element was removed by his duly paying them, and therefore the sum due to him became capable of proof in the liquidation."

The judgment of CHARLES, J., was affirmed by the Court of Appeal. The court laid stress on the fact that the question arose in an action and not in a proceeding in the liquidation, and they refused to consider how the matter would have stood in a proceeding in bankruptcy, or to question the decision in *Re Lankester* (31).

It is plain, therefore, that there is nothing in that case which as a decision governs the present question in the bankruptcy. Nor on the facts of that case is there any real similarity to this case. The so-called "policies" were not insurances at all, nor upon any contingency. There at the date of the petition there was, so far as the company was concerned, an absolute liability to pay the £2,000 in the sense that they could not prevent it from becoming payable. If Dodd chose to pay the one or two remaining premiums the liability must become complete. It cannot be said that there was no existing obligation on the company. Nor was any matter of estimation involved. At the date of the petition the amount which the company would have to pay was ascertained, and the amount or value of the unpaid premiums was a simple matter of calculation. In the present case there was no existing obligation on Mant and Mant at the date of the receiving order. They were not to come under any obligation unless they chose to do the business and could get the business. In my judgment, in *Sovereign Life Assurance Co.* v. *Dodd* (23) the set-off would have been allowable in bankruptcy as well as in an action. So it might have been in this case if Mant and Mant had by the agreement bound themselves to do business.

On the whole, therefore, the considerations governing the present case appear to me to be as follows. The proceeding being in bankruptcy, the question is whether there was matter of set-off at the time with reference to which the account is to be taken under s. 38—that is, the date of the receiving order. At that date

there was no sum due, certain or uncertain, nor any existing liability, and without new and entirely uncertain events and the voluntary action of Mant and Mant, nothing would become due. Mant and Mant could not be compelled at the time of the receiving order to admit any kind of liability as then existing, nor could they have forced the bankrupt or the trustee to accept any valuation of composition. Suppose that, on the one hand, the agreement had been unlimited in time, and, on the other hand, the bankrupt's debt to Mant and Mant had been so large as to exceed any probable liability of Mant and Mant under the agreement during Mant and Mant's life or continuance in business, and Mant and Mant had proved in the bankruptcy for their whole claim, how could it have been ascertained what sum the trustee could set-off? Neither the trustee nor the creditor has any such power given to him to accelerate or value the future and merely possible liability of the creditor as is given in the like case as against the bankrupt. A contract to build a ship or supply coals or make a street at a time which has not arrived when bankruptcy occurs is an existing liability the amount of which is then capable of being ascertained with more or less accuracy. But a possibility of liability cannot be valued unless by express enactment, and the statute makes no provision for this in such a case.

The decision of LEACH, V.-C., in *Whitaker* v. *Hall* (36) seems to adopt this view. There the bankrupt at the time of his bankruptcy was indebted to a Mrs. Whitaker, and had a prospective claim against her for £2,000 payable at her death. She died after the bankruptcy, and the £2,000 was claimed from her representatives. It was held that they could not set-off under bankruptcy law the amount of their own claim because the prospective liability,

> "being payable at the uncertain period of her death, was not the subject of computation so as to ascertain the balance within the words of the statute (Bankruptcy Act, 1731 (5 Geo. 2, c. 30, s. 28)). It is true that a value might have been set upon the sum payable upon the contingency of Mrs. Whitaker's death; so a value might be set upon every sum payable upon a contingency by the bankrupt, for the purpose of proof against his estate; but it is enough to say that the law has not provided for such a valuation."

The law has now provided for such a valuation in the one case but not in the other.

It is proper to observe that these conclusions are not necessarily applicable to a case in which the cross-demands arise out of one contract or transaction, or are in any manner interdependent. In such a case regard must be had to a new and different consideration. It may well be that the party who comes after the date for the account in bankruptcy to insist on the performance of one of two interdependent obligations must submit on his part to have set-off against his claim any cross-claim which has then ripened into an actual liability on the other side of the account. Suppose, for instance, a policy on a sailing ship for a distant voyage or a long period of time. The assured becomes bankrupt, owing premiums to the underwriter. Long afterwards a loss occurs, and the assured's trustee applies in bankruptcy for payment of the insurance money to the credit of the estate. It would be hard if the underwriter is not to have credit for the premiums owing to him. In such a case, and in many others which might be put, the account might be carried down to a date later than that which is prima facie the proper one. A principle of this kind seems to be indicated by the judgment in *Elliot* v. *Turquand* (17); and *Re Lankester* (31) is not inconsistent with it, for there no liability on the policy had ripened at the time when the question arose. In *Beckwith* v. *Bullen* (5) the court thought that in bankruptcy there might be a set-off as between premiums and immature liabilities on a policy. A remarkable decision of all the judges in LORD ELLENBOROUGH'S time, in *Graham* v. *Russell* (37), points in the same direction. There a shipowner became bankrupt, owing for premiums. After the bankruptcy the ship was lost, and the shipowner sued the underwriter, who sought to set-off the premiums due; and it was held that he might do so because

the Act 19 Geo. 2, c. 32 [Bankruptcy Act, 1745] had expressly enacted that a person insured before bankruptcy of the underwriter might prove for losses happening after the bankruptcy, and the court thought that as the epoch for taking the account was thus brought down for the one party, it ought to be brought down for the other also. But where, as in the present case, the cross-demands are separate and independent, I see no ground of equity or reason for altering the date which the statute indicates as the date with reference to which the account is to be taken for the purpose of set-off. In my opinion, the trustee's claim must be allowed with costs.

BIGHAM, J.—The question in this case is whether certain transactions between the appellants Messrs. Mant and Mant and the bankrupt Daintrey come within the mutual credit section (s. 38) of the Bankruptcy Act, 1883. The county court judge held that they did not, and from that decision Mant and Mant appeal.

I am of opinion that Mant and Mant are entitled to deduct the £86 due to them by Daintrey from the £300 due by them under the agreement. The law regulating the adjustment of cross-claims between a bankrupt and his creditors is statute-law, and is to be found exclusively in s. 38 of the Bankruptcy Act, 1883. The terms of this section seem to me to cover the case before the court. The dealings are mutual—that is to say, they are in the same right, and they are between a debtor against whom a receiving order has been made and a creditor claiming to prove a debt under the receiving order—that is to say, having a right to prove a debt in the bankruptcy proceedings initiated by the receiving order. It was argued for the trustee that the account directed to be taken by s. 38 must be taken as at the date of the receiving order, and it was said that, inasmuch as there was nothing payable by Mant and Mant at that date, no such account could possibly be taken, and that, therefore, the case did not fall within the section. The judgment of Lord Selborne in *Re Milan Tramways Co., Ex parte Theys* (18) was referred to as supporting the contention. That case has nothing to do with the point now under consideration; but in his judgment, Lord Selborne, referring to the mutual credit section of the Bankruptcy Act, 1869, said: [His Lordship read the passage read by Wright, J. (ante p. 663), and continued:] The answer to this argument is that Mant and Mant are not seeking to alter the rights of the parties by reference to subsequent transactions, but are seeking to ascertain them by reference to the natural outcome of previous transactions. Lord Selborne's observations, so far from supporting the trustee's contention, seem to me to show that the account which the section of the Act directed should be taken is to be taken when the claim on the one side or the other is presented.

In the case before the court there are no subsequent transactions; the debt, on the one hand, and the agreement out of which the cross-debt arises, on the other hand, both came into existence before the date of the receiving order, and the account must, in my opinion, be taken by placing the one debt against the other and ascertaining the difference. The judgment of Charles, J., in *Sovereign Life Assurance Co.* v. *Dodd* (23), I think, supports the view put forward by Mant and Mant. The facts, so far as they are material for the purpose in hand, were as follows. Dodd had in 1879 effected two policies of insurance on his life with the plaintiff company; under the policies he became entitled to two payments of £1,000 each if he lived until May 7, 1888. He paid the premiums for many years, and then borrowed from the company a sum of £1,170 on the security of the two policies. In August, 1887, a petition was presented against the company, and it was ordered to be wound-up. In December, 1890, the liquidator sued Dodd for the £1,170, and the question was whether the defendant was entitled to set off so much of the two sums of £1,000 then due to him as would be sufficient to meet the claim for £1,170. Charles, J., held he was so entitled. It was argued for the liquidator that, inasmuch as the claims on the policies did not mature until after the commencement of the liquidation, there were no mutual dealings within s. 38 of the

A Bankruptcy Act, 1883, and that, therefore, the set-off could not be pleaded. But CHARLES, J., dismissed the contention. It was enough, he said, that there existed at the commencement of the liquidation a debt on the one hand and a liability which in due course would mature into a debt on the other. He noticed the suggestion that a line should be drawn at the date of the commencement of liquidation (a date which corresponds with the date of the receiving order in a B bankruptcy), and he pointed out that this is true to the extent of excluding the consequences of previous transactions. It may be said that *Sovereign Life Assurance Co.* v. *Dodd* (23) is not the same as, but rather the converse of, the case now before us, because there Dodd was the debtor to the company before the liquidation and became the creditor afterwards, whereas in the present case Mant and Mant were the creditors before the bankruptcy and became the debtors afterwards. But C this, in my opinion, makes no difference.

There was a case decided under s. 39 of the Bankruptcy Act, 1869—*Booth* v. *Hutchinson* (30). In that case Booth was tenant of a house to Greetham at a time when Greetham became a bankrupt. At the commencement of the bankruptcy Greetham owed money to Booth. Booth continued as tenant after the commencement of the bankruptcy for some time, and so became liable to pay rent; D he might have terminated his tenancy by notice if he had chosen to do so, but in fact he allowed the tenancy to continue. The trustee in the bankruptcy sought to recover the rent without allowing Booth to set-off the debt due by Greetham. It was held that the set-off should be allowed, and that in taking the account the debt due by the bankrupt on the one hand should be placed against any rent which might become due—"before the close of the bankruptcy, that is, before the E distribution of the estate" on the other hand. The ground of the decision was that the rent arose out of a contract of tenancy entered into before the bankruptcy.

Palmer v. *Day & Sons* (20) was decided upon s. 38 of the Bankruptcy Act, 1883. In that case the bankrupt, Langton, owed a debt to Day & Sons, who were auctioneers. At the date of the receiving order Day & Sons held some pictures belonging to the bankrupt, which they had received from him with a revocable F authority to sell them on his behalf. After the date of the receiving order the trustee gave instructions to Day & Sons to sell the pictures, which they accordingly did. They paid to the trustee the proceeds of the sale after deducting the amount of the debt due to them by Langton. The court held that they were entitled to deduct the amount of the debt due to them, upon the ground that the transactions were mutual dealings within the meaning of the Act.

G Both in *Booth* v. *Hutchinson* (30) and in *Palmer* v. *Day & Sons* (20) there was a debt due by the bankrupt before the bankruptcy, and there was a debt which fell due to the bankrupt's estate after the commencement of the bankruptcy arising out of contracts entered into before the bankruptcy. In neither case could any account have been taken at the commencement of the bankruptcy, for it was quite uncertain whether anything, and, if anything, how much, might become H due to the bankrupt's estate; yet the account was allowed to be taken when the demand against the creditor on the estate was put forward. The court in their judgment in *Palmer* v. *Day & Sons* (20) said there was a debt on the one side and a delivery of property with directions to turn it into money on the other. So in the present case there was a debt due by Daintrey on the one side and there was a transfer by him of his business on the terms that it should be worked so as to I produce money payable to him on the other. Thus the cases seem to be identical. For these reasons I think the appeal should be allowed.

The judges differing, the appeal was dismissed and Mant and Mant with leave appealed.

Dickens, *Q.C.*, and *Hohler* for Mant and Mant.

Reed, *Q.C.*, and *Æneas Mackintosh* for the trustee in bankruptcy.

SIR NATHANIEL LINDLEY, M.R.—I cannot help thinking that there is an error in the judgment of WRIGHT, J., and that the view taken by BIGHAM, J.,

is correct. I agree with that part of the judgment of WRIGHT, J., in which, after reviewing the authorities, he came to the conclusion that the date of the receiving order and not the date of the bankruptcy was the time for ascertaining what mutual credits, debts, or other dealings were existing between the debtor and other persons. I cannot, however, agree with him in the second part of his judgment that there were no mutual debts, credits, or dealings between Daintrey and Mant and Mant. The facts were these. Daintrey owed Mant and Mant £86. On the other hand, Mant and Mant became liable under the document called "Heads of Agreement," dated Dec. 31, 1892, to pay Daintrey various sums under certain conditions, and what was payable by them was payable under the security of that document. Can we say that at the date of the receiving order there was nothing payable under that agreement? It is clear that when it was executed, money was, or would become, payable under it, and very considerable sums did in fact become payable.

Why the sum which would have become payable by Daintrey but for the bankruptcy should not be set-off against the debt which was due to him from Mant and Mant I cannot understand. How can the trustee claim to have 20s. in the pound from Mant and Mant and tell them that they must be content with a dividend on the debt due to them from Daintrey? Such a contention seems to me unarguable. It is to prevent such an injustice that the provisions of the old bankruptcy law have been recast and the mutual credit provisions have been inserted in the Bankruptcy Act, 1883. It appears to me to be true that when the trustee makes a claim against a person the bankruptcy proceedings to ascertain a claim do not apply. The machinery of the Act applies to a case of a claim against the estate. The trustee must wait till the assets fall in, and it is obvious that the operation of the mutual credit clause is not to be excluded altogether because there is no way of ascertaining the sum due at the particular date. WRIGHT, J., has, I think, gone wrong in the construction which he put upon this agreement. He thought that Mant and Mant were under no obligation towards Daintrey. It is true that they were not bound to do business for all the clients of Daintrey, and, above all, that no client of Daintrey's was bound to do business with them, but that Mant and Mant were bound on certain conditions to pay this money to Daintrey is clear. I think that the view of BIGHAM, J., was right and that this is a case in which s. 38 applies.

SIR FRANCIS JEUNE, P.—I agree.

ROMER, L.J.—I agree with WRIGHT, J., that the date of the receiving order is the proper date to look at for the purpose of seeing whether there were mutual dealings between Mant and Mant and Daintrey, and whether those mutual dealings gave rise to any right of set-off. I think it is clear that there were such dealings at that time. There was due from Daintrey to Mant and Mant £86, and, on the other hand, Mant and Mant were under a liability to Daintrey by virtue of the agreement of Dec. 31, 1892. I agree that the amount for which they would ultimately become liable could not be ascertained until some time later than the date of the receiving order, and that the amount might be very small; but whatever sum did eventually become payable, became payable to Daintrey by virtue of the agreement of December, 1892, and no other. For Mant and Mant to obtain the advantage of the mutual credit clause it was not necessary that the amount payable under the contract should be immediately payable to the bankrupt at the date of the receiving order, or that an account could be taken as between Mant and Mant and him at that date. It is quite sufficient if the account can be taken when the set-off arises. The trustee here is claiming money from Mant and Mant under an agreement between Daintrey and them entered into before, and existing at the date of the receiving order, and there have been no subsequent dealings between Mant and Mant, on the one hand, and Daintrey and

his trustees, on the other, outside that agreement. That being so, I cannot see why, when the trustee claims that there is a sum of money due to him from Mant and Mant by virtue of that agreement, they should not set-off against that claim the sum due to them from the bankrupt's estate.

Solicitors: *Palmer & Bull*, for *Mant & Mant*, Petworth; *Nash, Field & Co.*, for *Stuckey, Son & Pope*, Brighton.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

COOTE *v.* FORD

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., and Rigby, L.J.), May 17, 1899]

[Reported [1899] 2 Ch. 93; 68 L.J.Ch. 508; 80 L.T. 697; 47 W.R. 548]

Res Judicata—Payment into court—Acceptance by plaintiff—Right of parties to re-open dispute except matter in respect of which payment was made.

Payment into court by a defendant coupled with the plaintiff taking the money out is not equivalent to an admission by the defendant of the plaintiff's cause of action. The effect is merely that all proceedings in the action, so far as relates to the matter in respect of which the money was paid in, are at an end.

The plaintiff claimed damages from the defendants for trespass and an injunction to restrain them from trespassing on his land in the future. The defendants paid into court a sum in respect of the claim for damages, which was accepted by the plaintiff, and by their defence and counterclaim they set up a right by the custom of the manor entitling them to go on the plaintiff's land to kill and take rabbits.

Held: the payment into court by the defendants and its acceptance by the plaintiff did not estop the defendants from proceeding to maintain their claim of right or the plaintiff from seeking an injunction.

Notes. R.S.C., Ord. 22, r. 1, has been amended, and it is no longer necessary to state, when making a payment into court, whether liability is admitted or denied.

As to the effect of payment into court as res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 209-211, and cases there cited.

Case referred to:

(1) *Berdan* v. *Greenwood* (1878), 3 Ex.D. 251; 47 L.J.Q.B. 628; 39 L.T. 223; 26 W.R. 902, C.A.; Digest (Pleading) 162, *1436*.

Also referred to in argument:

Wheeler v. *United Telephone Co.* (1884), 13 Q.B.D. 597; 53 L.J.Q.B. 466; 50 L.T. 749; 33 W.R. 295, C.A.; Digest (Practice) 490, *1671*.

Goutard v. *Carr* (1884), 13 Q.B.D. 598; 53 L.J.Q.B. 55; 32 W.R. 242; 33 W.R. 295, n., C.A.; Digest (Practice) 490, *1671*.

Wood v. *Leetham* (1892), 61 L.J.Q.B. 215, D.C.; 13 Digest (Repl.) 460, *841*.

Appeal from an order of STIRLING, J., dismissing an application by the plaintiff by summons to strike out part of the defendants' counterclaim in the action. The plaintiff claimed against nine defendants (i) damages for alleged trespass, and (ii) an injunction to restrain threatened trespass. Paragraph 1 of the statement of claim stated the title of the plaintiff to a close of land called Martin Down, part of the waste of the manor of Martin. Paragraph 2 contained the allegation of the

trespass complained of, stating that on Sept. 1, 1898, the defendants wrongfully broke and entered the plaintiff's land in pursuit of game and rabbits, and did there kill game and rabbits. Threats to continue to trespass were alleged in para. 3, and that the defendants wrongfully claimed to be entitled to enter upon the plaintiff's land, and there to pursue and kill game and rabbits, and that they threatened and intended to repeat the acts complained of. By para. 1 of their defence the defendants, copyholders of the manor, or their tenants, admitted the plaintiff's title to the land in question. By para. 2 the defendants alleged that the copyholders of the manor in right of their respective tenements were, by the custom of the manor, entitled to the right and privileges for themselves and their tenants in occupation of such tenements to kill and take rabbits on and from the land in question by themselves or their servants, and their tenants or the servants of such tenants, and, alternatively, that the tenants of copyhold tenements for the time being had such right and privilege by virtue of their tenancy. By para. 3 the defendants alleged that the copyholders and their tenants, and the respective predecessors in title of the copyholders in their respective tenements, had exercised and enjoyed the rights and privileges aforesaid from time immemorial, and also for the respective periods of thirty and sixty years without interruption before the commencement of this action. The defendants further stated that two of them were tenants of copyholders, and two others servants of tenants of copyholders. They admitted that four of the defendants had gone on the land in question and killed rabbits, two as tenants of copyholders and two as servants of tenants of copyholders. The defendants then denied all the other allegations of the statement of claim, and then said, by para. 7:

> "Denying liability, each of the defendants brings into court the sum of 1s., and says that the same is sufficient to satisfy his liability to the plaintiff (if any) in respect of the matters complained of."

The two defendants who were tenants of copyholders delivered a counterclaim in which they repeated paras. 2 and 3 of the defence, and asked (i) for a declaration that they had in respect of their occupation of their copyhold tenement the rights and privileges therein mentioned, and (ii) an injunction to restrain the plaintiff from interfering with the enjoyment of such rights. The sum of 9s. was paid into court, and was taken out by the plaintiff, who gave notice, dated Feb. 22, 1899, that he accepted the sum paid in satisfaction "of the claim in respect of which it is paid in."

The plaintiff subsequently made the application before STIRLING, J., to strike out from the counterclaim the references to the statements in the defence on the ground that "they raise again upon the counterclaim matters already disposed of upon the claim." He submitted that the payment into court by the defendants was an admission that the plaintiff had a good cause of action as regarded the matters complained of therein, and in particular in para. 2 of the statement of claim; and, consequently, that the alleged rights in respect of which two of the defendants had counterclaimed could not be set up. In effect it was contended that when the plaintiff took the 9s. out of court the defendants ought to be regarded as having admitted the plaintiff's title to the lands free from any of the alleged rights claimed by the two defendants. The defendants, on the other hand, contended that the plaintiff was not in any way prejudiced or embarrassed, and that the 9s. paid into court was paid in in respect of the trespass and not in respect of the whole cause of action, and that the cause of action alleged in para. 3 of the statement of claim, on the one hand, and the rights alleged by the two defendants to exist, as stated in paras. 2 and 3 of the defence and repeated in the counterclaim, were still the subject of litigation between the parties. STIRLING, J., refused the application, and the plaintiff appealed.

Butcher, Q.C., and *A. à Beckett Terrell* for the plaintiff.

Duke, Q.C., and *Kerly* for the defendants, were not called on to argue.

SIR NATHANIEL LINDLEY, M.R.—This is an application by the plaintiff to strike out a portion of the defendants' counterclaim. The plaintiff is the lord of the manor. He brought an action against nine defendants for trespass and damages, and he claimed in the same action an injunction to restrain the defendants from taking game and rabbits. The defendants have put in a defence. They deny the plaintiff's right, set up a custom entitling them to take game and rabbits, in para. 7 of their defence they deny their liability, and each of them brings into court the sum of 1s. and says that the same is sufficient to satisfy his liability to the plaintiff (if any) in respect of the matters complained of. They go on to state their counterclaim. They repeat by reference their alleged custom entitling them to take game and rabbits, and they ask for a declaration that they are entitled to take game and rabbits, and for an injunction to restrain the plaintiff from interfering. That being the case, the plaintiff took out the 9s. in satisfaction. He gave a proper notice in proper time, and accepted the 9s. paid into court in satisfaction of the claim in respect of which it was paid in. Having done that, he seeks to stop this counterclaim and prevent the defendants from setting up the custom which they allege, on the ground that they must be treated as having estopped themselves by the admission they made by paying the money into court, from saying that he has no right to take it out in satisfaction. That would appear to me to be the legal effect of what has been done.

The money is paid into court under the Rules of the Supreme Court. The question in controversy turns on the true effect of Ord. 22, rr. 1 and 6. Order 22, r. 1, enables a defendant to pay money into court in one of two ways. It is confined to actions to recover debt or damages; it has nothing to do with ordinary injunctions. I do not say that it has nothing to do with this action, because this action is an action for damages as well as for an injunction. So far as it is an action for damages it is quite within a defendant's rights to pay the money into court. He pays it in in one of two ways under this rule. He can pay it in by way of satisfaction. If he does that, it shall be taken to admit the claim or cause of action in respect of which the payment is made. That is what the defendants in the present case have not done. They have paid it in under the next part of the rule, which says that, instead of paying it in in that way, a defendant may with a defence denying liability pay money into court—not a word about it being, in that case, "by way of satisfaction which shall be taken to admit the claim or cause of action." It does not say that at all. It is obvious why. It is utterly inconsistent to say that a man may deny liability and pay money into court and admit it at the same time.

If a defendant with a defence denying liability pays money into court, then it is subject to r. 6. Rule 6 says:

> "When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply: (a) The plaintiff may accept in satisfaction of the claim or cause of action in respect of which the payment into court has been made the sum so paid in, in which case he shall be entitled to have the money paid out to him as hereinafter provided notwithstanding the defendant's denial of liability, whereupon all further proceedings in respect of such claim or cause of action except as to cost shall be stayed."

What does that mean? Does that mean that the plaintiff can, by taking the money out of court, treat a denial of liability as an admission of liability? Can he force the defendant to admit that which he has strenuously denied? That appears to me to be nonsense. It means what it says. It says that, if the plaintiff likes to take the money out in satisfaction, all proceedings in the action, so far as relates to the matter in respect of which the money was paid in, are at an end. The plaintiff is not to fight it out if he likes to take it in satisfaction of all

damages. Then the action is stopped. One sees the sense of that from the plaintiff's point of view and the defendant's point of view. Each defendant in the present case says: "I am not going to admit your right, but it is not worth fighting so far as the damages are concerned. I shall pay 1s. into court, and get rid of it so far." He cannot get rid of it so far as the injunction is concerned.

Whether the plaintiff can in this action, as STIRLING, J., thinks he can, go on with a view to an injunction may be possibly a question. I should think he could, because you cannot properly pay into court as a defence to an injunction. You can only treat a payment into court as in respect of that regarding which it can be properly paid in—i.e., a claim for a debt or damages. Supposing that the plaintiff is not wrong so far as the injunction is concerned, what right has he to ask us to strike out the counterclaim and prevent the defendants in their counterclaim from setting up the custom on which they rely? It appears to me it would enable the plaintiff to put the defendants in a position which they have carefully avoided being put in. That is to say, the plaintiff is forcing upon the defendants an admission contrary to the protest of the defendants, who deny the whole thing.

I think that STIRLING, J.'s, view is right, and I do not think that the cases referred to have any bearing upon the present controversy. I cannot help thinking, so far as the working out of these rules is concerned, that the view taken by COTTON, L.J., in *Berdan* v. *Greenwood* (1) is right. That is to say, if the plaintiff goes on with this action for an injunction and he succeeds in establishing his right, why he should not get the costs of that controversy I cannot conceive. Neither can I conceive why the defendants should not, if they are right, set up the custom of this manor. To say that the custom of this manor cannot be investigated either now or hereafter because the plaintiff has taken this money in satisfaction of the claim for damages is illogical, unreasonable, and altogether wrong.

RIGBY, L.J.—I agree with all that the Master of the Rolls has said, and I shall add only a few observations of my own. First of all, I say that Ord. 22, r. 1, is confined to the case of an action brought to recover a debt or damages. It does not mean that where an action is brought to establish a right the consequences involved in r. 1 are that that right shall be established by the payment into court of money accompanied by a denial of liability. It would be very strange if it was so. I have no doubt that the money paid in here with a denial of liability was paid in in respect of the action so far as it is an action for damages. It is contrary to the whole purport of the rule to suppose that a claim of right is settled because damages in respect of a past infringement are settled by a payment in and the taking out of the money. I can see no reason why the plaintiff should not go on with his claim to an injunction, and why the defendants should not go on with their counterclaim. I consider STIRLING, J., to have been right throughout, and as regards this appeal it is dismissed with costs.

Appeal dismissed.

Solicitors: *Rowcliffes, Rawle & Co.*, for *Fulton & Pye Smith*, Salisbury; *Horne & Birkett.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

RUABON STEAMSHIP CO. *v.* LONDON ASSURANCE

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, Lord Davey and Lord Brampton), March 20, 23, November 16, December 14, 1899]

B

[Reported [1900] A.C. 6; 69 L.J.Q.B. 86; 81 L.T. 585; 48 W.R. 225; 16 T.L.R. 90; 44 Sol. Jo. 116; 9 Asp.M.L.C. 2; 5 Com. Cas. 71]

Insurance—Marine insurance—Apportionment of dock expenses—Repairs by insurers in dry dock and survey by shipowner—Liability of owner to contribute towards expenses.

C In the course of a voyage covered by a policy of marine insurance a ship sustained damage by a peril insured against, and had to go into dry dock for repairs. While she was in dock the owner took advantage of the opportunity to have her surveyed for re-classification at Lloyd's, though the time for such survey was not due. The holding of the survey did not cause the ship to be detained in the dock for any time beyond that which was necessary for com-

D pleting the repairs, nor to the cost of the use of the dock.

Held: there was no principle of law that where one person got an advantage from the act of another that other was thereby entitled to contribution towards the expense of performing the act, and, therefore, the insurers had no right to a contribution by the owner towards the expense of docking and the dock dues.

E *Marine Insurance Co.* v. *China Transpacific Co.* (1) (1886), 11 App. Cas. 573, distinguished.

Notes. Applied: *The Acanthus*, [1902] P. 17. Considered: *Carslogie Steamship Co.* v. *Royal Norwegian Govt.*, [1952] 1 All E.R. 20. Referred to: *The Haversham Grange*, [1905] P. 307; *Pyman Steamship Co.* v. *Admiralty Comrs.*,

F [1918] 1 K.B. 480; *Admiralty Comrs.* v. *Chekiang* (*Owners*), *The Chekiang*, [1926] All E.R. Rep. 114; *Morrison Steamship Co.* v. *Greystoke Castle* (*Cargo Owners*), [1946] 2 All E.R. 696

As to apportionment of dock expenses, see 22 Halsbury's Laws (3rd Edn.) 134, 135; and for cases see 29 Digest (Repl.) 286, 287.

G Cases referred to:

(1) *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1886), 11 App. Cas. 573; 56 L.J.Q.B. 100; 55 L.T. 491; 35 W.R. 169; 2 T.L.R. 857; 6 Asp.M.L.C. 68, H.L.; 29 Digest (Repl.) 287, *2166.*

(2) *Strang, Steel & Co.* v. *A. Scott & Co.* (1889), 14 App. Cas. 601; 5 T.L.R. 705; 6 Asp.M.L.C. 419; sub nom. *Steel & Co.* v. *A. Scott & Co.*, 59 L.J.P.C.

H 1; 61 L.T. 597; 38 W.R. 452, P.C.; 41 Digest 592, *4165.*

(3) *Wright* v. *Marwood* (1881), 7 Q.B.D. 62; 29 W.R. 673; sub nom. *Wright* v. *Marwood*, *Gordon* v. *Marwood*, 50 L.J.Q.B. 643; 45 L.T. 297; 4 Asp.M.L.C. 451, C.A.; 41 Digest 592, *4163.*

(4) *Burton* v. *English* (1883), 12 Q.B.D. 218; 53 L.J.Q.B. 133; 49 L.T. 768; 32 W.R. 655; 5 Asp.M.L.C. 187, C.A.; 41 Digest 596, *4218.*

I (5) *Harbert's Case* (1584), 3 Co. Rep. 11b; 76 E.R. 647; 21 Digest (Repl.) 659, *1484.*

(6) *Stirling* v. *Forrester* (1821), 3 Bli. 575; 4 E.R. 712; 26 Digest (Repl.) 143, *1048.*

(7) *Dering* v. *Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, *1065.*

(8) *Pitman* v. *Universal Marine Insurance Co.* (1882), 9 Q.B.D. 192; 51 L.J.Q.B. 561; 46 L.T. 863; 30 W.R. 906; 4 Asp.M.L.C. 544, C.A.; 29 Digest (Repl.) 291, *2200.*

Appeal from a decision of the Court of Appeal (CHITTY and HENN COLLINS, L.JJ., A. L. SMITH, L.J., dissenting), reported [1898] 1 Q.B. 722, affirming a decision of MATHEW, J., [1897] 2 Q.B. 456, at the trial of an action before him in the Commercial Court without a jury.

Cohen, Q.C., and *Montague Lush* for the appellants (shipowners).
Walton, Q.C., and *J. A. Hamilton* for the respondents (insurers).

Their Lordships took time for consideration.

Dec. 14, 1899.—The following opinions were read.

THE EARL OF HALSBURY, L.C.—The sum sought to be recovered in this case is a very small one, but the principle discussed and decided is one of very far-reaching importance, and I am unable to concur in the judgment of the majority of the Court of Appeal.

The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost or a moment to the period of time during which the execution of the repairs proceeded, and the question raised is whether the owner of the vessel is liable on any reason known to the law to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed. I notice that in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think that there is a fallacy in the employment of that word "used." He went on to his own vessel and held a survey, and I think that it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded to him by another person (the insuring company) being under contract to do that themselves which gave him an opportunity of seeing the vessel, and for which, if he had been minded to make a survey, he would have had to pay himself. But unless the phrase "using of the dock" is explained, it seems to me to be fallacious, first, to say that he used the dock, and then to infer that, as he used the dock, he is called upon to pay for it.

I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any court has a right to enforce what may seem to them to be just, apart from common law or statute. The courts, no doubt, will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense of performing that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above. I am unable to affirm that that is the condition of the common law.

The doctrine of "average" has been repeatedly held to be a rule derived from the maritime law of Rhodes. In his judgment in *Strang, Steel & Co.* v. *Scott & Co.* (2) LORD WATSON said (14 App. Cas. at p. 607):

> "The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text as preserved by PAULUS (Dig. L. 14, tit. 2) is: 'Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.'"

BRAMWELL, L.J., it is true in *Wright* v. *Marwood* (3), rested it upon an implied contract inter se to contribute by those interested. SIR WILLIAM BALIOL BRETT,

M.R., on the other hand, in *Burton* v. *English* (4), spoke of it as a right arising not from any contract at all, but from the old Rhodian laws, which had been incorporated into the law of England as the law of the ocean. It is not necessary to go minutely into the arguments arising from the difference of opinion as to the origin of the law. It is, at all events, a known principle enforceable by the courts, resting either upon positive enactment adopted into our law or from an implied contract between the parties. So LORD COKE in *Harbert's Case* (5) explains very clearly when dealing with "contribution." He says (3 Co. Rep. at p. 146):

> "Note, reader, when it is said before and often in our books that if one purchaser be only extended for the whole debt, that he shall have contribution; it is not thereby intended that the others shall give or allow to him anything by way of contribution, but it ought to be intended that the party, who is only extended for the whole, may by audita querela or scire facias, as the case requires, defeat the execution, and thereby he shall be restored to all the mean profits, and compel the conusee to sue execution of the whole land; so in this manner everyone shall be contributory, hoc est, the land of every ter-tenant shall be equally extended."

LORD REDESDALE in *Stirling* v. *Forrester* (6) said (3 Bli. at p. 596):

> "The decision in *Dering* v. *Earl of Winchelsea* (7) proceeded on a principle of law which must exist in all countries, that where several persons are debtors all shall be equal. The doctrine is illustrated in that case by the practice in questions of 'average,' etc., where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally: so it is where goods are thrown overboard for the safety of the ship, the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation."

I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties in question are bound to some third person. It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, which liability each is under an obligation to some third person to fulfil. In another part of LORD REDESDALE's observations in *Stirling* v. *Forrester* (6) his Lordship makes clear what he means by his commentary on *Dering* v. *Earl of Winchelsea* (7). He says (3 Bli. at pp. 590, 591):

> "The principle established in the case of *Dering* v. *Earl of Winchelsea* (7) is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted and one makes the payment the creditor is bound in conscience, if not by contract, to give to the party paying the debt, all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditors to exact or receive payment from one and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract but always in conscience as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound. That was the principle of the decision in *Dering* v. *Earl of Winchelsea* (7) and in that case there was no evidence of contract as in this. So in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions."

In all the cases to which I have referred, and in all the observations made by the learned judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons, except that one person has taken advantage of something that the other person has done, there being no contract between them—there being no obligation by which each of them is bound; and the duty to contribute is alleged to arise only on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down a wood which obscured his neighbour's prospect and gave him a better view, the neighbour ought upon this principle to be compelled to contribute to cutting down the wood. Or if a man built a wall so as to shield his neighbour's house from undue wet or danger from violent tempests, he ought to be entitled to contribution because the neighbour has got an advantage from what he did. I can find no authority for any principle which includes this case. The heads of "average," "principal and surety," "joint debtor," or "ownership of lands," all of which are liable in execution and only one of which has been made the subject of execution, are intelligible heads of the law, and are included within well-known and ascertainable principles. This case seems to me to go entirely beyond those ascertained principles, and for it there would appear to be no authority. No statute has authorised it; no principle of the common law comprehends it; and I am, therefore, unable to concur with the judgment of the majority of the Court of Appeal.

But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called the *Vancouver Case—Marine Insurance Co.* v. *China Transpacific Co.* (1). I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent. within the meaning of the warranty. It is necessary to observe somewhat minutely the facts of that case, in order to see whether there is anything in it which affects the question now in debate. The *Vancouver*, the vessel in question, was insured in a time policy which contained the warranty "free from average under 3 per cent." During a voyage covered by the policy she sustained certain damage not known at the time, but when some time after the owners, for their own purposes of cleaning and scraping her, put her into dock, the damage was observed then and there, and the underwriters were of course liable to make good the particular average loss for which under the policy they were liable. The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that by the accidental circumstance of the owner having put his vessel into dock, and the underwriter having thereby escaped any liability to the dock owner for dock dues, the cost of repairs to him was brought under the agreed amount of 3 per cent.

What the court had to determine was the liability under the policy in question, and with reference to that question which, be it observed, is to be measured by what the damage would cost to repair, the court held that the dock dues were part of the cost, and that under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. The owner paid the dock dues, and if he had not done so the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount paid would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and, that being measured by its cost of repair, it was held that the 3 per cent. was reached. What Lord Herschell meant is, I think, sufficiently explained

by what he says in commenting on *Pitman* v. *Universal Marine Insurance Co.* (8), as to the mode in which the particular average loss was to be arrived at in that case. He says (11 App. Cas. at p. 590):

> "All the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs, less the usual allowances."

The facts found in that case which is relied on were that the vessel was put into dry dock on Jan. 4, 1876. It was discovered on the afternoon of the same day that her stern post was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purpose for which alone she was put there by her owners, she might have been finished and discharged by the evening of Jan. 6, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from Jan. 4 to 11, when in fact she was discharged. How a mode of thus calculating the particular average loss so as to justify the contract between the two parties to it can justify such a proposition as is here insisted on, I am wholly unable either to understand or to agree to, and I think the judgment in the present case should be reversed.

LORD MACNAGHTEN.—I concur. I agree with my noble and learned friend on the woolsack that there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it, nor is there, I think, any authority to be found for the application of such a proposition, unless it is to be found in the *Vancouver Case* (1). The *Vancouver Case* (1) has been supposed to go some way in that direction in a question between shipowner and underwriter, where ship's repairs and underwriter's repairs are carried out simultaneously. But it must be borne in mind that the question for decision in that case was

> "whether a particular average loss sustained by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the appellants,"

and that (as LORD HERSCHELL was careful to point out) was the sole question for decision. It was not decided that the shipowner was liable for one half the cost of the use of the dock, including dock charges, but that the underwriter in respect of his obligation was liable at least for one half of the cost. That was enough in the particular case to give the victory to the shipowner, and in this House he could not have asked for more.

LORD MORRIS concurred.

LORD DAVEY.—I have had the opportunity of reading the opinion of my noble and learned friend LORD BRAMPTON. It expresses my opinion so much better than I could express it myself that I will not trouble your Lordships with any observations of my own.

LORD BRAMPTON.—I entirely concur in the opinion which has been delivered by the Lord Chancellor. I take the general rule to be correctly stated by LORD HERSCHELL in the *Vancouver Case* (1) (11 App. Cas. at p. 590):

> "that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances"

as the measure of his loss. I take it also as admitted that, but for the matter which I am about to mention, it would not be disputed that the respondents were liable under their policy to pay as an indemnity against the loss by perils of the sea which occurred, the full sum of £82 5s. claimed. This represents prima facie their responsibility. The respondents seek to reduce this amount by the sum of £2 5s. by reason of a survey of the ship which the plaintiffs, the owners, caused to be made by Lloyd's surveyor, during the period in which the vessel was under repair on the pontoon, which, for this purpose, I may call a dry dock. If they are right in making a reduction on this account, no question being raised as to the amount, the respondents are entitled to retain the judgment pronounced in their favour by the majority of the Court of Appeal.

Since the decision of the *Vancouver Case* (1), by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea, one of such operations being to effect repairs for the cost of which underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, neither of which operations could be performed unless the ship were drydocked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous drydocking, in such cases the cost of docking and all dock dues during the period in which the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it. I do not, however, find anything in the *Vancouver Case* (1) which would justify such a division of dock dues, unless in such cases as I have mentioned.

The present is a very different case. The *Ruaban* was drydocked solely to enable the underwriters to effect the repairs for which they were liable and with no other object, and no other repair was, in fact, done or required to be done on the ship; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to re-classification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if the vessel were afterwards surveyed to have incurred the expense of again drydocking her at the owners' expense, and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another drydocking was in this way saved, and that to that extent the owners were benefited, I think that circumstance immaterial, and it does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations.

I think that such contribution can only be insisted upon in those cases where work is done to the vessel itself by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, drydocking being necessary for each. If the respondents' claim for contribution were allowed, I see no reason why such a claim might not be made against an owner who, while his ship was in dry dock sold her, subject to immediate inspection and surveyor by his purchaser. A variety of other cases similar in character might be suggested. I think that the owners, in causing the survey to be made in this case, were taking what Lord Herschell termed "an incidental advantage" from the fact that a damage arising from a risk within the policy had necessitated repairs at the expense of the underwriter; and he puts by way of illustration the case

A of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea and docked for repairs for which underwriters were responsible, and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire time occupied in that operation should be borne by the shipowner, he adds, "if they were to be borne by him at all." This B observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship, and the survey did not in the smallest degree delay the completion or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed.

C **LORD ROBERTSON** concurred.

Appeal allowed.

Solicitors: *Botterell & Roche*, for *Vaughan & Roche*, Cardiff; *Waltons, Johnson, Bubb & Whatton.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

D

WEST OF ENGLAND FIRE INSURANCE CO. *v.* ISAACS

E

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), November 25, 1896]

[Reported [1897] 1 Q.B. 226; 66 L.J.Q.B. 36; 75 L.T. 564]

Insurance—Subrogation—Right of insurer to enforce assured's rights against third F *party—Action by assured against third party compromised—Remedy of insurer.*

The lessor of premises covenanted to insure against fire and to expend any insurance money received in making good damage by fire. The lessee covenanted to repair and insure the premises with the plaintiffs. A fire occurred and the lessee received from the plaintiffs £100 the full amount of the loss. He did G not make good the damage. The lease expired, and the lessor sued the lessee for breach of the covenant to repair. That action was compromised by the lessee paying £140 and undertaking not to sue upon the lessor's covenant in the lease. The lessor subsequently received £100 from the insurance company with which he had insured the premises.

Held: by acting as he had the lessee had put it out of his power to make any H claim against the lessor; he had thereby destroyed the plaintiffs' right to have his right of action under the covenant in the lease subrogated to them; and, therefore, they were entitled to the return of the £100 which they had paid to him.

Notes. Referred to: *Pailin* v. *Northern Employers' Mutual Indemnity Co.*, [1925] 2 K.B. 73; *Yorkshire Insurance Co., Ltd.* v. *Nisbet Shipping Co., Ltd.*, [1961] 2 All I E.R. 487.

As to subrogation, see 22 HALSBURY'S LAWS (3rd Edn.) 260-265; and for cases see 29 DIGEST (Repl.) 68, 69.

Cases referred to in argument:

Darrell v. *Tibbitts* (1880), 5 Q.B.D. 560; 50 L.J.Q.B. 33; 42 L.T. 797; 44 J.P. 695; 29 W.R. 66, C.A.; 29 Digest (Repl.) 69, *221.*

Castellain v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C.A.; 29 Digest (Repl.) 68, *219.*

Appeal by the defendant from a decision of HENN COLLINS, J., reported [1896] 2 Q.B. 377, at the trial of the action by him as a commercial cause. A

Premises were demised for a term to expire in December, 1894, by a lease which contained covenants by the lessee to repair and to yield up in repair, and to insure the premises against fire in the Royal Exchange Assurance Corporation in the joint names of the lessor and lessee. In 1885 the then lessee demised to the defendant a part of the premises, being a warehouse, for the residue of the term, less ten days. B The sublease contained covenants by the sub-lessee to repair and yield up in repair, and a covenant by the sub-lessor (lessee under the head lease) to insure the premises and to lay out the money received under any policy of insurance in making good any damage by fire, with a proviso

> "that the sub-lessee, his executors, administrators, and assigns, should remain liable, under the general covenant to repair thereinbefore contained, to make good any damage which the money received by virtue of any such insurance should be inadequate to repair." C

The lessee insured the premises in the Royal Exchange Assurance Corporation for £800. The defendant insured the premises demised to him in the plaintiff company for £800. The lease became vested in one Jones for the residue of the term. On D July 18, 1893, the premises demised to the defendant were damaged by fire. The amount of the damage was agreed to be £100 by both the insurance companies and by the defendant. On Mar. 28, 1894, the plaintiff company paid the defendant £100 in respect of the loss sustained by him by reason of the fire. The defendant did not repair the premises. The lease having expired in December, 1894, the lessor, on Jan. 9, 1895, brought an action against Jones for damages for breach of the E covenant to repair and yield up in repair, and on Jan. 19, Jones brought a similar action against the defendant. The first action was settled by the payment of £240. The second action was settled on April 4, 1895, by the defendant paying to Jones £140 in settlement of all claims for dilapidations, the defendant undertaking not to bring any action against Jones for breaches of the covenants in the sub-lease to the defendant. On April 19, 1895, Jones obtained payment of £100 from the Royal F Exchange Assurance Corporation in respect of the damage by fire. The plaintiff company then brought this action to recover £100 from the defendant, upon the ground that in the settlement with Jones he had given up a right against Jones to the benefit of which the plaintiff company was entitled. HENN COLLINS, J., gave judgment for the plaintiffs and the defendant appealed.

G

Channell, Q.C., and *Edward Pollock* for the defendant.
Cohen, Q.C., and *Wood Hill* for the plaintiffs.

LORD ESHER, M.R.—In this case a set of premises, which at one time are called a warehouse and at another time a stable, was insured against fire in two fire insurance offices, in each of them to the extent of at least £100. There has H been a fire, and in respect of that fire each of the insurance offices has paid £100. The question is whether, in that state of things, the decision of HENN COLLINS, J., in favour of the plaintiffs was right.

Many cases have been cited which go into the whole doctrine of subrogation, but this case seems to me to be capable of solution upon well-known doctrines which are not very difficult to state. What is the doctrine here, simply stated? This is an I action by the West of England Fire Insurance Co. against the defendant, who was the assured under a policy granted to him by that office. They say that he insured these premises in their office against fire; that a fire has taken place; and that the fire produced damage to the extent of £100. They do not say they were not bound to pay him; they say that they were bound to pay him upon that policy and did pay him, and, therefore, the matter was settled between them. But then they say that, if he had any remedy in respect of that fire against anybody else, if he had any right of action, inasmuch as they had paid him the whole loss, the doctrine of

insurance law is that any remedy he had against anybody in respect of that damage is subrogated to them; that they, therefore, as between him and them, had a right to have the advantage of it, and, after they had paid him the whole loss which was insured in that office, he had no right to go and deal with those claims which he might have had, but which were subrogated to them. That doctrine is not disputed.

What happened as between these plaintiffs and this defendant? They did pay him the whole sum insured in respect of this loss by fire. They, therefore, had subrogated to them any right which he might have against anybody in respect of that fire, and after they had paid him he had no right to deal with those rights which he might otherwise have had, but which now were subrogated to them. But he did deal with those rights. He had a right against one Jones, who was at that time in the position of being the lessor, in respect of a covenant contained in the lease which provided that he would insure these premises against a loss by fire, and that the lessor, if a fire occurred and the insurance money was paid, would expend that money, as far as might be necessary, in restoring the damage done by the fire. The contract between the parties at the time of this fire was that Jones had taken upon himself the fulfilment of that covenant in the lease, which had been assigned to him, and the defendant had agreed to be the tenant upon those terms. The plaintiffs paid the defendant, who was assured in their office. It seems to me impossible to doubt that they were bound to pay him. They never disputed their liability to pay him, and they paid him.

What, according to insurance law, were their rights immediately after they paid? Their rights were to have any claim, which he could make against anybody in respect of that fire, subrogated to them, or, to use another word, transferred to them; that is to say, that, according to insurance law, he was immediately bound to lend his name to them, in order that they might in his name bring any action in diminution of the loss which he could maintain against anybody. Has he interfered with that right of theirs to have subrogation? They say that he has; that he has made an arrangement or a compromise with the person against whom he had that right, Jones, so that he could not now bring any action against him; that, if he cannot bring an action against him now, he cannot subrogate that action to them; and that he has thus destroyed the right which they had to have his right of action subrogated. They contend that that is a breach of their right and of the duty he owed them, which was not to interfere with their subrogated rights.

Is it true that he has compromised the right which he had? He had a right against Jones, who was in the position of lessor to him that Jones would keep up the insurance of the premises with the Royal Exchange Assurance Corporation, the effect of which was that, in case of fire, the insurance company would pay to Jones the amount of the loss. Secondly, he had a right to say that Jones had a claim against the Royal Exchange Assurance Corporation, that they had never disputed their liability to pay, and that they had paid him in respect of the fire. That of itself would not give the defendant any right; but Jones had further covenanted that, if and when the Royal Exchange should pay him, he would spend the money in putting the premises to rights. If that had been carried out and the premises had been put to rights before the plaintiffs had been called upon to pay, according to insurance law they, who were only liable to indemnify the defendant, would have had nothing to pay to him because the loss to him, which was the loss of the premises, or of the use of the premises, would have been made good under the covenant by Jones expending the money which he had the right to receive and did receive from the Royal Exchange.

The plaintiffs say that they were entitled to that right, and that the defendant was bound to leave them to insist upon that right of his as against Jones; that is to say, his right to say to Jones that he had broken his covenant because he had received the money from the Royal Exchange and had not expended it to make good the damage. They say that, if they had been subrogated into the defendant's place, they could have sued Jones for his breach of covenant, and could have recovered

£100, the amount, as agreed by them all, of the damage by the fire. The plaintiffs assert that the defendant's interference with their rights by compromising the case and giving up his rights of action against Jones, has damaged them to the extent of £100. That is the law acted upon by the learned judge, and it seems to me that that law is perfectly right. The law is that, when two insurance companies have insured the same thing, against the same loss, they cannot both be called upon to pay. It will only be the Royal Exchange which will bear the loss. The present plaintiffs have paid £100 to the defendant and will get back their £100 from the defendant. This appeal must, therefore, be dismissed.

LOPES, L.J.—I agree.

RIGBY, L.J.—I agree. I wish to say a few words about the position of the lessor and the lessee. Under this lease there was what was called by the parties a general covenant to repair and to yield up in repair; but a special proviso was made for the case of damage by fire, and that was that the lessor should insure against damage by fire, and that he should lay out all moneys received in respect of such insurance in rebuilding or reinstating the premises so destroyed or damaged. That was an absolute covenant to spend all the moneys received, that is £100 in this instance. Then comes this proviso:

> "Provided always nevertheless that the lessee, his executors, administrators, and assigns, shall remain liable under the general covenant to repair hereinbefore contained to make good any damage which the moneys received by virtue of any such insurance shall be inadequate to repair."

That was the measure of his liability. There was none other. The liability, therefore, was for not making good the amount of damage which the £100 was insufficient to meet. This is not a case of technicalities. I do not see any difficulty in which a pleader would be. In substance the liability of the lessee to the lessor was to make good any damage that the £100 would not cover. He must get that £100 allowed, but he has so dealt with the lessor that no one can now get the £100, for he has already got the full benefit of that £100. He paid £140 without requiring that diminution of liability to which he was entitled. He so dealt with the insurance that the plaintiffs cannot have their right of subrogation, and they are entitled to recover the £100.

Appeal dismissed.

Solicitors: *W. & W. Stocken; Dawes & Sons.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

WHARTON *v.* MASTERMAN

[House of Lords (Lord Herschell, L.C., Lord Macnaghten and Lord Davey), November 27, 29, 1894, March 19, 1895]

B [Reported [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 43 W.R. 449; 11 T.L.R. 301; 11 R. 169]

Charity—Accumulation of fund—Absolute gift of capital and income—Right of charity to immediate payment of fund—Application of rule in Saunders v. *Vautier—Thellusson Act*, 1800 (39 *&* 40 *Geo.* 3, *c.* 98), *s.* 1.

C A testator, who died in 1865, bequeathed by his will certain annuities. He directed that in case the income of his trust estate should not be sufficient to pay the whole of the annuities in any year, they should abate rateably; that the surplus income, if any, should be invested; and that, after the decease of the last surviving annuitant, the trustees should convert the trust estate and stand possessed of the moneys and the accumulations in trust to divide the same among five charitable institutions. After providing for the annuities there was a large surplus income, which was accumulated and invested by the trustees.

D

Held: the rule in *Saunders* v. *Vautier* (1) (1841), Cr. & Ph. 240, that where there is an absolute vested interest made payable in a future certain event, with a direction to accumulate the interest in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest except the beneficiary, applied where the beneficiaries were charitable corporations or trustees of charities as it did to individual beneficiaries; the Accumulations Act, 1800 (the Thellusson Act) [repealed] had no application to the present case; and, therefore, the charities were entitled to stop the accumulation and have immediate payment of the fund.

E

F **Notes.** The Accumulations Act, 1800 (Thellusson's Act) has been repealed. For the law relating to accumulations see now the Law of Property Act, 1925, ss. 164, 165, 166 (20 Halsbury's Statutes (2nd Edn.) 771 et seq.).

Considered: *Re Travis*, *Frost* v. *Greatorex*, [1900] 2 Ch. 541; *Re Deloitte*, *Griffiths* v. *Deloitte*, [1925] All E.R. Rep. 118. Applied: *Re Knapp*, *Spreckley* v. *A.-G.*, [1928] All E.R. Rep. 696. Considered: *Re Jefferies*, *Finch* v. *Martin*, [1936] 2 All E.R. 626. Distinguished: *Re Blake*, *Berry* v. *Geen*, [1938] 2 All E.R. 362.

G Applied: *Re A.E.G. Unit Trust (Managers), Ltd.'s Deed*, *Midland Bank Executor and Trustee Co.* v. *The Co.*, [1957] 2 All E.R. 506. Considered: *Re Levy (deceased)*, *Barclays Bank, Ltd.* v. *Board of Guardians and Trustees for the Relief of Jewish Poor*, [1960] 1 All E.R. 42. Referred to: *I.R. Comrs.* v. *Hamilton-Russell Executors*, [1943] 1 All E.R. 474.

H As to accumulation of charitable funds, see 4 Halsbury's Laws (3rd Edn.) 302; and for cases see 8 Digest (Repl.) 442, 443.

Cases referred to:

(1) *Saunders* v. *Vautier* (1841), 4 Beav. 115; Cr. & Ph. 240; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 44 Digest 1090, *9406*.

I (2) *Gosling* v. *Gosling* (1859), John. 265; 5 Jur.N.S. 910; 70 E.R. 423; 44 Digest 563, *3812*.

(3) *Green* v. *Gascoyne* (1865), 4 De G.J. & Sm. 565; 5 New Rep. 227; 34 L.J.Ch. 268; 12 L.T. 35; 11 Jur.N.S. 145; 13 W.R. 371; 46 E.R. 1038, C.A.; 44 Digest 541, *3581*.

(4) *Eyre* v. *Marsden* (1838), 2 Keen. 564; 7 L.J.Ch. 220; 2 Jur. 583; 48 E.R. 744; affirmed (1839), 4 My. & Cr. 231; 3 Jur. 450; 41 E.R. 91, L.C.; 37 Digest 141, *681*.

(5) *M'Donald* v. *Bryce* (1838), 2 Keen, 276; 7 L.J.Ch. 173; 2 Jur. 295; 48 E.R. 634; 37 Digest 147, *728*.

(6) *Weatherall* v. *Thornburgh* (1878), 8 Ch.D. 261; 47 L.J.Ch. 658; 39 L.T. 9; 26 W.R. 593, C.A.; 37 Digest 146, *724*. A

(7) *Talbot* v. *Jevers* (1875), L.R. 20 Eq. 255; 44 L.J.Ch. 646; 23 W.R. 741; 37 Digest 150, *756*.

Also referred to in argument:

Re Parry, Powell v. *Parry* (1889), 60 L.T. 489; 37 Digest 148, *743*. B

May v. *Wood* (1792), 3 Bro. C.C. 471; 29 E.R. 649; 44 Digest 1061, *9138*.

Goodtitle d. Hayward v. *Whitby* (1757), 1 Burr. 228; 1 Keny. 506; 97 E.R. 287; 44 Digest 1047, *9018*.

Hanson v. *Graham* (1801), 6 Ves. 239; 31 E.R. 1030; 44 Digest 1087, *9382*.

Dundas v. *Wolfe Murray* (1863), 1 Hem. & M. 425; 32 L.J.Ch. 151; 71 E.R. 185; 1 New Rep. 429; 11 W.R. 359; 44 Digest 1100, *9500*. C

Love v. *L'Estrange* (1727), 5 Bro. Parl. Cas. 59; 2 E.R. 532, H.L.; 44 Digest 1054, *9063*.

Appeal from a decision of the Court of Appeal (Lindley, Kay, and A. L. Smith, L.JJ.), reported, sub nom. *Harbin* v. *Masterman*, [1894] 2 Ch. 184.

The bill was filed in April, 1865, by the executors of J. F. Duncan, who died in January in that year, for the administration of his estate. The material provisions D of the will of the testator, which was made in 1860, appear in the opinion of the Lord Chancellor (infra). The personal estate amounted to nearly £26,000, and there was a large surplus income after providing for the annuities bequeathed by the will. The case came before Wickens, V.-C., in 1871, and he decided (L.R. 12 Eq. 559) that the charities were entitled to the whole of the residuary estate, not only to £100 each, and to the surplus which had accumulated, amounting at that E time to about £8,000, but he declined to give any direction as to future accumulations, expressing some doubt whether the doctrine of *Saunders* v. *Vautier* (1) applied to a gift to a charitable institution. The next of kin, who had not been parties to these proceedings, now petitioned that the accumulations which had accumulated after the lapse of twenty-one years from the death of the testator should be paid to them. Stirling, J., decided against them, holding that the doctrine of *Saunders* v. F *Vautier* (1) applied, and the Court of Appeal affirmed his judgment, and also that of Wickens, V.-C., from which the next of kin had obtained leave to appeal also. They appealed to the House of Lords.

Crackanthorpe, Q.C., Hopkinson, Q.C., and *T. Ribton* (*Graham Hastings, Q.C.*, with them) for the next of kin. G

Cozens-Hardy, Q.C., Buckley, Q.C., and *Dickinson* for the charities named in the will.

Their Lordships took time for consideration.

Mar. 19, 1895. The following opinions were read.

LORD HERSCHELL, L.C.—The first question which arises in this case is H whether the charities named in the will of John Francis Duncan are entitled (subject to annuities which he thereby created) to the residue of his estate, or only to the sums specified in his will in connection with each of the charities. The ultimate trust of the residue is in these terms:

"In trust to pay and divide the same unto the several public charities hereinafter named according to the amounts set after their respective names—that is to say, to the treasurer for the time being of an institution known by the name of the London Orphan Asylum for the reception and education of destitute orphans established in London, £100; to the Public Dispensary, Carey Street, near Lincoln's Inn, £100; to the Royal Free Hospital, Gray's Inn Road, £100; to the King's College Hospital in Carey Street, Lincoln's Inn, £100; and to an institution under the patronage of the late Lord Mayor of London, Alderman Wire, the sum of £100 for the benefit of persons afflicted with paralysis." I

A The matter came before WICKENS, V.-C., for decision in 1871. He held that the charities had made good their claim to be residuary legatees of the testator's personal estate, and not merely legatees of five sums of £100 each. The Court of Appeal refused to disturb that finding, and I see no reason to differ from the view hitherto taken. The trust being

B "to pay and divide the residue unto the several charities hereinafter named according to the amounts set after their respective names,"

it seems to me impossible to suppose that the testator intended to limit their rights to the specific sums mentioned. The only reasonable constructioin is, I think, that which has been put upon the clause.

C The other questions raised by the next of kin, who are the present appellants, are not so simple. The testator directed the surplus income of his residuary estate, after satisfying the annuities which he provided for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon the trust, the terms of which I have quoted. Some of the annuitants are still living. It is contended for the appellants that they, as next of kin, are entitled to

D all the accumulations which have accrued subsequently to the period for which, under the provisions of Thellusson's Act, accumulation could lawfully be directed. It has first to be determined whether, upon the true construction of the will, the surplus income accumulated and the interest accruing from these accumulations, when invested, were charged with the payment of the annuities. This depends, of course, upon the intention of the testator, to be derived from the language used in

E his will. He bequeaths to trustees all the residue of his personal estate, which he thereafter calls "the said trust moneys, stocks, funds, and securities," and directs them, "from and out of the annual income of the said trust moneys, stocks, funds, and securities," to pay the annuities which he specifies, subject to a proviso in the following terms:

F "Provided always that in case the annual income of the said trust moneys, stocks, funds, and securities shall not be sufficient, for the payment of the whole amount of the said annuities, then it is my will and desire, and I direct my said trustees or trustee, when and as often as the same shall happen, to apportion the defficiency between and amongst the said annuitants according to the amount of their respective annuities and so as that the same shall rateably abate accordingly."

G Then follows a further trust:

"In every year after my decease to invest the surplus income, if any, of the said trust moneys, stocks, funds, and securities, and from and after the decease of the survivor of the annuitants to convert into money all such parts

H of the said trust moneys, stocks, funds, and securities, and the accumulations thereof respectively as shall not consist of cash, and to stand possessed of the money to arise from the conversion, and also such parts of the trust moneys, stocks, funds, and securities, and the accumulations thereof as shall consist of cash, upon trust to pay and divide them amongst the charities named."

I Having regard to the language used, I do not think it is possible to hold that the annuitants have any claim to be satisfied out of the accumulations of surplus income. But for the provision for abatement it might have been contended (and probably successfully contended) that such a right existed, but it seems to me to be expressly excluded by the abatement clause. It is true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word "accumulation" in the clause which precedes the ultimate trust; but whether this be so or not, I think that the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it

results. For these reasons it appears to me that the charities have a vested interest in the surplus income, and the accretions resulting from the investment of that surplus income. The testator, however, undoubtedly intended to postpone the enjoyment of his bounty by these beneficiaries until the death of the last annuitant. The courts below have, notwithstanding this, determined that the beneficiaries are entitled to the immediate enjoyment of all that is not made by the will subject to the payment of the annuities. This is, to my mind, the only point of any difficulty.

The courts proceeded on the doctrine acted upon in *Saunders* v. *Vautier* (1), which has been since often recognised. WOOD, V.-C., in *Gosling* v. *Gosling* (2), expounded the doctrine thus (John. at p. 272):

> "The principle of this court has always been to recognise the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age, unless during the interval the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy, the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years."

The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period. It is needless to inquire whether the courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognised that it would not be proper now to question it. WICKENS, V.-C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders* v. *Vautier* (1) was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries. I concur, therefore, in the conclusion at which the courts below arrived. The Thellusson Act has, in my opinion, for the reasons given, no application to the case. I think the judgment should be affirmed, and the appeal dismissed, with costs.

LORD MACNAGHTEN.—I am of the same opinion. It seems to me that the order of the Court of Appeal is perfectly right. As regards the construction of the testator's will, I do not think that there is any difficulty. The five charities are clearly the testator's residuary legatees. The gift to them is awkwardly expressed. The awkwardness, however, I think arises merely from the fact that in the result they are found to take equally, though the will appears to have been prepared with a view to an unequal distribution. It may be that, when the instructions for the will were given, the testator had not finally determined the shares in which the ultimate objects of his bounty were to take, and that he wished to leave the matter open till

A the last moment. But however that may be, there is only one result which can be brought out from the language which the testator has used. Then I think that the testator's will shows an anxious desire that the annuities should only be paid out of the income accruing from year to year on the corpus or capital of the testator's residuary estate as it subsisted at the time of his death. The intention seems to have been that the accounts should be closed at the end of each year. If there B was a deficiency the annuitants were to bear the loss, and the annuities were to abate rateably. If there was a surplus the surplus was to be put aside for the benefit of the residuary legatees. Under no circumstances, as it appears to me, were the annuitants to be at liberty to resort to the income of a future year for the purpose of making good a past deficiency. At the same time it is clear, on the face of the will, that the testator did not mean the residuary legatees to receive any part of C what the will gives them until the death of the last annuitant. If the residuary legatees were individuals, there could not be the slightest doubt that they would be entitled to call upon the trustees to hand over to them, at the end of each year, the surplus income of the testator's residuary estate. Does the fact that the residuary legatees are charities make any difference? Notwithstanding the doubt expressed by WICKENS, V.-C., when the case was before him in 1871, I do not think that it D does. The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible; and they may legally apply what they take under the bequest either as capital or as income. That being so, I agree with the reasoning of STIRLING, J., and the Court of Appeal. In regard to the questions which have arisen on this will, I am unable to see any substantial distinction, between the case of an incorporated charity and a charity not incorporated, E or between the case of a charity and an individual.

LORD DAVEY (read by LORD WATSON).—This case arises on the will of a testator named John Francis Duncan, who died on Jan. 1, 1865. The contest is between the conflicting claims of the testator's next of kin and those of five charitable institutions F named in his will to the accumulations of the surplus income of the testator's residuary estate subsequent to Jan. 1, 1886, being the expiration of twenty-one years from his death, and the accruing surplus income until the death of the surviving annuitant named in the will, and also to the capital of the estate on the expiration of that period. I observe from the proceedings in the suit that two of the annuitants were infants on May 25, 1868, so that, on a moderate estimate of probabilities, the G period in question may extend some way into the next century. The case came originally before WICKENS, V.-C., in the year 1871. At that time, however, the next of kin had not been ascertained and their present claims were represented by the Crown. The next of kin have since been ascertained, and are the appellants at your Lordships' bar. The Court of Appeal (affirming the judgment of STIRLING, J.) have decided (i) that the five charities are entitled to, and when the charge of the annuities H on the income has run off will be able to receive, the corpus of the residuary estate; (ii) that the annuities are charged only on the annual income of the estate de anno in annum, and that the annuitants have no right to have the deficiency of the income of any one year to pay their annuities made good out of the accumulations of the surplus income of past years; (iii) that the surplus income of each year is given away to other objects free from any claim of the annuitants; (iv) that what is known I as the rule in *Saunders* v. *Vautier* (1) is applicable where the donees, or legatees, are charities, as where they are individuals.

On the first point your Lordships did not think it necessary to call upon the respondents' counsel. All the judges before whom this case has come, including the late WICKENS, V.-C., have held that the will contains a gift of the capital of the estate to the charities, and that they are not confined to £100 each. I agree in that conclusion, and I have nothing to add to the reasons given in the courts below and what has been said by your Lordships. The next point is one of construction also. The testator gives the residue of his personal estate to trustees upon trust either to

permit the said residue, thereinafter called "the said trust moneys, stocks, funds, and securities," to remain in the state of investment in which the same might be at the time of his death; but, if absolutely necessary, to vary the same, or any part thereof, into or for others of the same or a like nature. I agree with the argument of the respondents that the trust fund so constituted consists only of the capital funds which formed the residue of his estate as at the time of the testator's death, and does not include any subsequent income, or income of accumulations. The testator then declares the trusts of the annual income of his "said trust moneys, stocks, funds, and securities," first to pay a legacy of £100, then to pay an annuity of £500 to his wife during her life by half-yearly payments, the first of such payments to be made six months after his decease, showing that it is the income of the estate from his death that he is dealing with, and another annuity of £50. Then he directs that after his decease the following annuities be paid, and names a number of annuitants.

Pausing there, it might be contended consistently with well-known authorities that the annuities are charged upon the capital, or at any rate upon the income of every year until they are satisfied. But then comes the abatement clause, which it is unnecessary to read again. This clause points to a recurring deficiency, "when and so often as the same shall happen," and it appears to me to negative any charge upon the corpus of the estate, or upon any surplus income of past years, or right to resort to the accumulations of such surplus income to make good the deficiency in any year. Whether it does not also negative any right to resort to the income of any future year to make up the deficiency of past years it is immaterial to consider, as it would only affect the amount of what is called the "surplus income," and the question does not arise.

The will then proceeds in these words,

> "and upon further trust that they my said trustees or trustee do and shall in every year after my decease invest the surplus income, if any, of the said trust moneys, stocks, funds, and securities, whether such surplus shall arise from the falling in or determination of any annuity, or otherwise."

After the decease of the survivor of the annuitants he directs a sale of such part of the trust moneys, stocks, funds, and securities, and the accumulations thereof, as shall not consist of cash, and give the proceeds, and also such part of the said trust moneys, etc., and the accumulations thereof as shall consist of cash, upon trusts which, as I have said, import a gift to the charities. In this will I am of opinion that the testator has carefully confined the rights of the annuitants to the annual income accruing de anno in annum of his capital residuary estate, and has dealt with the surplus income in each year as it accrued, upon different trusts, and as a distinct subject of gift. It is said that the will contains no direction to invest the income of the investments of the surplus income. There is no express direction, but, in my opinion, there is an implied direction to be found as well in the use of the word "accumulation," which in this connection imports a continuous process of rolling up, as in the general rule of equity which imposes upon trustees the duty of investing trust funds in their hands, of which the testator has not directed an immediate disposition. And I think that the accumulations comprise the whole fund created by the investment and re-investment by way of compound interest of the surplus income, and the income derived from it.

It is, however, suggested at the Bar that the income of investments of surplus income falls back into the original trust fund, and follows the destination of the income of it, and is, therefore, subject to a trust for the annuitants. In my opinion, this is not so. When there is no express trust declared of the income of a trust fund, it follows the destination of, and is an accretion to, the fund from which it is derived, unless there be words excluding that implication. But the source of the income in question is the investments of the surplus income, so that, even if it be not impliedly given by force of the term "accumulations," it would go in the same

way as the investments of the surplus income, that is, to the charities. I am, therefore, of opinion that the annuitants have no charge upon the surplus income or the investments of it, or the income derived from such investments, all of which, I think, are included in the accumulations, and the charities have a vested title free from any claim by any other person to the surplus income; but, according to the directions of the will, their enjoyment is postponed to the death of the survivor of the annuitants, and an accumulation is directed in the meantime.

This being so, the principle of *Saunders* v. *Vautier* (1) would at once be applicable if this were the case of a gift to an individual. That principle is this: that where there is an absolute vested interest made payable at a future certain event, with a direction to accumulate the interest in the meantime and pay it with the principal, the court will not enforce the trust for accumulation in which no person has any interest but the legatee; or, in other words, the court holds that the legatee may put an end to an accumulation which is exclusively for his benefit. The principle is stated, as well as elsewhere, by WOOD, V.-C., in the passage from his judgment in *Gosling* v. *Gosling* (2). There is no condition precedent to happen or to be performed in order to perfect the title of the legatees, and there is no other person who has any interest in the execution of the trust for accumulation, or can complain of its non-execution.

The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest. But it is said that there is a difference in the case of charities, and although there is no authority on the point, WICKENS, V.C., expressed some doubt upon it when it came before him in 1871. What he said was this:

> "But having regard to the form of the will, though the annuities are carefully secured, I do not think I can order a division of the fund at present. If the residuary legatees were five individuals I should probably do so, there being nothing in the Thellusson Act to prevent it. But the legatees being charities, am I entitled to stop the accumulation? If a sum of money be given to be accumulated, say for ten years, and then to a charity, is the charity, whether corporate or unincorporate, entitled to claim the money at once? There may be sound reasons for deferring the enjoyment. A testator may think that the charity has a certain provision during the present generation of subscribers, and that it will not want any additional provision. And it is obvious that, though the charity remains the same, yet, if the gift is to take effect ten years hence, a different class of persons will be benefited. It does not appear that all these charities have perpetual existence, but the distinction between an incorporated and unincorporated charity is too refined to be relied on."

Your Lordships, will, I am sure, regard any dictum, or even doubt, expressed by WICKENS, V.-C., on a subject of this kind with the greatest respect and attention. But I must confess that I do not, on the fullest consideration, find sufficient grounds for the Vice-Chancellor's doubt. It is easy, of course, to speculate on the testator's motives in postponing the enjoyment of a vested interest, and it is at least as easy to suggest motives for such a direction in the case of an individual as in the case of a charity. Nor can the possible difference in actual recipients of the testator's bounty make any distinction. An individual may die or become bankrupt during the period of accumulation. It is difficult to attribute to the testator a particular regard for the object of the charity, it may be in the middle of the next century, or respect for the persons who may then be the trustees or the managers of the charity. And I think it unsound to make the application of a canon of construction as to the effect of particular words in a will dependent on circumstances affecting the quality or character of the donee. It will be observed that, in the present case, the gift is to each charity in a form which would enable the managers to spend the amount as income, or deal with it as they might think fit. We have not to deal with

a fund to be created by accumulations and settled as a capital endowment at a future time, as to which different considerations would arise. A

I am, therefore, of opinion that there is no effective direction for accumulation of any part of the surplus income in this will, and, therefore, the Thellusson Act has no application to it, and the judgment of the Court of Appeal should be affirmed. The appellants' counsel indeed argued that the charities might be entitled for the twenty-one years after the testator's death, but that in consequence of the Thellusson Act, the subsequent surplus income was undisposed of. I find a difficulty in grasping the argument, because the Thellusson Act does not give anything to anybody, but merely vitiates the direction for accumulation beyond the prescribed period. But the conclusive answer is that, if there is no effective or enforceable direction for accumulation independently of the Act, then the Act has no application to the case. The cases cited by counsel for the appellants do not seem to me to support his argument. They are cases in which the class could not be determined until the happening of the event upon which the fund was made payable, as in *Green* v. *Gascoyne* (3); or the shares of the legatees, though vested, were liable to be defeated by the happening of some event before the time for payment, as in *Eyre* v. *Marsden* (4); or the gift itself was contingent upon the happening of an event, such as the death of a person without male issue, as in *M'Donald* v. *Bryce* (5). B C D

In *Weatherall* v. *Thornburgh* (6), the fund and accumulations were made a security for the payment of certain legacies on the happening of the given event, and the persons claiming were, therefore, only entitled to an undetermined and uncertain surplus, if any, which might be left of the fund after payment of the legacies. This is the ground stated by COTTON, L.J., and I think by JAMES, L.J., also. In *Talbot* v. *Jevers* (7) the annuities were clearly charged by the words of the will on the whole estate, capital and income, and the accumulation was directed only for a stated period, "or so much of it as the law will allow." There was, therefore, on the face of the will, no disposition of the intermediate surplus income after the expiration of the twenty-one years. The doctrine of *Saunders* v. *Vautier* (1) did not apply, because the annuitants had an interest in the income, and, according to the scheme of the will, the residuary legatees could not take it except in the form of accumulations. I think that the decision of BACON, V.-C., can be supported on this ground. In the view which I take of the case it is unnecessary to express any opinion on the point which was argued that, even if the annuitants had a charge on the income derived from investments of the surplus income, and the doctrine of *Saunders* v. *Vautier* (1), were, therefore, excluded, the charities would still be entitled to the surplus income after the expiration of the twenty-one years under the words of the Thellusson Act. I agree with your Lordships that the appeal shall be dismissed with costs. E F G

Appeal dismissed.

Solicitors : *Hood-Barrs & Co.; Winter & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

HARBIN *v.* MASTERMAN

[Court of Appeal (Lindley, A. L. Smith and Rigby, L.JJ.), December 9, 10, 16, 1895]

B [Reported [1896] 1 Ch. 351; 65 L.J.Ch. 195; 73 L.T. 591; 44 W.R. 421; 12 T.L.R. 105]

Annuity—Residue—Annuity charged on residue—Payment of annuity secured—Ample sum set apart—Distribution of residue.

When ample provision has been made, by a sufficient sum being set apart, to secure the payment of an annuity which is given by the will of a testator and C charged on residue, the court in the administration of the estate has jurisdiction to order the residue to be distributed among the residuary legatees, and this course will be adopted even in a case where the annuitant opposes.

Solicitor—Misconduct—Appeal brought, not in interest of client, but to benefit himself—Costs between himself and client disallowed—Order for payment to client of costs of unsuccessful appeal—R.S.C., Ord. 65, *r.* 11.

D A solicitor brought to the Court of Appeal an appeal from the decision of a judge of the Chancery Division, not in the interest of his client, but to benefit himself by enabling him to impose terms on the respondents to the appeal which would relieve him from a personal undertaking into which he had entered to pay certain costs. He informed his client that he would "take the burden of the appeal on myself and at the same time any benefit." The appeal having been E dismissed,

Held: the solicitor had incurred costs "improperly and without any reasonable cause" within R.S.C., Ord. 65, r. 11, and the court would order that such costs should be disallowed between him and his client and that he should repay to his client any costs which the client had been ordered to pay to the respondents to the appeal.

F

Notes. Applied: *Re Earle, Tucker* v. *Donne* (1923), 131 L.T. 383. Referred to: *Re Evan's and Bettell's Contract*, [1908-10] All E.R. Rep. 202; *Re Coller's Deed Trusts, Coller* v. *Coller*, [1937] 3 All E.R. 292; *Re Blake, Berry* v. *Geen*, [1938] 2 All E.R. 362; *Reid* v. *Coggans or Reid*, [1944] 1 All E.R. 134; *Re Cassel's Will Trusts, Public Trustee* v. *A.-G.*, [1946] 1 All E.R. 704.

G As to the payment of annuities on the administration of an estate, see 16 Halsbury's Laws (3rd Edn.) 319, 320; and for cases see 23 Digest (Repl.) 404-407. As to a solicitor's liability to pay costs, see 36 Halsbury's Laws (3rd Edn.) 198-201; and for cases see 42 Digest 337 et seq.

Case referred to:

H (1) *Fryer* v. *Buttar* (1837), 8 Sim. 442; 59 E.R. 175; 23 Digest (Repl.) 405, *4760*.

Also referred to in argument:

Re Parry, Scott v. *Leak* (1889), 42 Ch.D. 570; 61 L.T. 380; 38 W.R. 226; 23 Digest (Repl.) 405, *4761*.

Saunders v. *Vautier* (1841), Cr. & Ph. 240; 4 Beav. 115; 10 L.J.Ch. 354; 41 E.R. 482, L.C.; 23 Digest (Repl.) 403, *4745*.

I *King* v. *Malcott* (1852), 9 Hare, 692; 22 L.J.Ch. 157; 19 L.T.O.S. 19; 16 Jur. 237; 68 E.R. 691; 23 Digest (Repl.) 372, *4419*.

Slanning v. *Style* (1734), 3 P. Wms. 334; 24 E.R. 1089; sub nom. *Stanway* v. *Styles*, 3 Eq. Cas. Abr. 156, n., L.C.; 27 Digest (Repl.) 105, *776*.

Weatherall v. *Thornburgh* (1878), 8 Ch.D. 261; 47 L.J.Ch. 658; 39 L.T. 9; 26 W.R. 593, C.A.; 24 Digest (Repl.) 956, *9669*.

Prendergast v. *Lushington* (1846), 5 Hare, 171, L.C.; affirmed sub nom. *Prendergast* v. *Prendergast* (1850), 3 H.L.Cas. 195; 14 Jur. 989; 10 E.R. 75, H.L.; **43 Digest 930**, *3677*.

May v. *Bennett* (1826), 1 Russ. 370; 38 E.R. 144; 23 Digest (Repl.) 429, *4996*.
Booth v. *Coulton* (1870), 5 Ch. App. 684; 39 L.J.Ch. 622; 18 W.R. 877, L.J.; 39 Digest 148, *419*.
Boyd v. *Buckle* (1840), 10 Sim. 595; 59 E.R. 746; 39 Digest 145, *401*.
Simmons v. *Bollard* (1817), 3 Mer. 547; 36 E.R. 210; 24 Digest (Repl.) 660, *6491*.

Appeal from an order made by STIRLING, J., on a petition brought by charities, beneficiaries under a will, for the payment to them of funds in court.

By his will, dated July 5, 1860, John Francis Duncan, after making certain dispositions not material to be mentioned, bequeathed all the residue of his personal estate to trustees upon trust that they should either permit the moneys, stocks, funds, and securities constituting the same, to remain in their then state of investment, or to vary them, and to pay certain annuities therein mentioned. The testator then directed that in case the annual income of the trust funds should not be sufficient for the payment of the whole amount of the annuities in any year, the trustees, when and so often as the same should happen, should apportion the deficiency between and among the annuitants according to the amount of their respective annuities, so that the same should rateably abate accordingly. The testator then directed that the trustees should, in every year after his decease, invest the surplus income, if any, of the trust funds whether such surplus should arise from the falling in or determination of any annuity or annuities thereinbefore given or otherwise, and from and after the decease of the survivor of the annuitants should sell, dispose of, and convert into money all such part of the trust funds (and the accumulations thereof respectively as should not actually consist of cash), and stand possessed of the moneys to arise from such sale, disposition, and conversion, and also of such part of the trust funds and the accumulations thereof respectively as should not consist of actual cash, in trust to pay and divide the same among a number of specified charities. The testator died in January, 1865.

In April, 1865, a bill was filed by his executors for the administration of his estate. The suit came on upon further consideration before WICKENS, V.-C., on July 12 and 14, 1871, when the learned Vice-Chancellor, without deciding as to the future rights of anyone to the accumulations, decided (L.R. 12 Eq. 559) that the charities were entitled to the whole of the surplus in equal shares, but that the accumulations, as directed by the will, must continue until further order. A petition was subsequently presented by the next of kin of the testator, asking whether they were entitled to the accumulations which had arisen since the expiration of twenty-one years from the death of the testator, and if so, whether they were entitled to require immediate payment thereof. It was decided by STIRLING, J. (and his decision was affirmed by the Court of Appeal, and ultimately by the House of Lords), that the charities, not the next of kin, were entitled to the whole of the accumulations of income, and to have the accumulations stopped, and to be paid the surplus income of each year as it accrued.

By an order made at chambers on June 9, 1894, upon the application of one of the charities, all the annuitants except one—Mrs. Venables, entitled to an annuity of £150—by their solicitors consenting to accept the provision made by the order for their respective annuities in full satisfaction thereof, and the charities by their solicitors also consenting, it was ordered that the funds in court should be dealt with as directed in the schedule to the order, but that when any of the annuities provided for in such schedules should fall in, regard was to be had in apportioning the entire funds on such accounts respectively not only to the directions contained in the order of July 12, 1871, as to apportionment, but also to the fact that the funds carried over by this order were wholly derived from pure personalty; and by the schedule certain funds were carried over to the account of the several annuitants. The charities then petitioned for the payment of the funds in court to them, other than the sums set apart to answer the annuities. Mrs. Venables alone opposed on the ground that the whole of the funds ought to remain in court during her life. In June, 1895, the petition came on to be heard before STIRLING, J., who ordered the

A residue to be distributed subject to £8,000 being set aside to meet Mrs. Venables' annuity. Mrs. Venables appealed. The charities mentioned in the will were respondents to the appeal.

Graham Hastings, *Q.C.*, and *Johnston Edwards* for Mrs. Venables.
Fischer, *Q.C.*, and *Samuel Dickinson* for the London Orphan Asylum.
B *H. Fellows* for the Royal Free Hospital.
Hadley for King's College Hospital and the Public Dispensary.
Buckley, *Q.C.*, and *T. B. Napier* for the National Hospital for the Paralysed and Epileptic.

Cur. adv. vult.

Dec. 16, 1895. The following judgments were read.

C **LINDLEY, L.J.**—In this case there is an appeal, nominally in the name of Mrs. Venables, against an order made by STIRLING, J., directing certain funds to be paid over to some charities, which are residuary legatees. The direction for distribution is made although there is an annuity, charged upon the residuary estate, and still payable to Mrs. Venables. Under orders to which I need not refer, a sum of D £8,000 in Consols has been set apart to answer Mrs. Venables' annuity. The amount of that annuity is £150 a year. In the judgment of STIRLING, J., that was an ample sum to be set apart to provide for the annuity, and the annuitant's counsel did not really contend the contrary. It is obvious upon consideration, having regard to the age of the lady and the amount of the annuity, that £8,000 is quite ample. But her counsel argued that STIRLING, J., had no jurisdiction to order the E residuary estate to be divided, inasmuch as Mrs. Venables' annuity was charged upon the whole residuary estate. His point was that the annuity had not been paid and would not be paid until Mrs. Venables' death, and that on the terms of the will there was no jurisdiction in the court to order the residuary estate to be distributed until after her death. According to the strict language of the will, that, no doubt, is so.

F What is the meaning of a will which charges a residuary estate with a legacy or several legacies, and then directs that upon the death of the annuitants the residue is to be divided? As between the annuitants, on the one hand, and the residuary legatees, on the other, it is a gift of the residue subject to the payment of the annuities, and if the annuities are released, or ample provision is made for the payment of those annuities, it has been the invariable practice of the court to let the residuary G legatees have what is theirs. But the division is subject to an ample provision for the payment of the annuities. I confess that it took me by surprise to be told that there was no jurisdiction to make any such order as is asked for here, and that the court had never done it in face of opposition. That the court has been in the habit of doing it ever since LORD TALBOT'S time is obvious from the cases. Speaking from my own recollection—and my brother RIGBY confirms me—it has been done scores H of times. But we are not prepared to say that we recollect a case where it was done in spite of opposition. Here the opposition is an opposition of a dog-in-the-manger kind, there being ample to provide for the annuity of Mrs. Venables. Counsel for one of the charities, the London Orphan Asylum, referred us to a great many authorities which supported that view of the practice of the court, and, in addition to those decisions which have been cited, there are one or two more. There is more I particularly *Fryer* v. *Buttar* (1), which I will name without going through it. But there was considerable opposition there, although not actually to the distribution of the ultimate residue. The view taken by STIRLING, J., in the present case is the common-sense view, and it is, as I have already said, supported by the uniform practice of the court, and that is to let the residuary legatees have what is theirs, subject to setting aside a sufficient amount for the payment of the annuities. If in some unforeseen event it should become necessary for the annuitant to have recourse to the capital so set apart, she would be entitled to do so. But to suppose it is conceivable in any case, except the insolvency of the country, which is a contingency

the court never contemplates, that she will not be paid her annuity in full is perfectly idle.

So far there is no difficulty, and it was not because any of us felt a difficulty that we omitted to give judgment when the argument was concluded. But there was a question that occurred to us about the costs of this appeal which required care, and I will now say what I have to say about that point. The appeal will be dismissed with costs. But in these cases there is always a discretion in the Court of Appeal as to the orders it ought to make with reference to the question of costs, and I think the court is bound to see that its orders are not necessarily oppressive. It appears to me that in this case there was no sensible reason for all parties appearing by separate solicitors. It is well known that only two counsel on each side can be heard here. I think it would be oppressive to allow more than one set of costs. What I am prepared to do (and my colleagues agree with me) is to exercise our discretion on this occasion and give the costs to the party who has the conduct of the cause. There will be one set of costs to be paid by the annuitant and the others must pay their own costs. They are perfectly justified in employing their own solicitors if they like, but this is not a case where it was necessary for five sets of counsel to be instructed in order to protect the rights of the residuary legatees.

It appeared to us that this appeal could not have been bona fide brought by, or in the interest of, Mrs. Venables, and we took upon ourselves the responsibility of communicating with the Official Solicitor and directing him to see Mrs. Venables to ascertain whether this appeal was brought by her, and in her interest, she understanding that there was amply sufficient in court to provide for her annuity. We have ascertained that this appeal is really the appeal of her solicitor, Mr. Hood-Barrs, in her name. The Official Solicitor has given us a letter purporting to be signed by Mr. Hood-Barrs, which is to this effect that it is his appeal, that he intends fighting this case to the House of Lords, and that he is to have the benefit of the appeal, if there is any benefit. Under those circumstances it does strike us that it is for him to show us why we should not make an order that he should pay the costs.

A. L. SMITH, L.J.—I entirely agree.

RIGBY, L.J.—I also agree.

Mr. Hood-Barrs addressed the court.

LINDLEY, L.J.—We have now to consider whether this is a case in which an order ought to be made against Mrs. Venables' solicitor in person to indemnify his client against the costs of this appeal. We know now from Mr. Hood-Barrs' own statement the whole history of this case, and what this appeal is really for. It is now perfectly obvious that the suspicion which we had, when counsel first addressed us on the merits, is well founded—that this appeal cannot be fairly or properly regarded as an appeal brought in the interests of Mrs. Venables, but the object of the appeal is to compel the charities to come to some terms with Mr. Hood-Barrs, especially with respect to certain costs, as to some of which he has given his own personal guarantee. That explains his letter to Mrs. Venables which he admits is correct, and two passages of which I will read. He says :

> "With regard to the appeal about which I wrote you, as I have said, you will incur no liability whatever. Whatever liability there is will be with me. I hope ultimately to get a settlement of the appeal which will be beneficial to me"—

that is, I will take the burden of the appeal on myself and at the same time any benefit. That expresses in a few words the real truth of the matter. It is perfectly obvious to us that, although Mrs. Venables has so far authorised and approved of

this appeal as to render her responsible for the costs, yet, when we come to look at the matter as between her and her solicitor, it is equally obvious that she is a mere puppet in his hands, and that this appeal is brought by him for his own purposes and not in the interests of Mrs. Venables at all.

Mr. Hood-Barrs has thought proper to cast aspersions on the conduct of the Official Solicitor. All that I can say is, that we are responsible for his going to Mrs. Venables. We were convinced—or, at all events, strongly of opinion—that this appeal was not an appeal brought by her in her interests—in other words, we did not believe that the real object of this appeal was its apparent object, namely, to get for her a better security for her annuity. It was quite obvious that it was our duty, having that opinion, to take care that a suitor of the court was not made liable for considerable costs for a purpose with which she had nothing whatever to do. I think that not only were we justified, but that we should have failed in our duty if having that view we did not investigate the matter by sending the Official Solicitor to inform us more about it. The Official Solicitor goes as the officer of the court; he is not a solicitor for the client—nothing of the sort. He has performed his duty in a way that at least has given us perfect satisfaction. We should be failing in our duty if we did not apply to this case the power which is to be found in R.S.C., Ord. 65, r. 11:

> "If in any case it shall appear to the court or a judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the court or judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, . . ."

If there ever was a case in which that order ought to be applied, this is one. The charge against Mr. Hood-Barrs, which he has proved up to the hilt by his own statement, is, that this appeal is not brought for the benefit of his client, but that it is brought for the ulterior purpose of benefiting himself by compelling these charities, if he can, to come to some arrangement with him which they are not in the least bound to do, and which he has no right to impose. It is very nearly, if not quite, justifiable to say that it is a blackmailing appeal. As to the form of the order, the appeal will be dismissed with costs—one set of costs—to be paid by the annuitant, and to be repaid to her by Mr. Hood-Barrs personally. In other words, he is not to be entitled to any costs from his client. It must follow the terms of Ord. 65, r. 11.

A. L. SMITH, L.J.—I am entirely of the same opinion. The question which the court has now to determine is, whether it does appear to the court that "costs have been improperly or without any reasonable cause incurred" in this case. If the court comes to that opinion, power is given to the court, under Ord. 65, r. 11, to call upon the solicitor of the client to show cause why the costs should not be disallowed, or why he should not repay the costs which have been incurred by the client.

The testator made a will, and controversy arose as to the construction of that will. My brother STIRLING put a construction upon it. This court afterwards put the same construction upon it, and the House of Lords has held that the construction put upon it by my brother STIRLING, and this court, was right. I do not for a moment say that that litigation, which as I understand was undertaken on behalf of the next of kin, who were the appellants in this court, and in the House of Lords, was not a proper litigation for Mr. Hood-Barrs to undertake. I do not say that in any shape or way up to the judgment in the House of Lords, which was given in March, 1895,

any complaint can be made of Mr. Hood-Barrs in the matter. None whatever. What we have to determine is, as to what took place after March, 1895, when the decision of the House of Lords was given. The decision of the House of Lords affirmed that certain charities, five in number, were entitled to the corpus of the property subject to certain annuities. The House of Lords gave judgment for the respondents with costs against the appellants there, who were Mr. Hood-Barrs' clients. It seems to me that Mr. Hood-Barrs after that judgment had been given against his clients did all he could to get those charities to forgo their costs. That seems to me to be all right. But he could not get them to agree to that, and they were within their rights in saying they would not do so.

Then what happened? The charities want to get the property to which the House of Lords said they were entitled. That property was invested at that time in consols in court in the administration of the testator's estate. The charities took out a summons before my brother STIRLING to get an order that the corpus should be paid out to them in the shares to which they had been adjudged entitled under the decision of the House of Lords, but, of course, subject to such part of the corpus being set aside as would fully secure the annuitants having a charge upon the corpus. STIRLING, J., took into consideration the circumstances as regarded Mrs. Venables, and no doubt as regarded the other annuitants—none of whom appeal against his order—and he said: "If I set apart £8,000, and keep that in court for the purpose of satisfying your annuity I am perfectly certain you will have your annuity of £150 a year as long as you live." I am perfectly satisfied that STIRLING, J., was right in that. Nobody can hear what I am saying without being satisfied that the order of my brother STIRLING was a just order to make as between the annuitants, on the one part, and the charities, on the other, who were entitled to the residue of the corpus.

But now comes the difficulty with regard to Mr. Hood-Barrs. Mr. Hood-Barrs could not get the charities to agree to forgo the costs; so he goes to Mrs. Venables, who is a lady certainly not in affluent circumstances, and he gets her name for the purpose of appealing against that order of STIRLING, J. It certainly did appear to me, when counsel was arguing this case on behalf of the annuitant, that it was a senseless appeal, and one which nobody could have brought unless he or she had been ill advised, or was perverse or obstinate. I came to the conclusion that this was not in substance Mrs. Venables' appeal. It struck me—and I use a word which I have used before today, as no other word will properly describe it—as cruel, in such an appeal as this, which we had to dismiss, that we should make this unfortunate annuitant pay the costs. She has only a small annuity of £150 a year, and the costs in this court could not be otherwise than heavy when the appeal was dismissed. We have an officer of this court who is called the Official Solicitor. In my judgment, the Official Solicitor is appointed in order that a judge may communicate with him when he sees before him matters which he wants investigated, as regards the absolute accuracy of which counsel is not instructed, and has no knowledge whatever. It is then the duty of the judge to communicate with the Official Solicitor in order that the judge may be informed where the real truth of the case lies. In this case, Mr. Hood-Barrs chooses to apply the term "dirty work" to what the Official Solicitor has done. But I say—and I say it emphatically—that that term ought not to be applied, because the Official Solicitor has faithfully carried out our orders, which orders, considering the position in which we were placed, we were bound to give.

So we find out it was not Mrs. Venables' appeal. It is all very well to say that she had given instructions to Mr. Hood-Barrs, but what interest has Mrs. Venables in appealing to this court? She had her £8,000 capital set apart for her for the rest of her life, which sum was more than sufficient to pay, whatever might happen, her annuity of £150 a year. Mr. Hood-Barrs comes and tells us—and I have no doubt accurately—the attempts he had made to settle after he was defeated in the House of Lords. He could not get a settlement, and, as has been pointed out by my brother LINDLEY, this appeal is not brought in the interests of Mrs. Venables at all.

It was perfectly immaterial to her, except as regards costs, which way it went; but it was brought for the purpose of coercing, if Mr. Hood-Barrs could, these charities to come to his terms. In the letter of Nov. 9, 1895, he says, "I hope ultimately to get a settlement of the appeal which will be a benefit to me." If there ever was a case in which r. 11 of Ord. 65 should be put into force it appears to me to be this, and I think that the order which my brother LINDLEY has mentioned ought to be made.

RIGBY, L.J. I will assume for the purposes of my judgment in this case that the conduct of Mr. Hood-Barrs, down to the time when the order was made by STIRLING, J., for setting aside a sum to provide for Mrs. Venables' annuity, was not only justifiable, but from the point of view of his client altogether beneficial to the client, and that in every respect, down to that period, he was free from blame. The order made was that £8,000 2½ per cent. annuities should be appropriated to meet an annuity of £150 a year payable to a widow during the term of her life. It was not mentioned in the order that in the improbable—one might almost say the impossible—event of the annuity ever being larger than the income produced by that £8,000 the annuitant could have recourse to the £8,000 capital. But at any rate it was shown in argument addressed to us that the charities offered to have that made clear upon the face of the order; and that that offer, for reasons which we now perfectly comprehend, was declined. I say this because from Mr. Hood-Barrs' own statement it becomes abundantly clear that he did not think that the £8,000 was an insufficient security. He tells us himself, apparently unconscious of the conclusion that would be drawn from what he said, that he was willing after the order was made to come to terms which would release £2,000 out of the £8,000, leaving £6,000 only. He stipulated that his client, Mrs. Venables, should be allowed to resort to the capital of the remaining £6,000—terms less advantageous to his client than those which I believe were effectuated by the order. Those terms, at any rate, which fact for this purpose is more important, were offered by the other side at that time and declined. So that I think it would be absurd to suppose that Mr. Hood-Barrs imagined that Mrs. Venables' interests were in any way concerned in this appeal.

But we have it now made clear, and I must say that it appeared to me not improbable, that Mr. Hood-Barrs had a direct personal interest in the matter, or, at any rate, had grounds for believing that, if he could get this order, which his client's interests in no way required him to get, reversed on this appeal his own pocket would be the better for it, because he could impose terms upon the charities which would relieve him from the personal undertaking he had entered into to pay certain costs which I need not specifically refer to. That being the position of things, and that being, as we have from Mr. Hood-Barrs' own lips, his own appreciation of the case—namely, that Mrs. Venables was sufficiently secured, and that she had no interest in the appeal—he approaches her. He suggests—and a more improper suggestion I venture to say was never made—that she should lend her name to him coming here to this court as though she were the bona fide appellant, on the terms that he should indemnify her against costs, and that he personally should take the benefit of the appeal. It startles one to find that a solicitor, an officer of this court, can come into court and openly avow a transaction of that kind, and yet apparently remain unconscious of the absolute impropriety of it. It appears to me that that unconsciousness, if it be not assumed, is a very grave feature of the case.

Mr. Hood-Barrs permitted himself to make observations from a high standpoint as that of a respectable solicitor who had a right to throw aspersions on others who were doing their duty. I wish it to be known that, in my judgment at any rate, it is not the part of a respectable solicitor to induce clients to lend their names for appeals, in which they have no interest at all, in order that the solicitor himself may gain his own private ends. I look upon such an agreement as an abuse of the practice of the court. Mr. Hood-Barrs thought it right to complain of the fact that he was not approached for information. I have formed my own judgment as to the

sort of information we should have got from him if he had been allowed to be the go-between between the court and Mrs. Venables. I feel satisfied that we should not have arrived at the true state of things; and I am certain that we should have been altogether disregarding our duty if, in a case of this kind, we had not instructed the Official Solicitor to find out the facts which otherwise I feel convinced we never should have known. I will only say that I think that the Official Solicitor in doing what he did in no way exceeded the instructions that were given to him by us, and that he did what was perfectly right and proper. I protest against the notion that this court is to be bound by any idea of etiquette or by any theories as to what is respectable between solicitors, and to shut the door to information which would never have been obtained if we had not taken the course that we did. I consider that, if ever there was a case of costs being occasioned improperly, this is that case. I concur in the judgment which LINDLEY, L.J., has mentioned, that this is a case in which Mr. Hood-Barrs can recover nothing from his client, and that he must repay to her any costs which she is liable to pay under the order of the court already made. The fact that he indemnified her is one of the charges against him. It is no merit that he did it. It was absolutely wrong to do it. After this I hope no solicitor will ever come and say: "I intended what was right, I used the process of the court to bring about what I thought right, and I did it by deceiving the court in the first instance into a belief that it was not I acting in my own interest, but an innocent client who was bringing an appeal which the court has decided to be not only wrong, but altogether without precedent."

Appeal dismissed.

Solicitors: *Hood-Barrs & Co.; Winter & Co.; Hyde, Tandy, Mahon & Sayer; Gadsden & Treherne; Bower, Cotton & Bower.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

SAVOY OVERSEERS *v.* ART UNION OF LONDON

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten and Lord Shand), February 18, May 5, 1896]

[Reported [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 45 W.R. 34; 12 T.L.R. 377]

Rates—Exemption—Society instituted for purposes of fine arts—"Voluntary contributions"—Advantages received by members—Scientific Societies Act, 1843 (6 *& 7 Vict., c.* 36) *s.* 1.

By the Scientific Societies Act, 1843, s. 1, owners of land or buildings are exempted from being rated if the hereditament belongs to a society "instituted for purposes of science, literature, or the fine arts exclusively . . . and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions," and shall make no dividend or bonus in money to its members.

A society which was instituted for purposes of the fine arts exclusively gave each member in return for his subscription of a guinea a copy of an engraving and a chance in an annual distribution of prizes, both of which might result in substantial pecuniary benefit to the member.

Held: on their true construction the words "voluntary contributions" in s. 1 of the Act must be taken to mean contributions which were given without any advantage being received in return; on the facts it appeared that each member of the society obtained an ample return for the money which he had subscribed; and, therefore, the society was not exempted from being rated.

Notes. Distinguished: *Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q.B. 809. Considered: *Hornsey School of Art* v. *Edmonton Union* (1905), 94 L.T. 203; *Battersea Metropolitan Borough* v. *British Iron and Steel Research Association*, [1949] 1 K.B. 434; *British Launderers' Research Association* v. *Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; *Royal College of Nursing* v. *St. Marylebone Corpn.*, [1958] 1 All E.R. 120. Applied: *Institution of Mechanical Engineers* v. *Cane (V.O.)*, [1960] 3 All E.R. 715. Considered: *Cane (V.O.)* v. *Royal College of Music*, [1961] 2 All E.R. 12. Referred to: *Jenner Institute of Preventive Medicine* v. *St. George's, Hanover Square, Assessment Committee and Surveyor of Taxes*, [1900-3] All E.R. Rep. 189; *Institution of Civil Engineers* v. *I.R. Comrs.*, [1931] All E.R. Rep. 454; *Institute of Fuel* v. *Morley*, [1955] 1 All E.R. 161; *O'Sullivan* v. *English Folk Dance and Song Society*, [1955] 2 All E.R. 845; *Royal College of Nursing* v. *St. Marylebone Corpn.*, [1959] 3 All E.R. 663.

As to the exemption from rating of scientific and other institutions, see 24 HALSBURY'S LAWS (3rd Edn.) 336-342; and for cases see 38 DIGEST (Repl.) 582 et seq. For Scientific Societies Act, 1843, see 14 HALSBURY'S STATUTES (2nd Edn.) 7.

Cases referred to:

(1) *Churchwardens of Birmingham* v. *Shaw* (1849), 10 Q.B. 868; 116 E.R. 329; sub nom. *Re Birmingham New Library, Ex parte Birmingham Overseers*, 18 L.J.M.C. 89; 13 Jur. 357; sub nom. *R.* v. *Birmingham JJ.*, 3 New Sess. Cas. 445; sub nom. *R.* v. *Shaw, Birmingham JJ.*, 3 New Mag. Cas. 115; 13 L.T.O.S. 23; 13 J.P. 395; 38 Digest (Repl.) 582, *625*.

(2) *R.* v. *Manchester Overseers* (1851), 16 Q.B. 449; 4 New Sess. Cas. 482; 20 L.J.M.C. 113; 16 L.T.O.S. 435; 15 J.P. 193; 15 Jur. 219; 117 E.R. 951; 38 Digest (Repl.) 585, *635*.

(3) *R.* v. *Brandt* (1851), 16 Q.B. 462; 4 New Sess. Cas. 494; 20 L.J.M.C. 119; 16 L.T.O.S. 437; 15 J.P. 191; Jur. 223; 117 E.R. 956; 38 Digest (Repl.) 584, *629*.

(4) *R.* v. *Gaskell* (1851), 16 Q.B. 472; 21 L.J.M.C. 29; 18 L.T.O.S. 72; 15 J.P. 755; 15 Jur. 1156; 117 E.R. 959; 38 Digest (Repl.) 579, *606*.

(5) *R.* v. *Governors of Russell Institution* (1854), 2 C.L.R. 755; 22 L.T.O.S. 237; 18 J.P. 149; 2 W.R. 169; sub nom. *Russell Institution* v. *St. Giles Vestry*, 3 E. & B. 416; 23 L.J.M.C. 65; 18 Jur. 597; 118 E.R. 1198; 38 Digest (Repl.) 579, *608*.

(6) *Churchwardens of St. Anne* v. *Linnean Society* (1854), 3 E. & B. 793; 118 E.R. 1338; sub nom. *R.* v. *Linnæn Society of London*, 2 C.L.R. 761; 23 L.T.O.S. 186; 18 J.P. 504; 2 W.R. 516; sub nom. *Linnean Society of London* v. *Churchwardens and Overseers of St. Anne's, Westminster*, 23 L.J.M.C. 148; 18 Jur. 859; 38 Digest (Repl.) 580, *614*.

(7) *St. Marylebone Vestry* v. *Zoological Society* (1854), 3 E. & B. 807; 118 E.R. 1343; sub nom. *R.* v. *Zoological Society of London*, 2 C.L.R. 766; 23 L.J.M.C. 139; 23 L.T.O.S. 171; 18 J.P. 489; 18 Jur. 786; 2 W.R. 491; 38 Digest (Repl.) 585, *641*.

(8) *Bradford Library Society* v. *Churchwardens of Bradford* (1858), 1 E. & E. 88; 23 J.P. 485; 5 Jur.N.S. 513; 120 E.R. 841; sub nom. *R.* v. *Bradford Library and Literary Society*, 28 L.J.M.C. 73; 32 L.T.O.S. 105; 7 W.R. 36; 38 Digest (Repl.) 579, *609*.

(9) *Re Duty on Estate of New University Club* (1887), 18 Q.B.D. 720; 56 L.J.Q.B. 462; 56 L.T. 909; 35 W.R. 774; 3 T.L.R. 570; sub nom. *Inland Revenue Comrs.* v. *New University Club*, 2 Tax Cas. 279, D.C.; 39 Digest 298, *776*.

(10) *Inland Revenue Comrs.* v. *Forrest* (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 39 W.R. 33; 6 T.L.R. 456; 3 Tax Cas. 117, H.L.; 38 Digest (Repl.) 582, *626*.

Also referred to in argument:

R. v. *Institution of Civil Engineers* (1879), 5 Q.B.D. 48; 49 L.J.M.C. 34; 42 L.T. 145; 44 J.P. 265; 28 W.R. 253, D.C.; 38 Digest (Repl.) 584, *633*.

Liverpool Library v. *Liverpool Corpn.* (1860), 5 H. & N. 526; 29 L.J.M.C. 221; 2 L.T. 325; 24 J.P. 549; 8 W.R. 498; 38 Digest (Repl.) 587, *656*.

Appeal from a decision of the Court of Appeal, reported [1894] 2 Q.B. 609, reversing by a majority a decision of the Queen's Bench Division (WRIGHT and HENN COLLINS, JJ.), by which the latter court held that the Art Union Society was rateable in respect of their buildings, as not being an institution exclusively devoted to the purposes of encouraging literature, science, and the fine arts, supported wholly or in part by annual voluntary subscriptions, within the meaning of the Act. In the Court of Appeal LORD ESHER, M.R., and KAY, L.J., held that the society was exempt because, in their opinion, it did exist for the purposes mentioned exclusively, and that the contributions of its members were voluntary. A. L. SMITH, L.J., who dissented, held that, while the society existed for the purposes mentioned, the contributions were not voluntary, because the object of the subscribers was to obtain advantages for themselves. The overseers appealed.

The facts appear in the opinion of LORD HERSCHELL.

Sir Edward Clarke, Q.C., and *Haldinstein* for the overseers.

Sir Robert Reid, Q.C., and *Bristowe* for the society.

The House took time for consideration.

May 5, 1896. The following opinions were read,

LORD HALSBURY, L.C.—The appellants are the overseers of the poor and chapelwarden of the Royal Precinct of the Savoy, within which precinct the Art Union of London have premises which are rateable, unless they are exempted from such rating by virtue of the Scientific Societies Act, 1843, s. 1, which is as follows:

> ". . . from and after October 1, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or Lord Advocate, as hereinafter mentioned."

The question in this case depends upon a very simple alternative exposition of the sense in which the legislature used the words "voluntary." The society is partly supported by annual contributions, and the word "voluntary" must be construed in order to decide whether it is partly supported by voluntary contributions.

Two conditions have been insisted on for the exemption claimed by the Art Union. One is the exclusive devotion of its property to the purposes of art, and upon that, as it appears to me, no question arises. But the other condition is that

A it must be wholly or in part supported by voluntary contributions. There is no doubt that the word "voluntary" is constantly used in two different senses. It is constantly used as the antithesis of something done under compulsion; but it is also used commonly among lawyers, and not uncommonly among other people, as denoting the obtaining or giving of something without anything being obtained in return. A lawyer speaks of a voluntary conveyance as opposed to one which
B involves valuable consideration. It is common to hear of some institution supported by voluntary contributions. There is no doubt of the frequent use of the word "voluntary" in both these senses, and the problem to be solved is in what sense, or in which of these two senses, the legislature has used the word in the section under consideration. It is manifest that, if used in the former sense, every
C purchase is voluntary since no one can be compelled to buy; but if in the latter sense, there are a great many institutions which the legislature may well have intended to encourage, because, if people gave their money without receiving anything in return towards the encouragement of objects which the legislature approved, there would be a reason why the legislature should exempt such institutions from rating, since they would pro tanto relieve the national funds from
D burdens which but for such voluntary contributions the legislature might itself be called upon to contribute, if such institutions were to exist at all.

This consideration would seem to show that it is in the latter sense that the word is used, and, if so, it is fatal to the claim of the Art Union to be relieved from the burden in question. It hardly admits of debate that the Art Union gives to every subscriber full value for his money; the document published by the Art Union
E itself appears to establish very clearly that the subscriber obtains as an equivalent for his contribution money's worth at least equal to, if not beyond, the amount he has subscribed. I cannot, therefore, regard this as a voluntary contribution; it is a prudent and well-rewarded investment. The result is that the exemption cannot be insisted on, and I move your Lordships that the judgment of the Court of Appeal be reversed and the appeal allowed with costs.

F **LORD HERSCHELL.**—The question raised by this appeal is whether the respondent society is exempt from liability to be rated in respect of a building occupied by it, on the ground that it belongs to a society instituted for purposes of the fine arts exclusively and is occupied by it for carrying into effect its purposes, and that the society is supported wholly or in part by annual voluntary contributions. The Divisional Court of the Queen's Bench held that the respondents were
G not so exempt, but this judgment was reversed by the Court of Appeal, A. L. SMITH, L.J., dissenting.

It is stated by the charter that the respondent society was formed

> "for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public
H generally."

Whatever view may be taken of the means employed to accomplish this end, I see no reason to doubt that the society was instituted for the purposes of the fine arts exclusively within the meaning of the statute, and that these purposes have not been departed from. Upon this point the Court of Appeal was unanimous. The question which gave rise to a difference of opinion is one of great difficulty.
I Is the society supported wholly or in part "by annual voluntary contributions"? These words have been the subject of much discussion, and there are many judicial dicta bearing upon their meaning. I proceed at once to an examination of the authorities, for if these had been uniform and consistent your Lordships would have been unwilling, though not bound by them, to disturb a long-settled construction of the statute. But it will be seen that this is very far from being the case.

The earliest of the authorities is *Churchwardens of Birmingham* v. *Shaw* (1). LORD DENMAN, C.J., in delivering the judgment of the court, said (10 Q.B. at pp. 875, 876):

"It is perhaps not easy to determine what the legislature intended by the word 'voluntary' in this combination. . . . Upon consideration we think that annual contributions will satisfy the condition required if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure. . . . If the contributor was free to commence his contribution and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of voluntariness which in ordinary language it does not import. And that is what, in fact, is done by those who contend that it must also be gratuitous and bring no return of any kind to the contributor."

This judgment appears to me to lose sight of the fact that what has to be construed is the combination "voluntary contributions," and not merely the word "voluntary" alone, or in some other combination. It may be that this word is ordinarily used as the antithesis to "compulsory," though in legal parlance it is quite commonly employed to describe that which is gratuitous and without consideration. But putting aside this legal acceptation of the word, I cannot think that "voluntary contributions" in the statute means the same thing as "voluntary payments," or that an institution can properly be said to be supported by voluntary contributions where these are the price paid for a purchase, whether of goods or advantages, merely because the person making the payment was under no obligation to do so.

The *Birmingham Case* (1) was followed in *R.* v. *Manchester Overseers* (2), the Royal Manchester Institution being held exempt from rating. In *R.* v. *Brandt* (3), however, where it was sought to extend the exemption to a concert-hall, to the concerts in which subscribers and their friends alone were admitted, Lord Campbell, C.J., said (16 Q.B. at p. 471):

"We look upon this institution as totally different from the Birmingham Library or the Manchester Institution, where the members, not with a view to their own gratification but to the good of others, by cultivating in them a taste for literature, science, and the fine arts, subscribe money and contribute their personal trouble, and may therefore be fairly supposed to be the objects of the special favour of the legislature at the cost of their fellow parishioners."

Again, in *R.* v. *Gaskell* (4), a house belonging to the Portico Society, containing a library and reading room, the use of which was confined to members of the society, was on the same grounds held not exempt. The question next arose in *R.* v. *Governors of Russell Institution* (5). It was held not to be a society instituted for purposes of literature exclusively, but Lord Campbell, C.J., made some observations on the part of the enactment now under consideration. He said (3 E. & B. at pp. 427, 428):

"It is unnecessary to decide whether this be a society supported in part by annual voluntary contributions within the meaning of the Act. There may be ground for contending that 'contribution' here does not mean a voluntary annual subscription or payment of money for value received, or expected to be received, by the party paying, but means a gift from disinterested motives for the benefit of others."

In *Churchwardens of St. Anne's* v. *Linnean Society* (6) a building belonging to that society was held to be without the exemption. Lord Campbell, C.J., said (3 E. & B. at pp. 804, 805):

"The case in no way resembles the Russell Institution, where newspapers were supplied and accommodations given to the subscribers, preventing the payments from being mere voluntary contributions for the promotion of science."

A It is to be noted, too, that the mere fact that the payments of the Fellows were voluntary in the sense that they might be discontinued at any time was apparently treated as unimportant, for the Chief Justice, after pointing out that, though the Fellows were under an obligation to pay while they continued Fellows, the payment was still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the Fellows were at liberty to withdraw, added (ibid. at B p. 804):

> "though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary."

While the building belonging to the Linnean Society obtained the benefit of the exemption, it was held inapplicable to the buildings of the Zoological Society: C *St. Marylebone Vestry* v. *Zoological Society* (7). The decision turned mainly upon the earlier provisions of the enactment; but LORD CAMPBELL, C.J., observed that, if it had been necessary to decide the point, he should have said that the contributions were not voluntary contributions within the meaning of the Act, inasmuch as subscribers looked to the amusement which they and their families and friends would derive from their access to the gardens. And on the same point D ERLE, J., said (3 E. & B. at p. 822):

> "As to the question whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects."

E In the case of the Bradford Library, which was open only to members (*Bradford Library Society v. Churchwardens of Bradford* (8)) the Queen's Bench followed the *Birmingham Case* (1). ERLE, J., said (28 L.J.M.C. at pp. 77, 78):

> "Although personal benefit is derived by each subscriber, that is not a personal benefit or convenience such as has been mentioned in some of the F cases, which means something in the nature of that derived from an investment of money, though not absolutely a return of so much per cent.; if you by investment, get something for which you would otherwise have to pay—for instance, the advantage of nonpayment on admission to public gardens—then the subscription is not voluntary."

G This does not seem to me quite consistent with the dictum of the same learned judge which I have just quoted. Each member of the library did purchase a private convenience. He obtained the opportunity of reading books which he must otherwise have purchased or hired. This seems to me to be a return for the investment he made in contributing to the funds of the library. I confess that I am unable to appreciate the distinction which the learned judge suggests.

H Somewhat similar words came before the courts for construction in the case of the Customs and Inland Revenue Act, 1885, which exempted from the taxation thereby imposed "property acquired by or with funds voluntarily contributed." The view taken of the meaning of the words "voluntarily contributed" in *Re Duty on Estate of New University Club* (9), and by my noble friends LORDS WATSON and MACNAGHTEN, *Inland Revenue Comrs.* v. *Forrest* (10), was in complete accordance I with that more than once expressed by LORD CAMPBELL in discussing the meaning of the expression "voluntary contributions."

The matter now comes for the first time before your Lordships' House for decision. I do not think that it was intended to exempt from rating buildings belonging to a society merely because the payments by which it was wholly or in part supported were made voluntarily and not compulsorily, when they were not made gratuitously, but were the price of advantages obtained in return for them. The expression "supported by voluntary contributions" has long been well known in connection with hospitals and other institutions. I think that the essential idea

conveyed by them is that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor. It was pointed out by KAY, L.J., that in the case of some hospitals the contributors receive a certain number of letters of admission measured by the amount of their subscriptions. But though this may give them a voice as to the persons who are to be the objects of the charity, I think that it would be unreasonable to regard the contribution as being on that account not a gratuitous charitable gift, but the purchase of a personal advantage. If, indeed, a hospital were established on co-operative principles, each contributor being entitled to claim medical treatment there, and the inmates being confined to contributors, I should say that it was not supported by "voluntary contributions," even though there was nothing to compel any person to become a contributor, and he might cease to be so at any time he pleased.

Applying the construction which I have put upon the statute to the facts of the present case, I have come to the conclusion that the payments made by the members of the Art Union are not "voluntary contributions." Every member receives each year, in return for his subscription of a guinea, a copy of an engraving, and, in addition, one chance in the annual distribution of prizes. He may purchase extra chances at half-a-guinea each. The council also present a consolation prize to members who have paid ten consecutive subscriptions without gaining any prize. This arrangement, they say, "has given great satisfaction, and has avoided any disappointment on account of want of success in the annual distribution." And they point out that the engraving given to every one is a work of the market value at least of his subscription, and that, looking to the probable extinction of line-engraving, members have the opportunity of acquiring invaluable artists' proofs, the value of which in a few years must rise to many times their present cost. In addition to this, attention is called by the council to the fact that the highest prize of one year, £300, with £200 added by the prizeholder, was expended on the purchase of a picture which had since been sold for upwards of £1,000. When statements such as these are put forward by the council as an inducement to persons to join the society, I cannot but hold that the contributions of the members are not "voluntary contributions" within the meaning of the Act. I think, therefore, that the judgment appealed from should be reversed.

LORD MACNAGHTEN.—It cannot, I think, be denied that the Art Union of London is a society instituted for the purposes of the fine arts exclusively. That seems to me to be clear on consideration of its charter and byelaws, and the provisions of the Art Unions Act, 1846. But it seems to me to be equally clear that the Art Union of London cannot properly be described as a society "supported wholly or in part by annual voluntary contributions." This description, which is an essential condition of immunity under the Act, has given rise to a good deal of controversy and some difference of opinion. Apart from authority the meaning of the provision would seem to be tolerably obvious. The observation that must, I think, occur to anyone who may be called upon to construe it, is that the phrase which the legislature has adopted is an old and familiar acquaintance. In the public streets it meets the eye not infrequently on the walls of hospitals; it is to be found in the forefront of many charitable appeals. So used it carries with it a meaning which nobody can mistake. It means that the institution on whose behalf the statement is put forward depends for its support on freewill offerings, on the generosity of persons acting from disinterested motives, and not looking for any returns in the shape of direct personal advantage. Except in the Act of 1843 the expression is not, I think, found in any other connection. Nor is it, so far as I am aware, ever used in any other sense outside the Act. It is only natural to suppose that the enactment points to contributions partaking of a similar character, and made in a similar spirit. It appears to me to be almost absurd to say that a society is supported by voluntary contributions when it prides itself, as

A the Art Union of London apparently does, on returning to every contributor the equivalent of his contributions in market value and money's worth.

Very little assistance is to be derived from the reported cases on the subject. The authorities are, I think, neither clear nor uniform. The error, if I may call it so, began in 1849: *Churchwardens of Birmingham* v. *Shaw* (1). There LORD B DENMAN, C.J., who delivered the opinion of the Court of Queen's Bench, observes (10 Q.B. at p. 875); that

> "it is not, perhaps, easy to determine what the legislature intended by the word 'voluntary' in this combination."

Then his Lordship proceeds to take the word out of its setting, and to deal with C it as if it stood alone. On this the difficulty vanishes, and the conclusion is that, if the contributor was free to commence his contribution, and incurs no legal obligation to continue it, he must be considered a voluntary contributor, "unless" as his Lordship says (ibid. at pp. 875, 876), "we add something to the idea of voluntariness which in ordinary language it does not import." LORD D DENMAN'S view was carried still further in a later case, *Bradford Library Society* v. *Churchwardens of Bradford* (8), per LORD CAMPBELL, C.J., citing *Churchwardens of St. Anne* v. *Linnean Society* (6), where it was laid down that "a contribution paid under an obligation voluntarily incurred is a voluntary contribution." So that it seems that it would not be inappropriate to describe a co-operative store, where membership is constituted by the purchase of an annual ticket, or even the ground landlord of a fashionable quarter of London, as supported in part by annual volun- E tary contributions.

On the other hand, in order to escape from the consequence of this view, which would render the condition under consideration almost, if not altogether, unmeaning, it has been held in several cases that, where a contributor derives personal advantage from being a member of a society, the society, though formed for one of the purposes favoured by the Act, cannot be considered as formed for that purpose F "exclusively." This mode of construction may be admissible when the society is not incorporated, and its purpose, consequently, is not defined by charter or statute. When, however, that is the case, it seems to confuse the purpose of the society with the object of its individual members in joining it. In some cases it has been said that contributions which go to purchase some private benefit in the shape of amusement or convenience are not to be deemed voluntary according G to the true intention of the Act. I do not think that it is so; but then I think that this intention is only to be discovered by taking the words as they occur, in the combination in which they are placed, not by breaking up a compound expression, and weighing the words separately. I agree with the view that A. L. SMITH, L.J., has expressed, and I think that the appeal must be allowed.

H **LORD SHAND.**—In the decision of this case I think that a distinction must be clearly drawn between the purpose for which the society was instituted and the object of those who join it and annually subscribe to its funds. The society was, I think, instituted for the promotion of the fine arts exclusively. The question whether it has been supported wholly or in part by voluntary contributions involves a consideration of the purpose and object which the persons who give the annual I contributions have in view in becoming contributors. It seems to be quite clear that the inducement held out to contributors to join the society, which, therefore, may be taken to show the object for which the contributors become members, is that they will receive a return, not in money it is true, but in money's worth, which appears to me to be the same thing, for every contribution made. The members become in truth purchasers of personal property in the form of engravings, with the addition of the chance of prizes in the shape of paintings, advantages which form an adequate return for the money subscribed. I agree with your Lordships in thinking that money subscribed in this way cannot properly be regarded as

"voluntary contributions." That term seems to me to imply not merely that the subscriber chooses of his own free will to make his contribution, but that he does so for the benefit of others, as in the support of a hospital or other charitable institution, or in the promotion of science, literature, or the fine arts. It is not, I think, properly applicable to what is in substance a business transaction or investment in which the stipulation, or at least the agreement, is that a personal advantage substantially of the value of the sum subscribed is to be received in return by the contributor. I, therefore, concur in thinking that the judgment of the Court of Appeal should be reversed.

Appeal allowed.

Solicitors: *B. H. & E. Van Tromp; Hopgoods & Dowson.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

MEUX *v.* GREAT EASTERN RAIL. CO.

[Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), July 10, 11, 1895]

[Reported [1895] 2 Q.B. 387; 64 L.J.Q.B. 657; 73 L.T. 247; 59 J.P. 662; 43 W.R. 680; 11 T.L.R. 517; 39 Sol. Jo. 654; 4 R. 620]

Carriage of Goods—Railway—Passenger's luggage—Damage—Passenger an employee taking employer's property on journey—Damage to property through active negligence of railway servant—Right of employer to sue railway company for tort.

A servant brought to the station of the defendant railway company as his personal luggage a box containing liveries, the property of his employer, which had been provided for his (the servant's) use, and took a ticket for himself to enable him to travel by the same train as was carrying the box. By an act which amounted to active negligence on the part of a servant of the company and was not merely nonfeasance the liveries were damaged.

Held: although there existed no contract between the employer and the company on which the employer could sue for the damage to his property, the employer could recover in respect of that damage in an action for tort, that right not being affected by the contract to carry the property between the servant and the company.

Notes. Considered: *Wilson* v. *Barry Railway* (1916), 116 L.T. 71. Referred to: *The Winkfield*, [1900-3] All E.R. Rep. 346; *Harris* v. *Perry* (1903), 72 L.J.K.B. 725; *White* v. *Steadman*, [1913] 3 K.B. 340; *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.*, [1924] All E.R. Rep. 135; *Mankin* v. *Scala Theadrome Co.*, [1946] 2 All E.R. 614.

As to the liability of a railway company and the British Transport Commission for luggage carried by railway, see 31 Halsbury's Laws (3rd Edn.) 776-779; and for cases see 8 Digest (Repl.) 128 et seq.

Cases referred to:

(1) *Hayn* v. *Culliford* (1879), 4 C.P.D. 182; 48 L.J.Q.B. 372; 40 L.T. 536; 27 W.R. 541; 4 Asp.M.L.C. 128, C.A.; 41 Digest 430, *2699*.

(2) *Foulkes* v. *Metropolitan District Rail. Co.* (1880), 5 C.P.D. 157; 49 L.J.Q.B. 361; 42 L.T. 345; 44 J.P. 568; 28 W.R. 526, C.A.; 8 Digest (Repl.) 118, *757*.

A (3) *Alton* v. *Midland Rail. Co.* (1865), 19 C.B.N.S. 213; 34 L.J.C.P. 292; 12 L.T. 703; 11 Jur.N.S. 672; 13 W.R. 918; 144 E.R. 768; 8 Digest (Repl.) 103, *677*.

(4) *Taylor* v. *Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q.B. 134; 64 L.J.Q.B. 6; 71 L.T. 596; 59 J.P. 100; 43 W.R. 120; 11 T.L.R. 27; 39 Sol. Jo. 42; 14 R. 34, C.A.; 42 Digest 970, *21*.

B (5) *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422; 61 L.J.Q.B. 503; 66 L.T. 655; 56 J.P. 408; 8 T.L.R. 263, D.C.; 3 Digest (Repl.) 121, *401*.

(6) *Marshall* v. *York, Newcastle and Berwick Rail. Co.* (1851), 11 C.B. 655; 21 L.J.C.P. 34; 18 L.T.O.S. 94; 16 Jur. 124; 138 E.R. 632; 8 Digest (Repl.) 132, *849*.

C (7) *Kelly* v. *Metropolitan Rail. Co.*, [1895] 1 Q.B. 944; 64 L.J.Q.B. 568; 72 L.T. 551; 59 J.P. 437; 43 W.R. 497; 11 T.L.R. 366; 39 Sol. Jo. 447; 14 R. 417, C.A.; 42 Digest 970, *22*.

Also referred to in argument:

Martin v. *Great India Peninsular Rail. Co.* (1867), L.R. 3 Exch. 9; 37 L.J.Ex. 27; 17 L.T. 349; 8 Digest (Repl.) 67, *449*.

D *Austin* v. *Great Western Rail. Co.* (1867), L.R. 2 Q.B. 442; 8 B. & S. 327; 36 L.J.Q.B. 201; 16 L.T. 320; 31 J.P. 533; 15 W.R. 863; 8 Digest (Repl.) 103, *676*.

Mears v. *London and South Western Rail. Co.* (1862), 11 C.B.N.S. 850; 31 L.J.C.P. 220; 6 L.T. 190; 142 E.R. 1029; 3 Digest (Repl.) 118, *383*.

E *Becher* v. *Great Eastern Rail. Co.* (1870), L.R. 5 Q.B. 241; 39 L.J.Q.B. 122; 22 L.T. 299; 34 J.P. 693; sub nom. *Beeher* v. *Great Eastern Rail. Co.*, 18 W.R. 627; 8 Digest (Repl.) 132, *850*.

Hooper v. *London and North Western Railway* (1880), 50 L.J.Q.B. 103; 43 L.T. 570; 45 J.P. 223; 29 W.R. 241, D.C.; 8 Digest (Repl.) 133, *857*.

F *Great Northern Rail. Co.* v. *Shepherd* (1852), 8 Exch. 30; 7 Ry. & Can. Cas. 310; 21 L.J.Ex. 286; 155 E.R. 1246; sub nom. *Shepherd* v. *Great Northern Rail. Co.*, 19 L.T.O.S. 324; 8 Digest (Repl.) 128, *821*.

Appeal by the plaintiff from a decision of MATHEW, J., at the trial of the action without a jury.

The plaintiff, Lady Meux, brought the action against the defendant railway company to recover damages for damage done to certain liveries belonging to the G plaintiff, which, she alleged, was caused by the negligent acts of the defendants' servant of the railway company took possession, and dealt with in this way. of the plaintiff; that they were handed in to the custody of the defendants' servants by F. Harrer, C. Slade, and J. Wilson, three servants of the plaintiff, or by one of them, at Waltham Cross station, on June 5, 1894, to be carried by the defendants by the 3.40 p.m. train to Liverpool Street station as passengers' H luggage; that the property was overturned in front of the train, and was damaged and became useless to the plaintiff; and that F. Harrer, C. Slade, and J. Wilson were passengers by the 3.40 p.m. train from Waltham Cross to Liverpool Street, on June 5, 1894, and were travelling as the servants and upon the request of and at the expense of the plaintiff. The liveries were provided for the use of these servants of the plaintiff. MATHEW, J., gave judgment for the defendants, and the I plaintiff appealed.

J. Alderson Foote for the plaintiff.

Jelf, Q.C., and *F. H. Coller* for the defendants.

LORD ESHER, M.R.—The plaintiff has brought an action against the railway company upon the ground that her property was in a portmanteau, of which a servant of the railway company took possession, and dealt with it in this way. He took it in order to put it into the train, and was carrying it along the station for

that purpose, but he carried it badly and so carelessly that it fell from the platform on to the line, and was damaged. It seems to me that that was an active act on the part of the servant, and not a mere nonfeasance. A

It is suggested that there is no evidence of negligence. What happened in this case was unusual, and, in the absence of explanation, that is evidence to show that there was negligence. We ought to assume, therefore, that the act was done negligently. The plaintiff says that, therefore, she has a right to sue. The answer of the railway company is, that the portmanteau was brought by a servant of the plaintiff, who took a ticket for himself to travel, and gave the portmanteau to a porter as his personal luggage, to be carried as personal luggage; that there was, therefore, a contract to carry it as personal luggage made by the company with the plaintiff's servant alone, and with him personally and not on behalf of the plaintiff, who, therefore, was not a party to the contract; and that, if there was a breach of that contract, the plaintiff cannot sue. I think that that is quite true, because the portmanteau was taken as personal luggage, and accepted as personal luggage, and the contract with regard to it was made only with the plaintiff's servant personally. If the portmanteau had not been taken as personal luggage, but as other luggage, then the servant would have made a contract for its carriage on behalf of his mistress. This is often the case when a servant is sent in advance with a load of his master's luggage. If that luggage is paid for, and is not taken as personal luggage, the servant makes a contract for his master, and, if there is any breach of that contract, the master may sue in respect of it. But if the servant takes his master's luggage as if it were his own personal luggage, there is a contract with him alone, and he does not make any contract on behalf of his master, and the master cannot sue in respect of anything when the right to sue depends upon that contract. If, therefore, there is an omission to carry with sufficient care, or to deliver such luggage, amounting to a breach of the contract, the master cannot sue in respect of such breach. B C D E

Does the fact that the plaintiff cannot sue upon the contract deprive her of a right which she would have had if there had been no contract at all? I think not. The existence of a contract between the railway and another person, the servant, cannot deprive the master of a right which he would otherwise have. When, therefore, is a person entitled to sue for such an act as was committed here, when no contract has been made with him? Is there not such a right existing in a person whose property is given into the possession of another person that, if that other person damages the property, it must be wrongful? And is there anything in the existence of a contract to deprive him of that right? If luggage is taken to a train without the knowledge of the railway company, surreptitiously, the company is not liable for injury to it if the company does not know it is there. If it is placed openly on the company's premises to be carried, the company knows it is there and allows it to be there, and it must be a wrongful act on the part of the company to do any negligent or wrongful act to it, as, for instance, to throw it out. If the company takes up such luggage and carries it, the company must do so with reasonable care. Under such circumstances, the company is liable if there is no contract, or a contract made with someone other than the owner, if they negligently injure the luggage. F G H

What authority is there to the contrary? I entirely agree with the judgment of Bramwell, L.J., in *Hayn* v. *Culliford* (1), where he says (4 C.P.D. at p. 185): I

> "If then there is a contract between the plaintiffs and the defendants, the defendants are liable. So also if there is not. For, if so, the case is this: The goods were lawfully with the defendants' licence in their ship, and they tortiously so dealt with them that the goods were injured. It was found as a fact that the loading of the oxide was negligent. It was, therefore, wrongful, not as a breach of contract, but as a wrongful act in itself. If the defendants had done what was done wilfully, that is to say, intentionally, that it would

injure the plaintiff's goods, it is clear they would be liable. But what difference does it make that they did it ignorantly? It may be asked where is the duty of care? I answer, that duty exists in all men not to injure the property of others. This is not a mere nonfeasance which is complained of, it is a misfeasance, an act and wrongful."

He uses the word "lawfully" to contrast it with the word "tortiously," but the proposition would have been equally good without it, for the goods were there with the defendants' licence.

That is a sound doctrine, and seems to me to be stated also in *Foulkes* v. *Metropolitan District Rail. Co.* (2) by BRAMWELL, L.J., who there says (5 C.P.D. at pp. 158, 159):

"But, further, though the contract were with the South Western, the plaintiff is entitled to recover against these defendants. In that case there would be no duty of contract, and, consequently, no cause of action for a nonfeasance. But there would be that duty which the law imposes on all, namely, to do no act to injure another."

There, again, the distinction is drawn between an omission and a wrongful act or misfeasance. In both cases it is said that the right of the person injured is independent of contract, and arises from a breach of the duty imposed by the fact of dealing actively with the property. If the railway company so deals with the property as to injure it they are liable. Those are authorities for the proposition which I have stated, and principle goes with those authorities.

As to *Alton* v. *Midland Rail. Co.* (3), I think that that case does not touch this matter at all; it was decided on demurrer, and, therefore, decides only the point which was raised and argued. I think that it does not contradict what I have said as to the right of action in such a case as this. This right is not dependent upon contract, and is not taken away by the contract made with the servant. I am of opinion that the judgment of MATHEW, J., was wrong, and that this appeal must be allowed.

KAY, L.J.—This action is brought by the plaintiff to recover damages for injury done to her property by the Great Eastern Rail. Co. That property consisted of liveries belonging to her, and then in the possession of her servant, who was about to be a passenger in a train on the defendants' railway. It seems that the servant took these liveries as his own personal luggage. Undoubtedly these liveries were the property of the plaintiff. The liveries were damaged, and the plaintiff sues in respect of her property in the liveries. The damage was done through a servant of the defendants negligently dropping the portmanteau, which contained them, on to the railway line. That was an act of the defendants' servant, an act of commission, and an active interference with the luggage which was negligent and improper. There is no doubt here that the act complained of was not merely an act of omission or nonperformance, but was one of active commission.

The law applicable to such facts is all summed up in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (4). That was an action for personal injuries, and the general doctrine is thus stated in that case by LINDLEY, L.J. ([1895] 1 Q.B. at pp. 138, 139):

"It appears to me that this is an action founded on tort, and the conclusion to which I have arrived is based upon the following reasons. That which caused the injury was not an act of omission, it was not a mere nonfeasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All that the plaintiff would have to prove in such a case would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case."

A. L. SMITH, L.J., said (ibid. at pp. 139, 140):

> "It is not disputed that, as a matter of pleading, a plaintiff, for a cause of action such as the present, may declare in either contract or tort, but this is not the governing consideration. It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained while there by reason of the active negligence of the company's servants, whether he has a contract with the company or not . . . and he need not allege or prove any contract at all; he need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants, for this is sufficient to show a breach of that duty on the part of the defendants which is implied by law."

The question there was whether the action was one of tort, upon a question of costs, and it was treated as an action of tort, entirely independent of contract; that is, as an action for damages for an active tort.

Here these goods were lawfully on the premises of the defendant company. The portmanteau was accepted as the personal luggage of the servant to be carried as such. It is impossible, therefore, to say that it was not lawfully upon the premises. The railway company could not have refused to carry it as passenger's luggage. This case is different from a case where the luggage belongs entirely to someone other than the passenger. The servant of the plaintiff was a bailee of the goods, and the luggage was consequently lawfully upon the defendants' premises. I express no opinion upon the question whether, if the goods were not the goods of the servant at all, but belonged entirely to someone else, they would be lawfully upon the defendants' premises. Whether the railway company could, under such circumstances, after accepting them as passenger's luggage, damage them and then say that they were not passenger's luggage, I need not say. There are indeed some authorities that they would not be liable. These goods were lawfully upon the premises, and were injured by a negligent act, and the authorities are clear that the owner is entitled to sue in respect of that tort, because the railway company owed a duty to the owner not to damage the goods by any act. MATHEW, J., therefore, came to a wrong conclusion upon the facts of this case, and the appeal must succeed.

A. L. SMITH, L.J.—I am of opinion that the judgment of MATHEW, J., cannot be supported. He held that the plaintiff was not entitled to bring the action. The facts of the case are short and simple. The liveries were the property of the plaintiff, and were brought by her servant to the defendants' station as personal luggage belonging to him. The liveries were to be worn by him. By the active negligence of the defendants' servants those liveries were damaged; it was not a case of mere nonfeasance. I am not going to decide whether the plaintiff's servant could recover damages, because of *Claridge* v. *South Staffordshire Tramway Co.* (5), which may some day require further consideration. If the servant could have sued, he could have sued either upon contract or for a tort wholly independent of contract.

Then arises the question, whether the plaintiff can sue. She has suffered damage because her property was destroyed while lawfully upon the premises of the defendant company. It is said that she cannot sue because there was no contract between her and the defendants. I agree that she cannot sue upon contract; but I say that she has an action of tort wholly independent of any contract, her goods having been lawfully upon the defendants' premises, and there damaged by the negligent act of commission of the defendants' servant. The answer given to that is, that she cannot sue because there was a contract between her servant and the defendants. In my opinion, *Alton* v. *Midland Rail. Co.* (3) did not decide anything to the contrary of what I have stated to be the law. I tried, in *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (4), to explain that case. In *Alton* v. *Midland*

Rail. Co. (3) the plea was that the plaintiff was not a party to the contract. There was a demurrer to that plea. The sole point was whether the master could take advantage of the contract made with his servant, and recover damages from the railway company. In my opinion, that case is no authority for the proposition that the plaintiff cannot sue irrespective of any contract. *Hayn* v. *Culliford* (1), *Marshall* v. *York, Berwick, and Newcastle Rail. Co.* (6), *Taylor* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (4), and *Kelly* v. *Metropolitan Rail. Co.* (7), are all authorities in favour of the right to sue. It is impossible, therefore, to say that the plaintiff is not entitled to recover, and this appeal must be allowed.

Appeal allowed.

Solicitors: *Upton & Britton; E. Moore.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

Re NATIONAL BANK OF WALES. CORY'S CASE

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Sir Francis Jeune, P., and Romer, L.J.), June 21, 22, 23, 24, July 10, 11, 12, August 2, 1899]

[Reported [1899] 2 Ch. 629; 68 L.J.Ch. 634; 81 L.T. 363; 15 T.L.R. 517; 48 W.R. 99; 43 Sol. Jo. 705]

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Shand, Lord Davey and Lord Brampton), November 29, 30, December 7, 10, 11, 1900, August 1, 1901]

[Reported [1901] A.C. 477; 70 L.J.Ch. 753; 85 L.T. 257; 17 T.L.R. 732; 50 W.R. 65; 8 Mans. 346]

Company—Dividend—Payment while paid-up capital not intact—Expenses charged to capital to swell apparent profits.

A limited company is not prohibited from paying dividends because its paid-up capital is not intact. If a heavy, unexpected loss is sustained, it may be necessary to apply capital to meet it, and the payment of all future dividends until the capital so expended is made good is not forbidden. If, however, expenses or payments are improperly charged to capital simply to swell the apparent profits and make it appear that dividends may be properly declared, the dividends paid in such circumstances cannot be treated as legitimately paid out of profits and can no more be justified than if they were paid out of capital.

Observations on these matters by the EARL OF HALSBURY, L.C., and LORD DAVEY (post pp. 725-727).

Company—Director—Misfeasance—Improper payment of dividends—Need to prove culpable and gross negligence—Right to trust officers of company not to conceal material matters—Prima facie liability for misstatements to shareholders.

In considering charges of misfeasance against a director relating to the improper payment of dividends, it is the duty of the court to examine the state of things as they appeared to the director when the dividends were declared and to determine whether he was justified in what he did by what he knew or ought to have known. If a director acts within his powers and with such care as is reasonably to be expected from him having regard to his knowledge

and experience, and if he acts honestly for the benefit of the company, he discharges his equitable as well as his legal duty to the company. For negligence to be established against him it is not sufficient to prove an omission to take all possible care; his conduct must be shown to be in a business sense culpable and gross. A director acting honestly is not to be held liable for negligence because he trusts the officers of the company, regarding whom he knows no reason why they should be distrusted, not to conceal from him what they ought to report. On the other hand, while a director is not an insurer, if he makes misstatements to his shareholders he is liable for the consequences unless he can show that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time.

Notes. Applied: *Re City Equitable Fire Assurance Co.*, [1925] Ch. 407. Referred to: *Merchants' Fire Office* v. *Armstrong* (1901), 17 T.L.R. 709; *Bond* v. *Barrow Hæmatite Steel Co.*, [1900-3] All E.R. Rep. 484; *Re Crichton's Oil Co.*, [1902] 2 Ch. 86; *Lucas* v. *Fitzgerald* (1903), 20 T.L.R. 16; *Re Welsbach Incandescent Gas-Light Co.*, [1904] 1 Ch. 87; *Exploring Land and Minerals Co.* v. *Kolckmann* (1905), 94 L.T. 234; *Prefontaine* v. *Grenier*, [1907] A.C. 101; *Ammonia Soda Co.* v. *Chamberlain*, [1916-17] All E.R. Rep. 708; *I.R. Comrs.* v. *Barnato*, [1936] 2 All E.R. 1176; *Westminster Bank, Ltd.* v. *Riches*, [1945] 1 All E.R. 466.

As to payment of dividends and misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 396-406, 621-628, and for cases see 9 DIGEST (Repl.) 627 et seq., and 10 DIGEST (Repl.) 943 et seq.

Cases referred to:

(1) *Re Sharp, Re Bennett, Masonic and General Life Assurance Co.* v. *Sharpe*, [1892] 1 Ch. 154; 61 L.J.Ch. 193; 65 L.T. 806; 40 W.R. 241; 8 T.L.R. 194; 36 Sol. Jo. 151, C.A.; 9 Digest (Repl.) 631, *4209*.

(2) *Gregory* v. *Patchett* (1864), 33 Beav. 595; 11 L.T. 357; 10 Jur.N.S. 1118; 13 W.R. 34; 55 E.R. 499; 9 Digest (Repl.) 662, *4384*.

(3) *Bloxam* v. *Metropolitan Rail. Co.* (1868), 3 App. Cas. 337; 18 L.T. 41; 16 W.R. 490, L.C.; 10 Digest (Repl.) 1248, *8795*.

(4) *Re County Marine Insurance Co., Rance's Case* (1870), 6 Ch. App. 104; 40 L.J.Ch. 277; 23 L.T. 828; 19 W.R. 291, L.JJ.; 9 Digest (Repl.) 527, *3474*.

(5) *Re Oxford Benefit Building and Investment Society* (1886), 35 Ch.D. 502; 55 L.T. 598; 35 W.R. 116; 3 T.L.R. 46; sub nom. *Re Oxford Building Society, Ex parte Smith*, 56 L.J.Ch. 98; 9 Digest (Repl.) 631, *4211*.

(6) *Leeds Estate, Building and Investment Co.* v. *Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 3 T.L.R. 841; 36 W.R. 322; 9 Digest (Repl.) 632, *4216*.

(7) *Re London and General Bank (No. 2)*, [1895] 2 Ch. 673; 44 W.R. 80; 39 Sol. Jo. 706; 2 Mans. 555; 12 R. 520; sub nom. *London and General Bank, Ltd., Theobald's Case*, 64 L.J.Ch. 866; 73 L.T. 304; 11 T.L.R. 573, C.A.; 9 Digest (Repl.) 588, *3886*.

(8) *Re Ebbw Vale Steel, Iron, and Coal Co.* (1877), 4 Ch.D. 827; 46 L.J.Ch. 241; 36 L.T. 308.

(9) *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; 63 L.J.Ch. 456; 70 L.T. 516; 10 T.L.R. 393; 38 Sol. Jo. 384; 1 Mans. 136; 7 R. 170, C.A.; 9 Digest (Repl.) 181, *1170*.

(10) *Lee* v. *Neuchatel Asphalte Co.* (1889), 41 Ch.D. 1; 58 L.J.Ch. 408; 61 L.T. 11; 37 W.R. 321; 5 T.L.R. 260; 1 Meg. 140, C.A.; 9 Digest (Repl.) 628, *4196*.

(11) *Lagunas Nitrate Co.* v. *Lagunas Syndicate*, [1899] 2 Ch. 392; 68 L.J.Ch. 699; 81 L.T. 334; 48 W.R. 74; 15 T.L.R. 436; 43 Sol. Jo. 622; 7 Mans. 165, C.A.; 9 Digest (Repl.) 489, *3216*.

(12) *Overend and Gurney Co.* v. *Gibb* (1872), L.R. 5 H.L. 480; 42 L.J.Ch. 67, H.L.; 9 Digest (Repl.) 489, *3213.*

(13) *Giblin* v. *McMullen* (1869), L.R. 2 P.C. 317; 5 Moo. P.C.C.N.S. 434; 38 L.J.P.C. 25; 21 L.T. 214; 17 W.R. 445; 16 E.R. 578, P.C.; 36 Digest (Repl.) 10, *33.*

(14) *Re Denham & Co.* (1883), 25 Ch.D. 752; 50 L.T. 523; 32 W.R. 487; 9 Digest (Repl.) 526, *3462.*

(15) *Re Mercantile Trading Co., Stringer's Case* (1869), 4 Ch. App. 475; 20 L.T. 591; 17 W.R. 694; sub nom. *Re Mercantile Trading Co., Ex parte Official Liquidator*, 38 L.J.Ch. 698, L.JJ.; 9 Digest (Repl.) 524, *3454.*

(16) *Re Wincham Shipbuilding Boiler and Salt Co., Hallmark's Case* (1878), 9 Ch.D. 329; 47 L.J.Ch. 868; 38 L.T. 660; 26 W.R. 824, C.A.; 9 Digest (Repl.) 492, *3233.*

Also referred to in argument:

Turquand v. *Marshall* (1869), 4 Ch. App. 376; 38 L.J.Ch. 639; 20 L.T. 766; 33 J.P. 708; 17 W.R. 935, L.C.; 9 Digest (Repl.) 526, *3460.*

Re Exchange Banking Co., Flitcroft's Case (1882), 21 Ch.D. 519; 52 L.J.Ch. 217; 48 L.T. 86; 31 W.R. 174, C.A.; 9 Digest (Repl.) 526, *3461.*

Moxham v. *Grant*, [1899] 1 Q.B. 480; 68 L.J.Q.B. 283; 80 L.T. 356; 47 W.R. 282; 15 T.L.R. 180; 6 Mans. 120; affirmed, [1900] 1 Q.B. 88; 69 L.J.Q.B. 97; 81 L.T. 431; 48 W.R. 130; 16 T.L.R. 34; 44 Sol. Jo. 58; 7 Mans. 65, C.A.; 9 Digest (Repl.) 496, *3271.*

Re National Funds Assurance Co. (1878), 10 Ch.D. 118; 48 L.J.Ch. 163; 39 L.T. 420; 27 W.R. 302; 9 Digest (Repl.) 526, *3464.*

Trevor v. *Whitworth* (1887), 12 App. Cas. 409; 57 L.J.Ch. 28; 57 L.T. 457; 36 W.R. 145; 3 T.L.R. 745; 32 Sol. Jo. 201, H.L.; 9 Digest (Repl.) 97, *434.*

Guinness v. *Land Corpn. of Ireland* (1882), 22 Ch.D. 349; 52 L.J.Ch. 177; 47 L.T. 517; 31 W.R. 341, C.A.; 9 Digest (Repl.) 82, *349.*

Dent v. *London Tramways Co.* (1880), 16 Ch.D. 344; 50 L.J.Ch. 190; 44 L.T. 91; 9 Digest (Repl.) 181, *1175.*

Lubbock v. *British Bank of South America*, [1892] 2 Ch. 198; 61 L.J.Ch. 498; 67 L.T. 74; 41 W.R. 103; 8 T.L.R. 472; 9 Digest (Repl.) 625, *4180.*

Wilmer v. *McNamara & Co., Ltd.*, [1895] 2 Ch. 245; 64 L.J.Ch. 516; 72 L.T. 552; 43 W.R. 519; 11 T.L.R. 371; 39 Sol. Jo. 450; 13 R. 513; 9 Digest (Repl.) 626, *4185.*

Re Lands Allotment Co., [1894] 1 Ch. 616; 63 L.J.Ch. 291; 70 L.T. 286; 42 W.R. 404; 10 T.L.R. 234; 38 Sol. Jo. 235; 1 Mans. 107; 7 R. 115, C.A.; 9 Digest (Repl.) 550, *3630.*

Re Young and Harston's Contract (1885), 31 Ch.D. 168; 53 L.T. 837; 34 W.R. 84 C.A.; 40 Digest (Repl.) 128, *989.*

Pickard v. *Sears* (1837), 6 Ad. & El. 469; 2 Nev. & P.K.B. 488; Will. Woll. & Dav. 678; 112 E.R. 179; 21 Digest (Repl.) 369, *1103.*

Re Kingston Cotton Mill Co. (No. 2), [1896] 1 Ch. 331; 65 L.J.Ch. 290; 73 L.T. 745; 44 W.R. 363; 12 T.L.R. 123; 40 Sol. Jo. 144; 3 Mans. 75; on appeal, [1896] 2 Ch. 279; 65 L.J.Ch. 673; 12 T.L.R. 430; 40 Sol. Jo. 531; 3 Mans. 171; sub nom. *Re Kingston Cotton Mill Co., Ltd., Ex parte Pickering and Peasegood (No. 2)*, 74 L.T. 568, C.A.; 9 Digest (Repl.) 524, *3454.*

Davison v. *Gillies* (1879), 16 Ch.D. 347, n.; 50 L.J.Ch. 192, n.; 44 L.T. 92, n.; 9 Digest (Repl.) 181, *1174.*

Re Railway and General Light Improvement Co., Marzetti's Case (1880), 42 L.T. 206; 28 W.R. 541, C.A.; 9 Digest (Repl.) 489, *3215.*

Smith v. *Chadwick* (1884), 9 App. Cas. 187; 53 L.J.Ch. 873; 50 L.T. 697; 48 J.P. 644; 32 W.R. 687, H.L.; 9 Digest (Repl.) 127, *695.*

Derry v. *Peek* (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 38 W.R. 33; 5 T.L.R. 625; 1 Meg. 292, H.L.; 9 Digest (Repl.) 127, *685.*

Everitt v. *Automatic Weighing Machine Co.*, [1892] 3 Ch. 506; 62 L.J.Ch. 241; 67 L.T. 349; 36 Sol. Jo. 732; 3 R. 64; 9 Digest (Repl.) 354, *2265.*

Appeal by John Cory, a director of the National Bank of Wales, from an order made by WRIGHT, J., declaring him liable to make good £37,000 in respect of dividends declared and paid out of the company's funds in and between July, 1887, and January, 1891, and ordering him to pay that sum with interest at 5 per cent., but without prejudice to the right, if any, which he might have to repayment by the shareholders of the company of what he might pay.

The bank was in voluntary liquidation, and the order was made on a summons taken out on June 14, 1895, under s. 10 of the Companies (Winding-up) Act, 1890 [see now s. 333 (1) of the Companies Act, 1948: 3 HALSBURY'S STATUTES (2nd Edn.) 452], by the liquidator, and asked for a declaration that Cory as director was guilty of misfeasance or breach of trust (i) in authorising, sanctioning, or participating in the payment to shareholders of the company of interest or dividends on their respective shares out of the capital of the company, and was liable and might be ordered to repay to the liquidator the amount so paid during the period in which he acted as director; (ii) in making or sanctioning improper advances out of the funds of the company in contravention of the articles, whereby a loss accrued to the company, and that he might be ordered to pay to the liquidator the amount of that loss; (iii) in making or sanctioning improper advances to customers, and allowing overdrawn accounts and debts of customers to continue, with knowledge that those customers were, or were reputed to be, insolvent or otherwise unable to pay the amount of their indebtedness, whereby a loss had accrued to the company, and that, for the purpose of ascertaining the amount of the liability of the said Cory in respect of the matters aforesaid, all necessary accounts and inquiries might be directed to be taken and made; and that in taking and making such accounts and inquiries the whole period during which the said Cory acted as director might be considered notwithstanding that six years might have elapsed from the commencement thereof, on the ground that the losses arising from the wrongful acts aforesaid and the true state of affairs of the company were fraudulently concealed by Cory, and that he issued balance-sheets which were false to his knowledge, and, moreover, that part of such interest and dividends were retained by Cory and converted to his own use as a shareholder of the company; and that he might be ordered to pay to the liquidator the full amount of all such losses. The liquidator gave a cross-notice of appeal asking for the further order claimed by the summons.

The following statement of the further facts is taken from the judgment of the court. The National Bank of Wales was a limited banking company formed in 1879. Its objects were to carry on the business of bankers, including the making of advances and the acquisition of other businesses. Its capital was £2,000,000, divided into 100,000 shares of £20 each. The shares issued were never paid-up in full, £10 being paid-up, and the remaining £10 being uncalled, and forming, therefore, a large sum available in case of need. The number of shares increased from time to time. In 1884 the paid-up capital amounted to £125,000, and it so remained until 1890, when it was increased to £225,000.

The company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this. Each branch manager sent weekly to the head office what was called a weekly statement—i.e., an account showing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office, showing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine those documents, and to report to the board anything

disclosed by them which required their attention. The weekly statements and quarterly returns were in the board room for reference in case of need, but, unless attention was called to them the directors did not think it necessary to examine them.

The chairman of the directors was Thomas Cory, a brother of John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and, in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders, only saw the head office books and the returns from the branch offices, certified by their respective managers to the head office. These certified returns formed part of the weekly statements, but omitted much that they contained. The minutes of the directors' meetings showed that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager.

After John Cory had ceased to be a director the company made large advances on insufficient security, and took over an insolvent business which greatly embarrassed it. The company, however, was not unable to pay its debts, for its large uncalled capital was amply sufficient for that purpose, and, so far as its outside liabilities are concerned, it always has been and is quite able to discharge them in full. Being, however, in difficulties, the bank determined to amalgamate with another company and to wind-up. An agreement was entered into between the National Bank and the Metropolitan Bank for the transfer to the Metropolitan Bank of all the assets of the National Bank (except the uncalled capital) and for the payment by the Metropolitan Bank of all the debts and liabilities of the National Bank, subject, however, to this stipulation—namely, that if the assets transferred exceeded the liabilities, the excess should be returned to the National Bank, while if the assets transferred should prove insufficient to discharge those liabilities, the deficiency should be made good by the National Bank. There was a deficiency of about £41,000, which the National Bank had to make good. The sum could be raised by a call on the shareholders, but they objected to that if money could be got in from other quarters which would relieve them from the necessity of paying a call. The investigation into the affairs of the National Bank, which had been made in order to carry out the amalgamation with the Metropolitan Bank revealed that the whole of the paid-up capital had been lost and the cause of the loss was to a large extent attributable to the fact that a large number of debts due to the bank by its customers had turned out to be bad, and that large sums advanced to directors and owing by them were irrecoverable. Moreover, large dividends had been paid for a number of years as if the bank were flourishing, while, in truth, if its affairs had been properly conducted, those dividends ought never to have been recommended by the directors.

Sir Edward Clarke, *Q.C.*, *Swinfen Eady*, *Q.C.*, *G. F. Hart*, and *Nepean* for the appellant, John Cory.

Warmington, *Q.C.*, *Buckley*, *Q.C.*, *Ingpen*, and *Samuel Evans* for the liquidator.

Sheldon for the Metropolitan Bank.

Cur. adv. vult.

Aug. 2, 1899. The judgment of the court was read by

SIR NATHANIEL LINDLEY, M.R. —The appeal and cross-appeal require the court to examine into Mr. John Cory's conduct as a director of the company from the time when he became a director in 1884 until he ceased to be so in December, 1890, or even later if the liquidator is correct. The order under review was made on a summons issued under s. 10 of the Companies (Winding-up) Act, 1890, on June 14, 1895, a date which is material, having regard to the statute of limitations,

on which Mr. Cory relies as a defence to the greater part of the demands made against him.

It will be convenient to consider his appeal first. This raises the question whether the funds of the company have been misapplied in payment of dividends, and, if they have, whether Mr. Cory is liable for that misapplication. [His Lordship stated the facts set out hereinbefore, and, referring to the affidavit of John Cory as to the general course of business and his cross-examination, said:] Wright, J., regarded this evidence as an admission by John Cory of a total abnegation of the use of his faculties, and of an entire neglect of his duties. We cannot go so far as this. His evidence does, however, show that he only attended, when present, to whatever his attention was called; and that having no suspicion that anything was wrong he made no special inquiries in order to ascertain that all was right. There can be no doubt that the shareholders were grievously deceived by the reports and balance-sheets laid before them; and no one can be surprised at their anger with their directors, and especially with the chairman and general manager, both of whom have been criminally prosecuted and convicted for their fraudulent conduct.

John Cory's answer, however, to the attempt to make him liable for the losses sustained and dividends paid while he was a director is that he was himself as much deceived as the shareholders by the chairman and manager, and that he was not guilty of any breach of his duty in not making special investigation when he had no reason to suppose that anything was wrong. Wright, J., has come to the conclusion that John Cory was not only negligent, but fraudulent, or, at all events, guilty of misconduct equivalent to fraud as regards its legal consequences. The learned judge has arrived at this conclusion from the fact that in their reports the directors unjustifiably stated that they had made provision for bad and doubtful debts, whereas they had not. That the chairman and manager knew this is very likely true, but that John Cory knew it is quite another matter. The table of bad debts shows that sums were constantly written off for bad debts, and there is nothing to justify the inference that John Cory knew that these sums were insufficient, or that he did not honestly believe them to be sufficient. It may be that he ought to have been more vigilant than he was, and that he should not have trusted his brother and Collins so much as he did. But negligence is one thing, fraud is another, and we are quite unable to adopt the view of Wright, J., that John Cory acted fraudulently in making reports to the shareholders and laying the balance-sheets before them. At the close of the argument for the liquidator we intimated that, in our opinion, the charge of fraud against John Cory failed, and further study of the evidence has strengthened this conviction. This is not only a very important matter to him as regards character, but to a great extent it relieves him from responsibility for anything done or omitted before June 14, 1889.

Another part of the case on which we are unable to agree with Wright, J., relates to the date of John Cory's retirement from the board. There can be no doubt that he sent in a letter of resignation (although it was not produced), and that his resignation was accepted at a meeting of directors held in London on Dec. 18, 1890, and that he was informed of its acceptance on Dec. 22, 1890. There can also be no doubt that his resignation was concealed from the shareholders until after their meeting on Jan. 21, 1891, and that, in the report then laid before the shareholders, the name of John Cory appeared as a director. The evidence is conflicting upon the question whether his resignation was or was not mentioned at the meeting. On the other hand, he was not present at it; he swears he did not know that his name still appeared as a director. The learned judge says he is unable to believe that John Cory did not know that his name so appeared, and in the view of the court below John Cory improperly allowed his retirement to be concealed, and allowed himself to be held out as a continuing director and as concurring in the report of January, 1891, which the learned judge holds to be as fraudulent on John Cory's part as those which preceded it. We cannot adopt the learned judge's view

of this part of the case. We are satisfied that John Cory's resignation was bona fide and a fact, not a sham. He was not in fact a director after his resignation was accepted. He took no part in drawing up the report nor in recommending the dividend declared in January, 1891. Even if he received the report before the meeting and saw his name as a director and did not insist that his name should be struck out or that his resignation should be mentioned to the meeting (and the case against him cannot be put more strongly than this), even then we fail to see how such knowledge and omission can, without more, make him liable for misapplying the funds of the company; when in truth he took no part in their misapplication.

With these preliminary observations, we pass to consider John Cory's liability in respect of the dividends declared in July and December, 1889, and July, 1890. The liquidator has taken the view that the dividends declared and paid by the company when John Cory was a director were all paid out of the capital of the company, and the evidence adduced by the liquidator is directed to prove that such was the case. But when this evidence is examined it seems quite plain that the dividends were not in fact paid out of any part of the money forming the paid-up nominal capital of the company, but were paid, notwithstanding the loss of that capital and without making it good. What was done was this. The accounts were made up annually. Such losses incurred during the year as the directors recognised as losses were written off or provided for by carrying sums of money over to a reserve fund, and the balance of the receipts in each year over the outgoings in the same year (after making some allowance for bad debts and deductions for sums carried over to the reserve fund) were treated as the profits of that year, and were divided as dividends. Losses written off in one year were not brought forward the next year so as to diminish the profits of that year, but were simply ignored, a fresh start being made every year and dividends being declared out of the excess of the annual receipts over the annual expenses. The effect of this was to throw all bad debts written off and not provided for by an increase of the reserve fund on the capital, and to diminish the paid-up capital year by year, and nevertheless to keep paying dividends out of the excess of the annual receipts over the annual expenses.

It is obvious that this method of procedure, if long continued, would ultimately exhaust the paid-up capital of the company, and the first disastrous year in which the current outgoings exceeded the current incomings would produce great embarrassments. Such a mode of dealing with the company's assets, however reprehensible, must nevertheless not be confounded with paying dividends out of the paid-up capital of the company. The paid-up capital of a limited company cannot be lawfully returned to the shareholders under the guise of dividends or otherwise. Even an article of association authorising the payment of interest to shareholders on the amounts paid upon their shares cannot authorise a payment of such interest out of capital: see *Re Sharpe*, *Re Bennett Masonic and General Life Assurance Co.* v. *Sharpe* (1). But paid-up capital which is lost can no more be applied in paying dividends than in paying debts. Its loss renders any subsequent application of it impossible. There was no such dealing with the paid-up capital of the company in this case as to amount to an illegal application of it.

Further, it is not possible for the court to say that the law prohibits a limited company, even a limited banking company, from paying dividends unless its paid-up capital is intact. Suppose a heavy, unexpected loss is sustained; it must be met if there are assets to meet it with. The capital, even uncalled capital, must if necessary be applied to meet it. Such an application of capital is a perfectly legitimate use of it. There is no law which in the case supposed prevents the payment of all future dividends until all the capital so expended is made good. Many honest and prudent men of business would replace a large loss of capital by degrees and reduce the dividends, but not stop them entirely, until the whole loss was made good. No law compels them to pay no dividend at all. There are cases in which no honest competent man of business would think of charging

particular debts or expenses to capital. We are certainly not prepared to sanction the notion that all debts incurred in carrying on a business can be properly permanently charged to capital, and that the excess of receipts over the other outgoings can be afterwards properly divided as profit, as if there had been no previous loss. No honest competent man engaged in trade or commerce would carry on business on such a principle. But, excluding cases in which everyone can see that a particular debt or outlay cannot be reasonably charged to capital, it may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and is often a matter on which opinions of honest and competent men differ: see *Gregory* v. *Patchett* (2).

There is no hard and fast legal rule on the subject. There can, however, be no doubt that if expenses or payments are obviously improperly charged to capital, and are so charged simply to swell the apparent profits and to make it appear that dividends may be properly declared, dividends declared and paid under such circumstances cannot be treated as legitimately paid out of profits, and can no more be justified than if they were paid out of capital. This was determined in *Bloxam* v. *Metropolitan Rail. Co.* (3), and has been acted upon in many other cases—e.g., *Re County Marine Insurance Co., Rance's Case* (4), *Re Oxford Benefit Building and Investment Society* (5), *Leeds Estate, Building and Investment Co.* v. *Shepherd* (6) and *Re London and General Bank (No. 2)* (7) ([1895] 2 Ch. at p. 686). It would seem that SIR GEORGE JESSEL inclined to the opinion that a limited company could not pay dividends unless its paid-up capital was kept up: see *Re Ebbw Vale Steel, Iron, and Coal Co.* (8). But no decision has yet gone this length, and it has since been decided that dividends may be paid, even by a limited company, although its nominal capital is not kept up: see *Verner* v. *General and Commercial Investment Trust* (9); and the earlier case of *Lee v. Neuchatel Asphalte Co.* (10). What was lost there was fixed capital, and it is obvious that circulating capital or any other money employed in earning returns must be deducted from them in order to ascertain how much of them can be regarded as profit. If the returns do not exceed the money spent in procuring them (whether that money be called circulating capital or any other name) there can be no profits, and no ingenious process of book-keeping can alter the fact.

It is not denied in this case that the annual receipts did exceed the annual outgoings, and, the dividends having been paid out of the excess, the allegation that they were paid out of capital is not accurate. But, as already pointed out, it does not at all follow that the course adopted by the directors, in declaring dividends year after year as they did, was legally justifiable. It cannot be denied that the balance-sheets and profit and loss accounts concealed the truth (as now known) from the shareholders, and were, as it now turns out, grievously misleading. The shareholders were never told that the paid-up capital was being constantly diminished by bad debts, as now appears to have been the case. The shareholders were told every year that proper provision was made for those debts, and now that the case has been thoroughly investigated it is really reduced to the question whether John Cory was justified in making the statements he did and in dealing as he did with debts which have now been ascertained to be bad. It is easy to be wise after the event, and there is danger in treating a director as knowing years ago what now appears to be the fact. But it is the duty of the court to examine the state of things as they appeared to him when the dividends were declared, and to determine whether he was justified in what he did by what he knew and ought to have known. What he ought to have known is as important as what he knew.

It was stated in the judgment of this court in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (11) that if directors act within their powers, if they act with such care as is reasonably to be expected from them having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge their equitable as well as their legal duty to that company. We

believe this statement of the law to be correct, and we adopt it as our guide. It has been shown that in this case the dividends did not, in fact, come out of the paid-up capital of the company. Fraud is not established against John Cory, nor is there any proof that he was acting in the interests of his own friends or of himself and not bona fide with a view to the interest of the National Bank. The inquiry, therefore, so far as he is concerned, is reduced to the representations he made as to the position of the company and of his alleged want of care and attention to the affairs of the bank, and more particularly to his omission to find out that the manager was misleading the directors. In *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (11) it was said, and we repeat, that the amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: see *Overend and Gurney Co.* v. *Gibb* (12). Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. We do not know how better to describe it. Some useful observations justifying the expression "gross negligence" will be found in Lord Chelmsford's judgment in *Giblin* v. *McMullen* (13) (L.R. 2 P.C. at p. 336).

It is not, however, necessary to enlarge on this subject. The care, which in any case can be reasonably expected to be taken, is, speaking generally, the measure of the care which the law requires to be taken where there is no contract affecting the question. What we have to determine is whether John Cory was justified in making the statements he made, and whether he could be reasonably expected to find out more than he in fact knew. Bad and doubtful debts were constantly considered and provided for; some being written off; some by setting aside reserve capital; £12,000 odd were written off before 1890, and £13,600, or thereabouts, were written off in that year, and £70,000 was set aside for reserve capital. Such matters were considered by the directors. The accusation is that they did not do enough in this way. But here again, even if some debts known to the manager to be bad, were treated as good, it is not proved that John Cory knew this or had reason to suspect that what was done was inadequate. His evidence is clear that he neither knew nor suspected that such was the case, and that he really believed that the provision was ample.

The same question arises: Was it his duty to test the accuracy or completeness of what he was told by the general manager and managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on on principles of distrust. Men in responsible positions must be trusted by those above them as well as by those below them until there is reason to distrust them. We agree that care and prudence do not involve distrust, but for a director acting honestly himself to be held legally liable for negligence in trusting the officers under him not to conceal from him what they ought to report to him appears to us to be laying too heavy a burden on honest business men. But this is the whole of John Cory's shortcoming as proved by the evidence. . . . Cases such as these are always cases of degree. In *Leeds Estate, Building and Investment Co.* v. *Shepherd* (6) the directors trusted their manager and were held liable. They did not take the trouble to see that what he did was even apparently what he ought to have done. They delegated their functions to him. *Re Denham & Co.* (14) is more like the present case, and there the director was held not liable.

It must be now conceded that if John Cory had himself studied the weekly statements and quarterly returns and had compared those for one period with those for another, and more especially if he had seen the letters addressed by the auditors to the directors, he would have been put upon inquiry, and would have found out, if he had not neglected his duty, that the affairs of the bank were not in the flourishing condition which he believed them to be in. . . . We are satisfied that these letters from the auditors were fraudulently concealed from

John Cory, and that he never knew of, or suspected, their existence. His ignorance of them was not attributable to negligence on his part. John Cory's omission to examine the weekly statements and quarterly returns is also, we think, excusable, although not on the same grounds, for they were known by him to exist, and were in the board room for inspection. We have had the advantage of an exhaustive examination of them, and of a comparison of long series of them, and we know the result and their full significance. But without a comparison of those for one period with those of an earlier period a director would derive little information that was really useful. No suspicion being aroused, John Cory's reasons for not examining them are natural, and his omission to examine them does not show want of reasonable care and attention on his part to the affairs of the bank. He had no reason to suppose that there were unsatisfactory debts beyond those written off and provided for.

The evidence when carefully sifted unquestionably shows that Mr. Cory might have found out that he was deceived by the general manager, and that the dividends declared were not in a business sense warranted by the profit made. On the other hand, the evidence shows that, although he was deceived, he neither knew nor suspected it. We are not prepared to say that he is guilty of any breach of duty in not discovering that those whom he trusted were misleading him; nor that in point of law he was guilty of any breach of duty in recommending the payment of dividends as and when he did. A director does not warrant the truth of his statements; he is not an insurer. But if he makes misstatements to his shareholders he is liable for the consequences unless he can show that he made them honestly, believing them to be true, and took such care to ascertain the truth as was reasonable at the time. This, we think, Mr. Cory did. It follows that Mr. John Cory is not only not liable to make good the dividends declared, but also that he is not liable to refund those which he himself received as a shareholder, whether before or after June 14, 1889, for there was no breach of trust in this matter by him.

[His Lordship dealt with a question of fact which does not call for report and concluded:] We think it only due to the liquidator to add that, although Mr. Cory has succeeded in his appeal, his conduct justified the closest scrutiny, but the order appealed from ought to be reversed, and, having regard to the serious charges made against him, the liquidator must pay Mr. Cory his costs both of the summons and of his appeal.

Appeal allowed.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

DOVEY AND OTHERS *v.* CORY

The liquidator appealed to the House of Lords who, on Aug. 1, 1901, dismissed the appeal.

THE EARL OF HALSBURY, L.C., said that a great part of the judgments of Wright, J., and of the Court of Appeal, was occupied by discussing matters which were not now before their Lordships as matters in debate. He was very clearly of opinion that the judgment of the Court of Appeal was right and ought to be affirmed, but his opinion was entirely based on the question of fact that Mr. Cory was guilty of no breach of duty whatever. He was very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the fact that he took, did not now arise.

[His Lordship reviewed the evidence and concluded:] I am very reluctant to give any opinion on the question whether the sum paid in dividends was properly divisible, inasmuch as the question may arise, and then it may be necessary to

decide it. I deprecate any premature judgment. I am, as I have said, very reluctant to enter into a question, which does not arise here, into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to the correctness of which I am not satisfied. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's Wealth of Nations is appropriate enough, may with reference to a concrete case be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve their ruin. On the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital; but what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do, I, for one, decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a court of law.

LORD MACNAGHTEN and **LORD SHAND** concurred.

LORD DAVEY said that he would refer to three cases, which contained the whole law upon the subject. He continued: In *Re Mercantile Trading Co., Stringer's Case* (15) the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on the estimated value of assets which were afterwards totally lost. It was held that, the estimate having been made bona fide, and without any intention to defraud anybody, a director could not be made liable, when the company was wound-up, to replace the money. In *Rance's Case* (4) Lord Romilly, M.R., laid down the principle which he thought governed cases of this description thus (6 Ch. App. at p. 109):

> "When an improper payment has been made, if it be a mere error of judgment, it cannot be recovered; if it be a fraudulent payment then it can."

The learned judge explained what he meant by a fraudulent payment:

> "I mean one where the person who makes it, or is concerned in making it, is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself. . . . The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him, he is equally guilty."

I think that this statement of the law is very nearly, but not quite, accurate. In my opinion, it is not necessary that the motive of the improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression "wilfully shutting his eyes" culpable negligence, or

reckless indifference by the director in the performance of his duties. LORD ROMILLY decided that case in favour of the director. The Court of Appeal took a different view of the facts from that taken by LORD ROMILLY, and held that the directors, in the preparation of the so-called balance-sheet, had not followed the directions in their articles of association, and that the balance-sheet did not in fact purport to show a profit out of which a dividend could be paid. In that case there can be no doubt of the liability of the director who took part in the payment of the dividend.

Leeds Estate, Building and Investment Co. v. *Shepherd* (6), before STIRLING, J., was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned judge in the course of his judgment states the law thus (36 Ch.D. at p. 801):

> "It seems to me that the views expressed by the learned judges who decided *Rance's Case* (4) are consistent with the proposition that directors who are proved in fact to have paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account, such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements of account submitted to them."

I agree in this statement of the law, and I do not think it inconsistent with that of LORD ROMILLY, properly understood, and subject to the observation which I have already made upon it. It is by this standard that the conduct of Mr. Cory must be judged in this case. In his affidavit, he states generally that he was from first to last under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time during his directorship paid to the shareholders. He adds that the general manager and branch managers were, so far as he knew, men of unquestioned competence and integrity, and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. . . . I think that Mr. Cory was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think that he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by SIR GEORGE JESSEL, M.R., in *Hallmark's Case* (16), and by CHITTY, J., in *Re Denham & Co.* (14), that directors are not bound to examine entries in the company's book. It was the duty of the general manager and, possibly, the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration, but Mr. Cory was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the liquidator has not made out to my satisfaction that Mr. Cory wilfully (as that term is explained in the cases) misappropriated the company's funds in payment of dividends.

What I have said is sufficient for the decision of this appeal. But I desire to express my dissent from some propositions of law laid down in the Court of Appeal. The learned judges seem to have thought that a joint stock company, incorporated under the Companies Acts, may write off capital losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed the outgoings, pay dividends out of such excess without making up the

capital account. If this proposition be well founded it appears to me that a company whose capital is not represented by available assets need never trouble itself to reduce its capital, with the leave of the court and subject to the other conditions imposed by the Companies Act, 1877, in order to enable itself to pay dividends out of current receipts. It may be that I have misapprehended the statement of law intended to be made by the learned judges in the Court of Appeal. I think that possible, because I find that in *Verner* v. *General and Commercial Investment Trust* (9), Lindley, L.J., says ([1894] 2 Ch. at p. 266):

> "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk or lost, and yet the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law in the passage which I have quoted is not open to objection, and it is only because the learned judge appears to me to have departed from it in his judgment in the present case that I have troubled your Lordships with these remarks. I agree that the appeal should be dismissed.

LORD BRAMPTON concurred.

Appeal dismissed.

Solicitors: *Riddell, Vaizey & Smith*, for *Thomas Williams*, Neath; *Burton, Yeates & Hart*, for *Johnsons, Barclay & Lowe*, Birmingham; *Michael Abrahams, Son & Co.*

[*Reported by* C. E. Malden., Esq., *Barrister-at-Law.*]

JONES *v.* BIERNSTEIN

[Queen's Bench Division (Lawrance and Channell, JJ.), January 25, 1899]

[Reported [1899] 1 Q.B. 470; 68 L.J.Q.B. 267; 80 L.T. 157; 47 W.R. 239; 15 T.L.R. 164; 43 Sol. Jo. 224]

[Court of Appeal (A. L. Smith, Henn Collins and Vaughan Williams, L.JJ.), November 10, 1899]

[Reported [1900] 1 Q.B. 100; 69 L.J.Q.B. 1; 811 L.T. 553; 48 W.R. 232; 16 T.L.R. 30]

Distress—For rent—Pound breach—Goods remaining on premises—Abandonment of possession—Evidence of abandonment of distress—Distress for Rent Act, 1737 (11 *Geo.* 2, *c.* 19), *s.* 10.

When goods distrained for rent are impounded on demised premises they are in the possession of the law and anyone removing them is liable to an action for pound breach under s. 10 of the Distress for Rent Act, 1737, even though the landlord has abandoned possession of the goods. Abandonment of possession is not in itself an abandonment of the distress though in certain circumstances it may be evidence of an intention to abandon the distress.

Notes. Referred to : *Lavell & Co.* v. *A. and E. O'Leary*, [1933] All E.R. Rep. 423. A
As to impounding goods on the premises after seizure for distress, see 12 HALSBURY'S LAWS (3rd Edn.) 134; and for cases see 18 DIGEST (Repl.) 358. For the Distress for Rent Act, 1689, s. 3, see 6 HALSBURY'S STATUTES (2nd Edn.) 145. For the Distress for Rent Act, 1737, s. 10, see ibid., p. 152.

Cases referred to : B
(1) *Bannister* v. *Hyde* (1860), 2 E. & E. 627; 29 L.J.Q.B. 141; 1 L.T. 438; 24 J.P. 230; 6 Jur.N.S. 171; 121 E.R. 235; 18 Digest (Repl.) 348, *953*.
(2) *Bagshawes, Ltd.* v. *Deacon*, [1898] 2 Q.B. 173; 67 L.J.Q.B. 658; 78 L.T. 776; 46 W.R. 618, C.A.; 21 Digest (Repl.) 601, *908*.
(3) *Kemp* v. *Christmas* (1898), 79 L.T. 233; 14 T.L.R. 572, C.A.

Also referred to in argument : C
Tennant v. *Field* (1857), 8 E. & B. 336; 27 L.J.Q.B. 33; 3 Jur.N.S. 1178; 6 W.R. 11; 120 E.R. 125; 18 Digest (Repl.) 315, *605*.
Thomas v. *Harries* (1840), 1 Man. & G. 695; 1 Scott, M.R. 524; 9 L.J.C.P. 308; 4 Jur. 723; 133 E.R. 511; 18 Digest (Repl.) 315, *603*.
Swann v. *Earl of Falmouth* (1828), 8 B. & C. 456; 2 Man. & Ry. K.B. 534; 6 L.J.O.S.K.B. 374; 108 E.R. 1112; 18 Digest (Repl.) 325, *712*. D
Lumsden v. *Burnett*, [1898] 2 Q.B. 177; 67 L.J.Q.B. 661; 78 L.T. 778; 46 W.R. 664; 14 T.L.R. 403, C.A.; 18 Digest (Repl.) 421, *1667*.

Appeal by the plaintiff from Southwark County Court in an action of pound breach.

The plaintiff was the owner of a house, No. 151, Fentiman Road, Clapham, which was let to a tenant. The rent being in arrear, the plaintiff, on Wednesday, July 13, E
1898, distrained on the premises. The goods distrained upon were not in any way interfered with—as by putting them in a separate room—but a man was left in possession by the bailiff. Among the goods seized was a certain amount of furniture which the tenant had obtained from the defendant on the hire purchase system. As all the instalments had not been paid, this furniture was, at the time of the distress, the property of the defendant. The man in possession remained on the F
premises on Thursday and Friday until 10 p.m., when, as there was no sleeping accommodation, he went home for the night. It appeared that during this time the agent of the defendant was attempting to regain possession of the furniture belonging to him in some way that would not constitute an infraction of the law. These attempts came to the knowledge of the man in possession. On Saturday night, about 8 p.m., he left the premises with the intention of not coming back again till G
Monday morning, being under the impression, as he declared at the time, that the defendant would make no attempt during Saturday night or Sunday to obtain his goods. About half an hour after he left the defendant did come to the premises, and, after learning of the intention of the man in possession of returning on Monday, took possession of his goods and removed them from the house to his own premises. The plaintiff, on finding that the goods had been removed, brought an action in the H
county court under s. 10 of the Distress for Rent Act, 1737, for pound breach, claiming treble damages under that section and under s. 3 of the Distress for Rent Act, 1689. The county court judge found as a fact that the plaintiff, by the man in possession leaving the premises, had abandoned the possession, but held he had not abandoned the distress. On the ground, however, that to sustain an action for pound breach the goods removed must be in the actual possession of the landlord, he I
held that no action in this case would lie. The plaintiff appealed.

J. D. Crawford for the plaintiff.
H. D. Greene, Q.C., and *Schwabe* for the defendant.

LAWRANCE, J.—The only question raised in this case is whether as against the true owner of the goods taken in distress actual possession is necessary to found an action of pound breach. The question is the same as against the true owner and as

against the tenant. The goods were distrainable, not because they are the tenant's, but because they are on the demised premises at the time of the distress. The question, then, is, is real possession necessary to maintain an action of pound breach against anyone taking away goods distrained for rent and impounded on the tenant's premises? The county court judge has come to the conclusion that it is. I think he is wrong. The goods having been seized and impounded, it is clear, on the authority of *Bannister* v. *Hyde* (1), that it is not necessary that possession should be retained by the landlord in order to sustain an action of pound breach for their removal from the premises where they are impounded. There is no need to keep a man in possession on the premises. Once the goods are impounded, they are in the custody of the law. It is not necessary to go into the question as to what constitutes an impounding. No question as to whether there was or was not a proper impounding was raised at the trial. The county court judge had come to the conclusion that, assuming there was a proper impounding, it was necessary, in order to maintain this action, that real possession of the goods must be shown. He was wrong in this, and the appeal must be allowed.

CHANNELL, J.—I am of the same opinion. The county court judge seems to have been misled by *Bagshawes, Ltd.* v. *Deacon* (2). That was not a case of distress, but a case relating to execution. The difference between the two is this: In the case of seizure in execution, the possession of the sheriff is itself the possession of the law; as soon as his possession ceases, the possession of the law ceases. But when goods are seized in distress, as soon as they are impounded they are placed in the custody of the law. Formerly as soon as they were impounded they ceased ipso facto to be in the possession of the distrainor, and now, though they usually remain in his possession, it is not necessary they should do so. Once they are impounded, they are in the custody of the law, whether they remain in his possession or not. To sustain an action for pound breach, it is necessary to show, not that the goods were in the distrainor's possession, but that they were in the possession of the law—that they have been and are impounded. That is what is meant by an action for pound breach—an action for taking the goods out of the custody of the law.

The question raised before the county court was, whether it is necessary, in order to keep the goods in the custody of the law, that the party distraining should retain possession. As I have said, it is clear that there has been and is an impounding of the goods distrained. This is not necessary. The only question raised by an abandonment of possession is whether the abandonment of possession is such as to show an abandonment of the distress. The abandonment of possession might under certain circumstances be conclusive evidence of this. That appears from the judgment of CROMPTON, J., in *Bannister* v. *Hyde* (1). But once it is shown not to amount to an abandonment of possession there was no difficulty in maintaining an action of pound breach if there was a proper impounding. What constitutes a proper impounding on the premises is very difficult to say. There is a strange absence of authority on the point. Taking possession of the goods with the manifest intention of keeping possession of them was probably sufficient. But the question does not arise in this case. The county judge assumed that there had been an impounding. He held that, there having been an impounding, possession was necessary to sustain an action for pound breach. In this he was wrong, and, if further authority were necessary to support this view, I would refer to *Kemp* v. *Christmas* (3). The point was not discussed there, but it was assumed throughout that, if the goods were once impounded, there was no need to prove actual possession in order to support the action.

From this decision the defendant appealed to the Court of Appeal.

Nov. 10, 1899. **A. L. SMITH, L.J.** Upon this appeal no question is open whether or not the goods had been impounded. The county court judge found that they had

been impounded, and leave to appeal has only been given on the assumption that the county court judge was correct on this point. The only question for our decision is whether a man must always remain in possession of goods that have been impounded in order to keep them in the custody of the law. That question hardly needs an answer. Where there has been an impounding, there is no need that someone should remain in actual possession.

HENN COLLINS and **VAUGHAN WILLIAMS, L.JJ.,** concurred.

Appeal dismissed.

Solicitors : *C. J. Parker; H. E. Tudor.*

[*Reported by* J. A. Strahan, Esq., and E. Manley Smith, Esq., *Barristers-at-Law.*]

COUGHLIN *v.* GILLISON

[Court of Appeal (A. L. Smith, Rigby and Henn Collins, L.JJ.), October, 26, 27, 1898]

[Reported [1899] 1 Q.B. 145; 68 L.J.Q.B. 147; 79 L.T. 627; 47 W.R. 113]

Bailment—Gratuitous bailment—Duty of care of bailor—Gratuitous loan of article—Defect in article lent—Injury to bailee as result of defect—Liability of bailor.

The gratuitous lender of a chattel for use by the borrower is not liable to the borrower for any injury caused by a defect in the chattel unless he knew of the defect and, either deliberately or by gross negligence, did not inform the borrower of the existence of the defect.

Blakemore v. *Bristol and Exeter Rail. Co.* (1) (1858), 8 E. & B. 1035, and *MacCarthy* v. *Young* (2) (1861), 6 H. & N. 329, approved.

Notes. As to gratuitous loan for use, see 2 Halsbury's Laws (3rd Edn.) 109-111; and for cases see 3 Digest (Repl.) 73, 74.

Cases referred to :

(1) *Blakemore* v. *Bristol and Exeter Rail. Co.* (1858), 8. E. & B. 1035; 31 L.T.O.S. 12; 120 E.R. 385; sub nom. *Blackmore* v. *Bristol and Exeter Rail. Co.*, 27 L.J.Q.B. 167; 4 Jur.N.S. 657; 6 W.R. 336; 3 Digest (Repl.) 73, *122.*

(2) *MacCarthy* v. *Young* (1861), 6 H. & N. 329; 30 L.J.Ex. 227; 3 L.T. 785; 9 W.R. 439; 158 E.R. 136; 3 Digest (Repl.) 73, *127.*

(3) *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; 6 Moo. P.C. C. N.S. 369; 22 L.T. 140; 34 J.P. 275; 16 E.R. 765, P.C.; 36 Digest (Repl.) 108, *536.*

Application by the plaintiff for judgment, or for a new trial.

The plaintiff sued the defendants to recover damages for personal injuries sustained through the explosion of a boiler on the defendants' ship. The defendants employed a stevedore to ballast their vessel which was lying in dock. The stevedore employed a gang of men to do the work, of whom the plaintiff was one. The work was to be done by means of a hand winch. The men asked the master of the vessel to permit them to use the ship's donkey engine to help them in their work, and the master consented on condition that they employed and paid a competent man to work the engine, which was done. There was a plate on the boiler of the engine with the date 1887, the maker's name, and the words "proved up to 120lb." It

appeared from the evidence that the engine had been regularly used for the purposes of the ship up to that time. The boiler burst while the engine was being used in the work of ballasting, and the plaintiff was injured. It was proved that the boiler burst when working at a pressure of about 50lb., and that it was so defective that it could not safely stand a pressure of more than 15lb. There was no evidence that the defendants or the master of the ship knew that the boiler was defective. The action was tried before HAWKINS, J., with a jury, and at the close of the plaintiff's case the learned judge held that the defendants, as gratuitous lenders, could not be liable unless they knew of the defective condition of the boiler, and he therefore directed the verdict and judgment to be entered for the defendants. The plaintiff appealed.

C. Dodd, Q.C., and *Minton Senhouse* for the plaintiff.
Pickford, Q.C., and *Maurice Hill* for the defendants.

A. L. SMITH, L.J.—This was an action brought by a man in the employment of a stevedore who was injured by an explosion of the donkey engine of a ship. The action was to recover damages from the owners of the ship. The facts of the case are very short. The plaintiff was engaged by the stevedore as one of a gang to ballast the ship, working by means of a hand winch. The men did not want to work with a hand winch, and they asked the master to allow them to use the donkey engine of the ship. The master said that they might use the engine if they would employ and pay an efficient man to work it; the matter was so arranged, and the use of the engine was given to the men. During the progress of the work the boiler of the engine exploded and the plaintiff was injured. The point was taken at the trial that it was clear on the evidence in support of the plaintiff's case that there was a gratuitous bailment of the donkey engine to the men. It seems to me that it is impossible to say that there was anything in the evidence adduced by the plaintiff to show that this was not a gratuitous bailment. On that question, therefore, there was no evidence to be left to the jury.

Then there was a point of law raised as to what is the duty of the bailor to the bailee in the case of a gratuitous bailment. The law on that point was clearly laid down in *Blakemore* v. *Bristol and Exeter Rail. Co.* (1), where the judgment of the court was delivered by COLERIDGE, J. From that case it is clear that, where there is a gratuitous bailment, the bailee has no cause of action against the bailor unless he can show that, when the chattel was bailed, the bailor knew that it was not fit for the purpose for which it was lent. It has been contended that that is not the rule, but that the rule is that the bailee has a cause of action if there has been gross negligence on the part of the bailor. In my opinion, the law is that, if there has been gross negligence on the part of the bailor in not communicating to the bailee that which he knew as to the condition of the chattel, the bailor will be liable. The law does not go any further than that. The judgment in *Blakemore* v. *Bristol and Exeter Rail. Co.* (2) was approved in *MacCarthy* v. *Young* (2), and the law was again laid down in the same way.

In my opinion *Moffatt* v. *Bateman* (3) in the Privy Council does not apply in the present case. That was not a case of the gratuitous bailment or loan of a chattel. In that case the defendant drove the plaintiff in his carriage, and it was held that he must not be guilty of gross negligence in driving the plaintiff. In the present case, even supposing that gross negligence would be sufficient to support the action, where is the evidence of gross negligence or, indeed, of any kind of negligence? There is none at all. The onus is on the bailee to prove some facts to show that the bailor was guilty of negligence in not disclosing the defect in the thing lent. This case is absolutely devoid of any evidence of any knowledge, or of any negligence on the part of the bailor. It is said that the plate on the boiler was an intimation that the boiler was efficient; but it only states that at one time it was tested by the makers to a certain pressure. That is no evidence on which the defendants can be made liable. The appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion, and I concur in the judgment delivered by A. L. SMITH, L.J. It is quite clear that, in the case of a gratuitous bailment, in order to render the bailor liable to the bailee, there must be the concealment of some material fact, or such negligence in not communicating something with reference to the article lent as would amount to the same thing as concealment, for instance, in the case of the loan of an article which has not been used for a long time. There are no such facts in the present case, and there is no evidence of any concealment or negligence to make the bailor liable. I agree, therefore, that the appeal must be dismissed.

HENN COLLINS, L.J.—I am of the same opinion. In my judgment, this is purely a case of a lender and borrower, and I will confine my observations to that class of cases. It is clear that there may be cases of gratuitous bailment where there is an obligation on the bailor which does not attach to a person who lends gratuitously. There may be a gratuitous bailment for the benefit of both parties, which is not a mere loan for the benefit of the bailee. The evidence in this case does not bring it within the cases of invitor and invitee. There was no kind of invitation by the lender to use this engine for his benefit. What then, is the duty of a lender? That duty has been defined in *Blakemore* v. *Bristol and Exeter Rail. Co.* (1) and *MacCarthy* v. *Young* (2). The lender is bound to communicate to the borrower information of any defects in the article lent of which he is aware. If he knows of a defect and deliberately withholds the information from the borrower, that is a fraud and he will be liable. If he knows of a defect and by gross negligence fails to communicate the information to the borrower, that amounts to the same thing, and he will be liable.

The plaintiff has relied on a passage in POTHIER'S TRAITE DU PRET A USAGE, para. 84, which is as follows:

> "Une autre espèce d'obligation du prêteur envers l'emprunteur, c'est celle de lui donner avis des défauts de la chose qu'on lui demande à emprunteur, lorsqu'il en a connoissance, et que ces défauts peuvent causer du dommage a l'emprunteur. Le prêteur, faute d'avoir satisfait à cette obligation, est tenu, actione contrariâ commodati, de tout ce que l'emprunteur a souffert du vice de la chose prêtée, dont il n'a pas été averti. Il y en a un example en la Loi 18, s. 3, où il est dit:
>
> 'Qui sciens vasa vitiosa commodavit, si ibi infusum vinum vel oleum corruptum effusumve est, condemnandus eo nomine est.'
>
> En général, le prêteur doit donner avis a l'emprunteur, de tout ce qu'il a intérêt de sçavoir par rapport à la chose qu'il lui prête; et si par dol ou par une faute lourde, il manque de lui en donner connoissance, il est tenu envers lui, actione contrariâ commodati, de ses dommages et intérêts."

It is said by the plaintiff that this passage shows that the lender is bound to communicate to the borrower all that he has an interest in knowing with regard to the thing lent, and that he is liable if by gross negligence he does not find out a defect and inform the borrower. That passage, however, refers to communicating matters of which the lender is aware. This is shown by the earlier part of the same paragraph, and in an earlier paragraph (para. 80) it is distinctly so stated. Therefore, the gratuitous lender is liable only if he has kept back something which was known to him, either deliberately or through gross negligence.

Counsel for the plaintiff cited another passage from another French lawyer; but, though that may be the law of France, the law of this country does not go any further than was laid down in *Blakemore* v. *Bristol and Exeter Rail. Co.* (1). Counsel for the plaintiff also cited *Moffatt* v. *Bateman* (3) in the Privy Council. That case was, indeed, well decided; but it bears a false analogy to the present case. That was not the ordinary case of a gratuitous loan. It was a case like that of a carrier without

reward: the bailee was to carry the bailor, and was bound not to be guilty of gross negligence. The duty in that case was that of the gratuitous bailee towards the bailor, and not the duty of the bailor to the bailee. Gross negligence is the standard by which to measure the duty of a gratuitous bailee towards the bailor. That is not, however, the standard by which to try the obligation of a gratuitous lender towards the borrower. This appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Lovett & Liddle; Thomas Cooper & Co.*, for *Hill, Dickenson, Dickenson & Hill*, Liverpool.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

BELL *v.* BALLS

[CHANCERY DIVISION (Stirling, J.), February 11, 12, March 10, 1897]

[Reported [1897] 1 Ch. 663; 66 L.J.Ch. 397; 76 L.T. 254; 45 W.R. 378; 13 T.L.R. 274; 41 Sol. Jo. 331]

Auctioneer—Sale of land—Memorandum of contract—Need to be signed by auctioneer as agent for purchaser at time of sale—Inadequacy of signature of clerk.

In a sale by auction of freehold property the authority of the auctioneer to bind both parties by signing the memorandum on a copy of the particulars does not extend to the auctioneer's clerk, for the auctioneer as agent cannot delegate his authority. The memorandum, therefore, must be signed by the auctioneer himself at the same time of the sale, so as to constitute part of the transaction of sale.

The defendant, on entering a sale-room, had a conversation with the auctioneer and was asked to "give him a bid" for certain freehold property. In consequence of this request he bid for the property, but had no intention of actually purchasing it. When the property was knocked down to him he left the room, and, on being brought back, refused to sign the memorandum of agreement on a copy of the conditions of sale which had been drawn up by the auctioneer's clerk. A week later the auctioneer, at the instance of the vendor, filled up and signed his name as agent for the defendant on a memorandum on another copy of the conditions of sale. In an action brought by the plaintiffs for specific performance of the alleged contract,

Held: neither document was sufficient memorandum to satisfy the Statute of Frauds as the first had been drawn up by the auctioneer's clerk, and the second was not signed by the auctioneer contemporaneously with the transaction of sale.

Peirce v. *Corf* (1) (1874), L.R. 9 Q.B. 210, approved.

Buckmaster v. *Harrop* (2) (1807), 13 Ves. 456, considered.

Notes. Section 4 of the Statute of Frauds (which imposed the need of a written memorandum before certain contracts could be enforced) has been largely repealed, but it still applies to a guarantee, and under s. 40 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 500), no action may be brought on a contract for the sale of land unless the agreement or memorandum thereof is in writing.

Applied: *Chaney* v. *Maclow*, [1929] 1 Ch. 461. Referred to: *Wilson* v. *Pike*, [1948] 2 All E.R. 267.

As to the authority of auctioneer, see 2 HALSBURY'S LAWS (3rd Edn.) 71 et seq.; and for cases see 3 DIGEST (Repl.) 4 et seq.

Cases referred to:

(1) *Peirce* v. *Corf* (1874), L.R. 9 Q.B. 210; 43 L.J.Q.B. 52; sub nom. *Pierce* v. *Corf*, 29 L.T. 919; 38 J.P. 214; 22 W.R. 299; 3 Digest (Repl.) 8, *61*.

(2) *Buckmaster* v. *Harrop* (1807), 13 Ves. 456; 33 E.R. 365, L.C.; 3 Digest (Repl.) 8, *58*.

(3) *Tamplin* v. *James* (1880), 15 Ch.D. 215; 43 L.T. 520; 29 W.R. 311, C.A.; 42 Digest 485, *524*.

(4) *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; 1 Nev. & M.K.B. 313; 110 E.R. 522; 3 Digest (Repl.) 10, *73*.

(5) *White* v. *Proctor* (1811), 4 Taunt. 209; 128 E.R. 309; 3 Digest (Repl.) 8, *60*.

(6) *Bramley* v. *Alt* (1798), 3 Ves. 620; 30 E.R. 1186; 3 Digest (Repl.) 15, *108*.

(7) *Kemeys* v. *Proctor* (1820), 1 Jac. & W. 350; 37 E.R. 409; 3 Digest (Repl.) 10, *80*.

(8) *Emmerson* v. *Heelis* (1809), 2 Taunt. 38; 127 E.R. 989; 3 Digest (Repl.) 8, *59*.

(9) *Earl of Glengal* v. *Barnard* (1836), 1 Keen. 769; on appeal (1842), 5 Beav. 245; affirmed sub nom. *Lady Thynne* v. *Earl of Glengall* (1848), 2 H.L.Cas. 131; 12 Jur. 805; 9 E.R. 1042, H.L.; 12 Digest (Repl.) 177, *1170*.

(10) *Mews* v. *Carr* (1856), 1 H. & N. 484; 26 L.J.Ex. 39; 156 E.R. 1292; 3 Digest (Repl.) 9, *68*.

(11) *Day* v. *Wells* (1861), 30 Beav. 220; 54 E.R. 872; 3 Digest (Repl.) 6, *43*.

Also referred to in argument:

Dyas v. *Stafford*, [1882] 9 L.R.Ir. 520; 12 Digest (Repl.) 179, **704*.

Sims v. *Landray*, [1894] 2 Ch. 318; 63 L.J.Ch. 535; 70 L.T. 530; 42 W.R. 621; 8 R. 582; 3 Digest (Repl.) 10, *75*.

De Bunche v. *Alt* (1878), 8 Ch.D. 286; 47 L.J.Ch. 381; 38 L.T. 370; 3 Asp.M.L.C. 584, C.A.; 12 Digest (Repl.) 566, *4312*.

Henderson v. *Barnewell* (1827), 1 Y. & J. 387; 148 E.R. 721; 12 Digest (Repl.) 178, *1183*.

Farebrother v. *Simmons* (1822), 5 B. & Ald. 333; 106 E.R. 1213; 3 Digest (Repl.) 41, *300*.

Wright v. *Dannah* (1809), 2 Camp. 203; 1 Digest (Repl.) 323, *100*.

Seton v. *Slade*, *Hunter* v. *Seton* (1802), 7 Ves. 265; 32 E.R. 108; 3 Digest (Repl.) 6, *33*.

Manser v. *Back* (1848), 6 Hare, 443; 67 E.R. 1239; 3 Digest (Repl.) 6, *39*.

Farmer v. *Robinson* (1805), 2 Camp. 339, n.; 1 Digest (Repl.) 802, *3280*.

Jones v. *Rimmer* (1880), 14 Ch.D. 588; 49 L.J.Ch. 775; 43 L.T. 111; 29 W.R. 165, C.A.; 42 Digest 484, *513*.

Preston v. *Luck* (1884), 27 Ch.D. 497; 33 W.R. 317, C.A.; 12 Digest (Repl.) 102, *601*.

Action by vendors for specific performance of an agreement for the sale of a freehold house.

The plaintiffs were the vendors of a freehold house known as The Riddings, 73, Tulse Hill. They caused this property to be put up for public auction by Messrs. Herring, Son and Daw, at the Mart, Tokenhouse Yard, on Nov. 25, 1895. The terms were expressed in the particulars and conditions of sale, at the end of which was the usual memorandum of agreement in blank, intended to be filled up by the purchaser and the auctioneer. The defendant, with a friend called Wyatt, attended the sale, which was conducted by Mr. Daw. As Mr. Daw entered the sale-room a conversation took place between him and the defendant, whom he knew personally, and just before he entered the rostrum he asked the defendant to "give him a bid." The sale then proceeded. It consisted of five properties, of which the house concerned was the third, and the reserve on that lot was fixed at £1,600. After

A some biddings the defendant bid £1,550, and after a short conversation between Mr. Daw and the vendors, the lot was knocked down to the defendant at that price. The sale of the two remaining properties was proceeded with, and at the close the defendant left the room. The auctioneer's clerk then mentioned to the auctioneer that the defendant had not signed the memorandum and a messenger was sent after him, and he returned. He was then asked to sign the memorandum but refused on B the ground that he made the bid not on his own behalf but for Mr. Daw, and in compliance with the request made to him.

In the meantime the clerk had filled up the memorandum of agreement, on a copy of the conditions of sale, in the appropriate way. It ran thus:

"I, George Balls, of Brixton Hill, S.W., do hereby acknowledge that I have C this day purchased the property described in the within particulars of sale for the sum of £1,550, and having paid into the hands of Messrs. Herring, Son, and Daw, the auctioneers, the sum of £155 as a deposit and in part payment of the purchase money, I hereby agree and bind myself, my heirs, executors, administrators, and assigns, to pay the balance of the said purchase money, and complete the said purchase in all respects according to the within conditions of sale. D As witness my hand, this 25th day of November, 1895. [Then followed the account of the purchase money, the deposit and balance owing, and then] as agents for the vendors, Peter Bell and William Dickson, we hereby ratify this sale, and as auctioneers acknowledge . . ."

The defendant refused to sign it, and Mr. Daw, the auctioneer, did not sign it. A week later, namely, on Dec. 2, Mr. Daw, at the instance of the vendors, filled up E and signed his name as an agent of the defendant on a memorandum on another copy of the particulars. That memorandum was slightly altered, because no deposit was paid, but otherwise it was the same as before. On being presented with this memorandum the defendant still refused to complete the sale and the plaintiffs brought this action to compel him to do so, relying on the above-mentioned memoranda as being sufficient to satisfy s. 4 of the Statute of Frauds. The F defendant raised the defences that he entered into the contract under a mistake, and that there was no sufficient memorandum in writing to satisfy the Statute of Frauds.

Grosvenor Woods, Q.C., and *Ingpen* for the plaintiffs.
Hastings, Q.C., and *Stallard* for the defendant.

Cur. adv. vult.

G

Mar. 10, 1897. **STIRLING, J.**, stated the facts and continued: The first question, which is one of fact, is, whether the defendant really bid for the property as he alleges, or, in other words, as a puffer at the sale. The story told by the defendant is somewhat strange; but having seen him in the box and heard the evidence of Mr. Wyatt, the defendant's friend, and seen the memoranda produced, I believe he H did act under the belief which he professes; but that, on the other hand, there was no reasonable ground for his so acting, and what passed between him and Mr. Daw ought not to have misled him into that belief.

The question then is, what is the legal result? It seems to me that, assuming a memorandum to exist which satisfies the requirements of the Statute of Frauds, there was a valid contract, and that the mistake does not affect the validity of the contract at law between the plaintiffs and defendant, and that at the utmost it constitutes a defence so far as the action seeks specific performance. Prior to the Judicature Acts there would have been an end of the matter; but, as the matter now stands, according to *Tamplin* v. *James* (3) the court is bound to go on and give the plaintiffs such relief as they are entitled to. Therefore it becomes necessary to consider the second defence, namely, that neither of these documents was sufficient to satisfy the Statute of Frauds.

First, as to the auctioneer's clerk's memorandum, it is decided and established by a case to which I will refer later, that in a sale by auction the auctioneer has

authority to bind both parties if he signs the memorandum on a copy of the particulars, and the question is, if that memorandum be filled up by a clerk, is that sufficient? An agent, however, cannot delegate his authority, and the law with reference to a clerk is thus stated by BLACKBURN, J., in *Peirce* v. *Corf* (1) (L.R. 9 Q.B. at pp. 214, 215):

> "I take it as quite clear that the auctioneer's clerk has no authority to sign by the general custom; although, as *Bird* v. *Boulter* (4) decided, there may be special circumstances to show that an auctioneer's clerk had authority to sign; where the bidder, that is the person to be charged, by word or sign authorises the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent."

In the present case he did not sign, nor did he otherwise authorise the auctioneer's clerk to sign, and therefore the case of *Bird* v. *Boulter* (4), referred to by BLACKBURN, J., has no application.

It was urged, however, that the exigencies of the case require the clerk to be held authorised to sign the memorandum on behalf of the purchaser. The ordinary practice on a sale of real estate, as stated by Mr. Daw, appears to be for the auctioneer, after a lot is knocked down, to proceed with the sale, leaving the clerk to find out the name of the purchaser and to prepare the memorandum on two copies of the particulars, one for the signature of the purchaser and the other for that of the auctioneer. That there is some convenience in that practice there can be no doubt; but as to its validity it seems to me that the mere statement of it shows that there is no sufficient ground for alleging that the exigencies of the case require that the authority should be delegated. The practice contemplates that one part should be signed by the auctioneer, and if this be consistent with the requirements of business, it is difficult to see why the auctioneer himself should not sign the other. This appears to me an answer to the contention which was forcibly urged in argument. There can be no difficulty in writing his name down at the time on a copy of the particulars, and any way that has been held sufficient in several cases: see *White* v. *Proctor* (5); *Bramley* v. *Alt* (6); *Kemeys* v. *Proctor* (7). I come, therefore, to the conclusion that the memorandum filled in by the clerk is not sufficient to satisfy the statute.

Then is the memorandum sufficient which was signed by the auctioneer on Dec. 2? It is contended by the purchaser that, although the auctioneer signed it, yet he had no authority to do so, because the authority conferred at the time of the sale had expired long before that, and at all events could not be exercised at that date; and, secondly, that whatever authority was originally given had been actually revoked. In these circumstances it becomes necessary to consider the ground on which it was originally held that, on a sale by public auction of an interest in land or chattel subject to the provisions of the Statute of Frauds, the auctioneer is authorised to sign the memorandum. It was first established in the case of *Emmerson* v. *Heelis* (8), and LORD MANSFIELD, in giving his decision, says (2 Taunt. at pp. 47, 48):

> "Now this memorandum is more particular than most memorandums of sale are, and upon it the auctioneer writes down the purchaser's name. By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser; and it does seem, therefore, that this is a contract signed by an agent for the purchaser, and consequently is binding."

In the *Earl of Glengal* v. *Barnard* (9) LORD LANGDALE, M.R., thus explains the ground of that decision (1 Keen. at p. 788):

A "The nature of the proceeding by auction—the bidding for the purpose of making the purchase—the necessity of making a statement of the bidding—the direction to the auctioneer to write down the bidding, which is perhaps involved in the very process of bidding, and some other circumstances, afford intelligible ground for the decision in *Emmerson* v. *Heelis* (8), and the approbation which has since been bestowed upon it."

B These cases appear to me to show that the authority conferred on an auctioneer by a purchaser is to write down the bidding, and thus to make a minute or record of it at the time as part of the transaction. Such a record is held to be a memorandum sufficient to satisfy the statute. But I do not see anything which justifies him in making such a minute except at the time when the writing down of the name has C been fairly held to be a part of the sale by auction. If the auctioneer were allowed to postpone putting down the name to a later time, evils might arise similar to those which the statute was intended to prevent. Such authority as he has appears to have been considered in several cases. The case of *Mews* v. *Carr* (10), relied on by the defendant, cannot, I think, be regarded as an authority, because there the lots were unsold, and the defendant in the case having called on the auctioneer and D agreed to purchase certain lots the auctioneer entered the defendant's name in his presence in the catalogue. But all that did not take place until several days after.

The other point was raised in *Buckmaster* v. *Harrop* (2). There appears from the report (13 Ves. at p. 457) that the evidence of a memorandum in writing by the auctioneer did not show that he had made entries of the biddings at the time of the sale, and an objection was taken upon that ground by the residuary legatee. Two E objections were in fact raised; one, that the memorandum was not made at the time; and the other, that the auctioneer had an interest. Dealing with that, the Lord Chancellor says (ibid. at pp. 473, 474):

"The only evidence that I can receive is the written memorandum itself, unless it is lost; and it must be a contemporary memorandum, especially in this case, as the auctioneer being himself the vendor, though only as a trustee, F could not in strictness be the agent of the purchaser."

The Lord Chancellor therefore says that the memorandum must be contemporary, so as to constitute part of the transaction of sale. If the auctioneer had proceeded to sign immediately after the conclusion of the sale, I should have been slow to hold that it was beyond his power; but the memorandum of Dec. 2, was signed at a G time when the authority had ceased. It becomes, therefore, unnecessary to consider the question which was discussed, whether the purchaser could revoke the authority conferred on the auctioneer before he signed the memorandum. Without entering into a discussion of the cases cited, I will content myself with saying that I share with LORD ROMILLY the reluctance with which he held that upon a sale by auction under ordinary circumstances the vendor (or, as in the case before me, the H purchaser) can say, after the lot has been knocked down to him, that he is not satisfied, and desires to withdraw his authority: see *Day* v. *Wells* (11). The result is, that the defence succeeds, and that the action must be dismissed with costs.

Solicitors: *Beaumont, Son & Rigden; C. Butcher.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

Re MAYFAIR PROPERTY CO. BARTLETT *v.* MAYFAIR PROPERTY CO.

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), March 24, April 1, 1898] B

[Reported [1898] 2 Ch. 28; 67 L.J.Ch. 337; 78 L.T. 302; 46 W.R. 465; 14 T.L.R. 336; 42 Sol. Jo. 430, 5 Mans. 126]

Company—Winding-up—Debentures charged on uncalled capital—Reserve capital—Companies Act, 1879 (42 & 43 *Vict.*, *c.* 76), *s.* 5.

A limited company was incorporated in 1892 with a capital of £50,000 divided into 5,000 partly paid-up shares of £10 each. Both the memorandum and the articles of association authorised the creation of a charge on the uncalled capital of the company. In October, 1892, by a special resolution, it was declared that £5 remaining uncalled on the ordinary shares should not be capable of being called up "except in the event of and for the purposes of the company being wound-up." In June, 1894, the company issued 160 first mortgage debentures of £100 each charged on all its property, both present and future, including its "uncalled capital for the time being." In August, 1896, the company was compulsorily wound-up, at which time £5 remained uncalled on the ordinary shares, and subsequently the liquidator called up the uncalled capital. On the question whether the debentures were a first charge on the uncalled capital, C D

Held: the company having by special resolution provided a reserve of uncalled capital, that reserve was preserved for the general purposes of the company when wound-up; any application of that reserve towards repayment of the debentures would not be an application for the purposes of the company being wound-up; accordingly, the company had no authority to charge the debentures on the reserve uncalled capital and the reserve remained intact for the purposes of the winding-up. E F

Notes. For s. 5 of the Companies Act, 1879, see now s. 60 and s. 64 of the Companies Act, 1948, 3 HALSBURY'S STATUTES (2nd Edn.) 512, 514.

Applied: *Re Irish Club Co.*, [1906] W.N. 127. Referred to: *Hickman* v. *Peacey*, [1945] 2 All E.R. 215.

As to charge on uncalled capital, see 6 HALSBURY'S LAWS (3rd Edn.) 463, 464; and for cases see 10 DIGEST (Repl.) 752 et seq. G

Cases referred to:

(1) *Re Pyle Works* (1890), 44 Ch.D. 534; 59 L.J.Ch. 489; 62 L.T. 887; 38 W.R. 674; 6 T.L.R. 268; 2 Meg. 83, C.A.; 10 Digest (Repl.) 754, *4905.*

(2) *Heydon's Case* (1584), 3 Co. Rep. 7a; 76 E.R. 637; 42 Digest 614, *143.*

(3) *Newton* v. *Anglo-Australian Investment Co.'s Debenture-Holders*, [1895] A.C. 244; 72 L.T. 305; 43 W.R. 401; 11 T.L.R. 278; 2 Mans. 246; 11 R. 438; sub nom. *Re Anglo-Australian Investment, Finance and Land Co., Ltd., Newton* v. *Anglo-Australian Investment, Finance and Land Co., Ltd.'s Debenture-Holders*, 64 L.J.P.C. 57, P.C.; 10 Digest (Repl.) 753, *4900.* H

(4) *Ooregum Gold Mining Co. of India* v. *Roper, Wallroth* v. *Roper*, [1892] A.C. 125; 61 L.J.Ch. 337; 66 L.T. 427; 41 W.R. 90; 8 T.L.R. 436; 36 Sol. Jo. 344, H.L.; 9 Digest (Repl.) 304, *1913.* I

(5) *Re British Provident Life and Fire Assurance Society, Stanley's Case* (1864), 4 De G.J. & Sm. 407; 4 New Rep. 255; 33 L.J.Ch. 535; 10 T.L.R. 674; 10 Jur.N.S. 713; 12 W.R. 894; 46 E.R. 976, L.JJ.; 10 Digest (Repl.) 753, *4896.*

Also referred to in argument:

Re Phœnix Bessemer Steel Co. (1875), 44 L.J.Ch. 683; 32 L.T. 854; 10 Digest (Repl.) 753, *4895.*

Re David Lloyd & Co., Lloyd v. *David Lloyd & Co.* (1877), 6 Ch.D. 339; 37 L.T. 83; 25 W.R. 872, C.A.; 10 Digest (Repl.) 844, *5564*.

Re Henry Pound, Son and Hutchins (1889), 42 Ch.D. 402; 58 L.J.Ch. 792; 62 L.T. 137; 38 W.R. 18; 5 T.L.R. 720; 1 Meg. 363, C.A.; 10 Digest (Repl.) 844, *5568*.

Appeal by H. H. Bartlett, the holder of a debenture issued by the Mayfair Property Co., and charging its uncalled capital, from a decision of WRIGHT, J. (see infra).

The company was formed and registered as a limited company on Aug. 16, 1892, with a nominal capital of £50,000 divided into 5,000 shares of £10 each. The memorandum of association stated that one of its objects was to borrow money and issue debentures charged on "the property and rights of the company, both present and future, including its uncalled capital." By the articles of association full power was given to the directors to issue debentures charging all the assets of the company, including its uncalled capital. Before this power was exercised a special resolution was passed on Oct. 12, 1892, whereby it was declared

> "That such portion of the company's capital as consists of £5 per share remaining uncalled upon all the ordinary shares of the company shall not be capable of being called up, except in the event of and for the purposes of the company being wound-up in accordance with the provisions of the Companies Act, 1879."

In June, 1894, it was resolved by the directors to create and issue debentures for £50,000 bearing interest at 6 per cent., and 160 debentures for £100 each bearing interest at 6 per cent. were created and issued accordingly under the seal of the company. By these debentures the company bound itself to pay the principal moneys and interest secured by them, and the company as beneficial owner charged with such payments "its undertaking and all its property whatsoever and wheresoever, both present and future, including its uncalled capital for the time being." At the time these debentures were issued £4 5s. per share had been called up. There remained to be called up £5 15s. per share, of which, however, £5 could only be called up on the winding-up of the company.

On Aug. 8, 1896, an action was brought against the company by a debenture holder suing on behalf of himself and all other debenture holders, and on Aug. 12, he obtained judgment in the usual form and a receiver was appointed. On the same day the company was ordered to be wound-up and a liquidator was appointed. By this time of the £5 15s. per share, uncalled up when the debentures were issued, 15s. had been called up by the directors; so that on Aug. 12, 1896, when the winding-up order was made, £5 per share had been called up by the directors and £5 more—i.e., the reserve capital—only remained to be called up for the purposes of the company being wound-up. The liquidator had called on the contributories for payment of this £5 per share. The assets of the company, including the reserve capital called up by the liquidator, were insufficient to pay the costs of the winding-up and the creditors of the company.

In November, 1897, the plaintiff in the debenture holders' action applied by summons to determine the question whether the debentures created a valid first charge on the reserve capital so as to entitle the holders of them to payment out of that fund in priority to the other creditors and to the costs of the winding-up. WRIGHT, J., held against the plaintiff, that the company had no power to create any charge on that portion of its capital which by the Companies Act, 1879, could only be called up "in the event of and for the purposes of the company being wound-up." From that decision the plaintiff appealed.

Swinfen Eady, Q.C., and *R. F. Norton* for the plaintiff.

Farwell, Q.C., and *George Henderson* for the official receiver and liquidator.

Cur. adv. vult.

April 1, 1898. The following judgments were read. A

SIR NATHANIEL LINDLEY, M.R., stated the facts, referred to sections 4, 5, 6, 10, of the Companies Act, 1879, and continued: The contention on the part of the plaintiff is that a limited company can validly charge its uncalled capital if authorised so to do by its memorandum of association or by its articles; and that the capital or money which under the Act of 1879 can only be called up in the event of and for the purposes of the company being wound-up is part of the capital of the company in the full and proper sense of that word; and that there being no prohibition against creating charges upon it the power to create such charges necessarily follows. This argument is based on *Re Pyle Works* (1), which finally settled that uncalled capital of a limited company governed by the Companies Act, 1862, could be validly charged in favour of particular persons. It is further contended that the payment of the secured debts of a company is as much a purpose of the company as the payment of its other debts; that there is no necessary implication requiring the court to hold reserve capital to be incapable of being charged with the payment of particular debts; and that it may be ruinous to a company to prevent it from obtaining relief from perhaps temporary pressure by raising money on the security of its most valuable asset. B C D

Cogent as this argument is, I am convinced that it is unsound, and that to yield to it would defeat and not carry out the purpose with which the Act of 1879 was passed. When *Re Pyle Works* (1) was decided I foresaw that the decision might be pressed further than I was prepared to go, and I pointed out that, in my opinion, it did not authorise mortgages of reserve capital formed under the Act of 1879. I adhere to that view now that I have carefully re-considered it. In order properly to interpret any statute it is as necessary now as it was when LORD COKE reported *Heydon's Case* (2) to consider how the law stood when the statute to be construed was passed: what the mischief was for which the old law did not provide; and the remedy provided by the statute to cure that mischief. The Companies Act, 1879, was passed in order to remedy some defects in the law relating to unlimited companies, and which defects, although long known to lawyers, startled the public when the City of Glasgow Bank stopped payment in 1878. The members of unlimited companies were in this position: First, they were liable to calls on their shares to their nominal amounts. This was the only liability which could be enforced by the company or by its directors whilst the company was carrying on business. This liability, but no liability beyond, was an asset of the company with which the company could deal. But, secondly, in addition to this limited liability the members were under an unlimited liability to the creditors of the company; and this unlimited liability could be enforced by creditors, although it was not an asset of the company which the company or its directors could charge, alien, or dispose of in any way whatever to the prejudice of any creditor. What was wanted was power to form a company with a reserve capital which should be limited in amount, which should be available for creditors in the event of a winding-up, and which should not be under the control of the directors any more than the funds were which the creditors could obtain, but the directors could not under the old law. This amendment in the law was made by the Act of 1879. E F G H

It appears to me plain that s. 5 was framed with a double object—viz., first, to preserve for the general creditors of the company the funds which the members were liable to pay, but which the directors could not call up; and, secondly, to enable the members to limit the amount of their liability on a winding-up to pay the creditors more than the amount preserved for them. If the plaintiff's contention is right, the first of these objects will be entirely defeated, although there is not a sign of any intention on the part of the legislature to effect so great a change in the law, and although such a change would or might be ruinous to the great body of a company's creditors and be destructive of the credit which the preservation intact of reserve capital gives to those companies which avail themselves of the Act of I

1879. To effect such a change in the law applicable to unlimited companies which avail themselves of the Act of 1879 some provision is wanted to confer on companies carrying on business power to deal with what the members are only liable to pay when the winding-up takes place. Such a power would be a complete novelty and cannot be inferred from the absence of any words prohibiting it.

I have dwelt on the effect of the Act of 1879 on unlimited companies, which take the benefit of it because the effect on them and the effect on limited companies are to be gathered from the use of exactly similar language. It was obviously desirable to enable companies originally formed and registered as limited companies to have reserve capital and not to confine that advantage to unlimited companies registering themselves as limited companies. The object of the last part of the section is exactly the same as the object of the first part. Both classes of companies are put on the same footing so far as reserve capital is concerned. The prohibition against calling up the reserve capital in the case of limited companies is inserted for precisely the same purpose as in the case of unlimited companies—viz., to preserve such capital for the general purposes of the company when wound-up. To interpret the section so as to enable a company to defeat this object by pledging or otherwise disposing of its reserve capital is, in my opinion, entirely to miss the real meaning of the legislature as expressed in the language it has used. Neither the Act of 1879 nor the other Companies Acts give a company power to dispose of assets which cannot come into existence until it is wound-up. To hand over the reserve capital or any part of it when called up to a prior assignee, or to a mortgagee who has no claim against the assets until he has realised or given up his security, is not to apply the reserve capital for the purposes of the company being wound-up within the true meaning of that expression as used in s. 5, but to prevent such application. This was the view of Wright, J., and it is mine also.

With respect to *Newton* v. *Anglo-Australian Investment Co.'s Debenture-Holders* (3), on which counsel for the plaintiff so much relied, I need only observe that it was not a decision on the Act of 1879, but a decision on an article of association, so worded as not to preserve, nor indeed to show any intention to preserve, the reserve capital for the benefit of the general creditors in the event of liquidation. I cannot regard that case as an authority against the view which I take of the Act of 1879. The appeal must be dismissed with costs.

RIGBY, L.J.—I concur.

VAUGHAN WILLIAMS, L.J.—I agree; but I prefer to express my own reasons. The question in this case is whether capital rendered incapable by the Act of 1879 of being called up, except in the event and for the purposes of a winding-up, can be mortgaged by the directors. It is not an essential characteristic of capital of companies formed under the Companies Act, 1862, that it should be capable of being mortgaged by the company. All that was decided in *Re Pyle Works* (1) was that, there being in the articles of that company a power of mortgage wide enough to include uncalled capital, there was nothing in the nature of uncalled capital as constituted by the Companies Act, 1862, to prohibit, either by express words or by necessary implication, the mortgaging of such capital, and that the article, therefore, was operative and not ultra vires. The question, therefore, in this case, is not whether capital rendered incapable of being called up by the Act of 1879 is capital within the meaning of the Companies Act, 1862, but whether being such capital there is anything in the Act of 1879 which expressly or by necessary implication renders such capital incapable of being mortgaged. This question depends on the true construction of the words of the Act. [His Lordship read s. 4 of the Act of 1879, and continued:]

It will be observed that this section, excepting in so far as it provides that the registration of an "unlimited company" as a "limited company" in pursuance of this Act shall not affect or prejudice any debts or liabilities incurred prior to registration, does not impose any condition of registration. Then comes s. 5, which

enacts: [His Lordship read s. 5, and continued:] The first three paragraphs of this section relate solely to "unlimited companies" registering as "limited companies." The first paragraph provides that the "unlimited company" may by the resolution assenting to registration increase the nominal amount of its capital by increasing the nominal amount of each of its shares, and the second paragraph provides that no part of such increased capital shall be capable of being called up, except in the event of, and for the purposes of, the company being wound-up. The third paragraph provides, that in cases where no such increase of nominal capital may be resolved upon an "unlimited company" by the resolution assenting to registration as a "limited company" may provide that a portion of its uncalled capital shall not be capable of being called up, except in the event of and for the purpose of the company being wound-up. It will be observed that the condition in para. 2 is a condition of the increase of capital, and not a condition of registration as a "limited company." The statutory condition is of course irrevocable, and the resolution to the same effect in para. 3 seems equally irrevocable, as being a condition of the constitution of the company as a "limited company."

If one may speculate on the intention of the legislature in creating this condition of the increase of its nominal capital on the registration of an "unlimited company" as a "limited company," and in empowering the "unlimited company" on registration as a "limited company" to provide that a portion of its uncalled capital shall be subject to a similar condition to that contained in the proviso, it would seem to be that, whereas the "unlimited company" while it existed as such afforded to its creditors, in the unlimited liability of its members, a fund for the satisfaction of their claims, outside and beyond the nominal amount of its capital, as defined by the nominal amount of each of its shares, which fund was not available for the company in the conduct of its business, or in any way at the disposal of the company, the legislature seems to have intended to empower the company as a "limited company" to appropriate a portion of its capital to the creation of a fund which should be limited to the same purposes, viz., which, while available for the satisfaction of creditors, should not be available for the company in the conduct of its business, or in any way at the disposal of the company. I do not think, however, that the legislature, by the provisions in these paragraphs, had in view the protection or security of the creditors. If the legislature had so intended, it would have made the appropriation of a portion of the capital to such a purpose a condition of registration under this Act. I think the view of the legislature was to enable the company on registration to improve is credit, by affording to its creditors to a limited extent a security somewhat of the character which the company, whilst unlimited, afforded to them.

The primary object of the Act of 1879 being to enable an "unlimited company" to convert itself into a "limited company," and the legislature having thought fit to enable the "unlimited company," at the time of its conversion, to maintain or improve its credit by the appropriation of a portion of its capital as a reserve of this character, the legislature seems to mean, by s. 5, to extend this power or privilege to companies which were originally registered as "limited companies" under the Act of 1862. The fourth paragraph of the section runs thus: [His Lordship read para. 4, and continued:] It will be observed that the final words of this paragraph give a statutory effect to the resolution when passed. The effect of this would seem to be to make the resolution irrevocable. Apart from this section, I doubt whether a resolution providing that a portion of the capital of a "limited company" should not be capable of being called up except in the event of, and for the purposes of the company being wound-up, could have been effectively passed by the company, even in the shape of a resolution altering the articles, unless the memorandum of association in general or specific terms authorised the passing of such a resolution; but I gather from the observations of Lord Herschell, in *Ooregum Gold Mining Co. of India* v. *Roper* (4), that such a resolution might validly be passed if authorised generally or specifically by the "memorandum of association." It may be that such

A a resolution passed independently of the memorandum of association and independently of the statute, would have been revocable except so far as acted on, and would have merely limited the control of the company over this portion of the capital in respect of "calls," and would have left the power of mortgaging untouched; but the effect of a resolution passed under the memorandum of association or the statute is certainly to render the resolution irrevocable.

B Supposing such a clause to have been validly introduced into the memorandum of association, what would have been the effect of such a clause in the memorandum on this portion of the capital? I am not speaking here of its effect as an alteration of the memorandum or constitution of the company, authorised by this Act, because in such case its effect would undoubtedly, to my mind, be the same as the effect of the identical resolution authorised in this section, if passed by an unlimited company C at the time of its conversion by this Act into a "limited company." I am speaking of its effect as a valid clause in the memorandum of association, if such there could be, independently of some statute outside the Act of 1862. Would not the effect of such a clause by necessary implication be to withdraw the portion of the capital of the company affected by it from the control of the company as a "going concern," and to convert it into a fund applicable only to the payment of debts in the event of D a winding-up? I think it would have this effect by negativing qua this portion of the capital the implication of a power to mortgage, just as KNIGHT BRUCE and TURNER, L.JJ., held in *Stanley's Case* (5) that the necessary discretion of the directors from time to time to make calls negatived the implication of a power to mortgage or assign uncalled capital. It is true that the inference of the lords justices must be taken to be overruled by *Re Pyle Works* (1), but the principle that you may negative E such implication by an intent drawn from the terms of the memorandum is not overruled.

I agree with the contention of the plaintiff that the payment of secured creditors is a purpose of the winding-up, and I agree that this portion of capital is an asset of the company which has to be collected by the liquidator—but neither of these propositions seems to me to negative the appropriation of this portion of the assets F to the exclusive purpose of the payment of debts, or at all events the appropriation of this portion of the assets to purposes exclusive of sale or mortgage. It must be remembered that the Act of 1862 contains no express power to a company to sell or mortgage the whole or any part of its property, and that you must look at the memorandum of association to find whether there is by implication a power of sale or mortgage of its property, and what part of its property, and whether there is any G prohibition, express or implied, contained in it prohibiting sales or mortgages of the whole or any part of its property. And I think that a clause in the memorandum negativing the power to call up a portion of the capital except for the purpose of winding-up would by implication negative the power of the company to sell or mortgage such portion. At all events, whatever may be the effect of a resolution passed independently of this statute, I think that a statutory resolution, passed H under s. 5 of this Act, by implication negatives the implied power to mortgage the portion of capital affected by it, which would otherwise be inferred in respect of every portion of the capital of the company, and renders invalid, pro tanto, any mortgaging power given by the articles.

I wish to add that, in *Newton* v. *Anglo-Australian Investment Co.'s Debenture-Holders* (3), the articles did not render the capital incapable of being called up I except for the purpose of winding-up, but only unless a special resolution was passed by the company, to the effect that the paid-up capital of the company had become insufficient to meet its liabilities, and that it was therefore necessary to call up the balance of the shares. This article obviously left the whole capital at the disposal of the company.

Appeal dismissed.

Solicitors: *Munns & Longden; Mackrell, Maton, Godlee & Quincey.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

J. AND P. COATS, LTD. *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), July 28, 1897]

[Reported [1897] 2 Q.B. 423; 66 L.J.Q.B. 732; 77 L.T. 270; 61 J.P. 693; 46 W.R. 1; 13 T.L.R. 548]

Stamp Duty—Conveyance on sale—Transfer of shares in one company in exchange for shares in another company.

A shareholder in one company agreed to transfer his shares to another company in consideration of an allotment of shares in the latter company and executed a deed transferring his shares in the former company to the latter company "in exchange" for the allotted shares.

Held: the instrument must be stamped as a "conveyance on sale" within s. 54 and s. 55 of the Stamp Act, 1891, and not as an "exchange" within s. 73 of the Act.

Notes. Relief from stamp duty in the case of the reconstructions and amalgamations of companies was given by the Finance Act, 1927, s. 55 (21 HALSBURY'S STATUTES (2nd Edn.) 935).

Referred to: *Governments Stock and Other Securities Investment Co., Ltd.* v. *Christopher*, [1956] 1 All E.R. 490.

As to charge on conveyance where consideration consists of stock, see 33 HALSBURY'S LAWS (3rd Edn.) 311, 312; and for cases see 9 DIGEST (Repl.) 420. For sections 54 and 55 of the Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 627.

Cases referred to:

(1) *John Foster & Sons* v. *I.R. Comrs.*, [1894] 1 Q.B. 516; 63 L.J.Q.B. 173; 69 L.T. 817; 58 J.P. 444; 42 W.R. 259; 10 T.L.R. 152; 38 Sol. Jo. 128; 9 R. 161, C.A.; 9 Digest (Repl.) 31, *18*.

(2) *Great Western Rail. Co.* v. *I.R. Comrs.*, [1894] 1 Q.B. 507; 63 L.J.Q.B. 405; 70 L.T. 86; 58 J.P. 397; 42 W.R. 211; 10 T.L.R. 128; 38 Sol. Jo. 96; 9 R. 122, C.A.; 39 Digest 280, *646*.

Appeal by J. and P. Coats, Ltd., from a decision of the Divisional Court (WILLS and GRANTHAM, JJ.), reported [1897] 1 Q.B. 778, upon a Case Stated by the Commissioners of Inland Revenue upon the questions (i) whether the instrument was chargeable with the duty as assessed ? (ii) If not, with what duty the instrument was chargeable?

The instrument was as follows:

"I, Alfred Kaye, in exchange for eight fully-paid ordinary shares of J. and P. Coats, Ltd., allotted to me by them, do hereby transfer to the said J. and P. Coats, Ltd., twenty-five ordinary shares of £10 each, of and in the undertaking called James Chadwick & Brother, Ltd. To hold unto the said J. and P. Coats, Ltd., subject to the several conditions on which I held the same immediately before the execution hereof. And we, the said J. and P. Coats, Ltd., do hereby agree to accept and take the said shares subject to the conditions aforesaid."

The appellant company was incorporated under the Companies Acts, 1862-1890 on Aug. 6, 1890, with a capital of £3,750,000 divided into 175,000 ordinary and 200,000 preference shares of £10 each, for the purpose of carrying on the manufacture of cotton, woollen, and other threads; and James Chadwick & Brother, Ltd., was incorporated under the same Acts on Nov. 27, 1891, with a capital of £500,000 divided into 25,000 ordinary and 25,000 preference shares of £10 each, for the purpose of carrying on a business of a precisely similar character. Negotiations had

taken place between James Chadwick & Brother, Ltd., and the appellant company, for the acquisition by the appellant company of the shares of James Chadwick & Brother, Ltd., or of all its undertakings and property. An extraordinary general meeting of the shareholders in James Chadwick & Brother, Ltd., was held on July 20, 1896, when it was resolved that the amalgamation with the appellant company be carried out and that it be effected by an exchange of the preference and ordinary shares in James Chadwick & Brother, Ltd., for fully paid-up preference and ordinary shares in the appellant company. A memorandum was prepared for signature by the shareholders in James Chadwick & Brother, Ltd., by which those who signed agreed with J. and P. Coats, Ltd., to transfer to them all their preference and ordinary shares in James Chadwick & Brother, Ltd., in exchange for fully-paid preference and ordinary shares of J. and P. Coats, Ltd., in certain proportions. A memorandum was signed by Alfred Kaye and accepted for and on behalf of J. and P. Coats, Ltd. Subsequently Alfred Kaye executed an instrument "in exchange for" fully-paid ordinary shares in the appellant company. The commissioners were of the opinion that the instrument was a transfer made upon a sale to be charged under the head "Conveyance or Transfer on Sale" with ad valorem duty. On a Case Stated by the Commissioners the Divisional Court gave judgment for the Crown. J. and P. Coats, Ltd., appealed.

Cozens-Hardy, Q.C., and *Theobald* for the appellants.

The Attorney-General (*Sir Richard Webster, Q.C.*) and *Danckwerts* for the Crown.

LORD ESHER, M.R.—I am clearly of opinion that the decision of the Divisional Court in this case must be upheld. The first thing is to see what is the true construction of the Act, and what is the rule with regard to a transaction of this kind. Here it must be admitted, and is admitted, that there is a conveyance by a person of his property which consists of shares in a company. We have to apply to that transaction that which was said by LINDLEY, L.J., in *John Foster & Sons* v. *I.R. Comrs.* (1). The person who conveys in the present case, is Mr. Kaye. In *Foster's Case* (1), LINDLEY, L.J., said ([1894] 1 Q.B. at p. 528):

> "Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of s. 71 of the [Stamp Act, 1870]."

That is the case here, reading s. 55 of the Act of 1891 for s. 71 of the Act of 1870. That is the construction of the Act adopted by LINDLEY, L.J., that if a person conveys property for a consideration and that consideration is shares, it is equivalent to a conveyance of the property for money, and is a conveyance on sale. Then again, in that case, KAY, L.J., said (ibid. at p. 531):

> "It seems to me clearly to be a sale for a consideration which, if not money, at least is money's worth";

and A. L. SMITH, L.J., said (ibid. at p. 531):

> "Section 70 enacts that the term conveyance on sale includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser. Then s. 71 implies that it may be in consideration of any stock or marketable security."

The transaction in the present case can be described exactly in the language used in the above case. It has, however, been attempted to make an instrument which will not come within the language of that case. The consideration has been stated before the words of conveyance, and the words used are "in exchange for"; but if for those words are substituted the words "in consideration of," there is the exact transaction described in that case, and the latter words are those which ought properly to be used in this transaction. It is also really the same as the transaction

described in *Great Western Rail. Co.* v. *I.R. Comrs.* (2), which preceded *Foster's Case* (1). It seems to me that the present case is exactly within the decision in *Foster's Case* (1), and that this is nothing but an artful attempt to conceal the real transaction by using the words "in exchange" instead of "in consideration," in order to try and get out of the rules laid down in those two cases. In my opinion, therefore, the decision of the Divisional Court was perfectly right, and this appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion. The question is, whether this document was a "conveyance on sale" within the meaning of the Stamp Act, 1891. The Stamp Act, 1891, by s. 54 and s. 55, gives a definition of what shall be included in the term "conveyance on sale." That question has been already dealt with in *John Foster & Sons* v. *I.R. Comrs.* (1) and *Great Western Rail. Co.* v. *I.R. Comrs.* (2). I think that this case comes within the definition contained in s. 54 and s. 55, as explained by LINDLEY, L.J., in *Foster's Case* (1). In considering this document we must see what is the real substance of the transaction, and the mere fact that the words "in exchange for" are used cannot alter the substance of the transaction. In my opinion this transaction is in substance a conveyance on sale within the meaning of the Act. It is contended that it is not a conveyance on sale, but an exchange within s. 73 and the schedule to the Act. As to the schedule, if this is a conveyance on sale, as I hold it to be, then it cannot be an exchange. Section 73 clearly does not apply to a case like this; it applies only to an exchange, partition, or division of real property. The contention of the appellants can, therefore, only be founded upon the words in the schedule—"Exchange or Excambion—Instruments effecting. In the case specified in s. 73, see that section. In any other case, 10s." It is not necessary now to decide to what those words "in any other case" do apply. They do not apply to the present case. I agree, therefore, that this appeal must be dismissed.

RIGBY, L.J.—I am of opinion that this case is one of "conveyance on sale." Looking at the document in question we find that it is an undoubted transfer to J. and P. Coats, Ltd., of shares in an undertaking called Chadwick & Brother, Ltd. So far, it is without doubt a transfer; that is, a conveyance of these shares within the meaning of the Act. The consideration is certain shares of J. and P. Coats, Ltd. Instead, however, of saying "in consideration of," they ingeniously say "in exchange for." Suppose those words "in exchange" were left out altogether, and the words were "for fully-paid shares in," nobody would ever have suggested that it was not a conveyance on sale. Using those particular words cannot make any difference. By the use of particular words the nature of the transaction cannot be altered. If we look at what led up to this transaction, we see that the shareholders were asked to sell their shares, and the whole bargain went upon a sale of these shares to J. and P. Coats, Ltd. The meetings of the company were called to sanction a scheme for the sale of those shares, and this was a sale of those shares. The transaction is in substance a sale, and nothing else. If this were not so, every transfer of property for property would be an exchange, but that would be contrary to the provisions of s. 54 and s. 55. It has been ingeniously argued that it is an exchange if the transfer is of property of the same kind on each side; but I find nothing in the Act to support that argument. Whatever may be the meaning of the words in the schedule as to exchange "in any other case," I will not now say anything about that, except that this transaction is not an exchange, but is a conveyance on sale. The appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Linklater & Co.; Solicitor of Inland Revenue.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL *v.* NEWCASTLE-UPON-TYNE CORPORATION

B [COURT OF APPEAL (Lopes and Rigby, L.JJ.), May 19, 20, 1897]

[Reported [1897] 2 Q.B. 384; 66 L.J.Q.B. 593; 77 L.T. 203]

Discovery—Crown—Right to discovery.

Discovery—Documents—Claim to part of river—Relevance of documents of conservators relating to part claimed and other parts.

C In an action for a declaration the Crown claimed to be entitled to part of the foreshore and river bed within the limits of a port. The defendants, the conservators of the river, claimed the ownership of the whole of that foreshore and river bed. On the question of what documents, if any, the defendants were bound to disclose,

D **Held:** (i) the Crown had the same right of discovery against a subject as one subject had against another; (ii) the Crown was entitled to the discovery, not only of documents relating to the parts claimed by the Crown, but also of all documents relating to acts of ownership by the defendants within the limits of the port, including their acts as conservators, as they might repel the defendants' claim.

E Dictum of PARKE, B., in *Jones* v. *Williams* (1) (1837), 2 M. & W. at p. 331, applied.

Notes. Under the Crown Proceedings Act, 1947, s. 28, the Crown may now be required to make discovery of documents, produce documents for inspection and answer interrogatories in civil proceedings to which it is a party, but this is without prejudice to its right to resist discovery on the ground that disclosure of a document or the answering of a question would be injurious to the public interest.

F The provisions as to discovery and inspection are now contained in R.S.C. Ord. 31.

One of the points raised in the Appeal was that the court had no jurisdiction to order discovery because no exception had been taken by the Crown to the answers to the interrogatories within six weeks, as it was alleged was necessary under the Rules of Easter Terms, 1866. This argument was rejected, and the case is not here reported on this point.

G Considered: *Re Société le Affréteurs Réunis and Shipping Controller*, [1921] 3 K.B. 1. Referred to: *Robinson* v. *State of South Australia* (*No. 2*), [1931] All E.R. Rep. 333; *Duncan* v. *Cammell Laird & Co., Ltd.*, [1942] 1 All E.R. 587.

As to discovery by and against the Crown, see 12 HALSBURY'S LAWS (3rd Edn.) 14; as to the extent of disclosure, see ibid. p. 26. For cases see 18 DIGEST (Repl.) 23. For the Crown Proceedings Act, 1947, s. 28, see 6 HALSBURY'S STATUTES H (2nd Edn.) 66.

Case referred to:

(1) *Jones* v. *Williams* (1837), 2 M. & W. 326; Murp. & H. 51; 6 L.J.Ex. 107; 150 E.R. 781; 44 Digest 90, *715*.

I Also referred to in argument:

A.-G. v. *Metropolitan District Rail. Co.* (1880), 5 Ex.D. 218; 42 L.T. 342; 28 W.R. 376, C.A.; 16 Digest (Repl.) 263, *321*.

A.-G. v. *Emerson* (1882), 10 Q.B.D. 191; 52 L.J.Q.B. 67; 48 L.T. 18; 31 W.R. 191, C.A.; 16 Digest (Repl.) 263, *318*.

Noel v. *Noel* (1863), 1 De G.J. & Sm. 468; 2 New Rep. 294; 32 L.J.Ch. 676; 8 L.T. 555; 9 Jur.N.S. 589; 11 W.R. 791; 46 E.R. 186, L.JJ.; 18 Digest (Repl.) 55, *422*.

A.-G. v. *London Corpn.* (1850), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L.J.Ch. 314; 14 L.T.O.S. 501; 14 Jur. 205; 42 E.R. 95, L.C.; 18 Digest (Repl.) 9, *50*.

Interlocutory Appeal by the defendants from an order of WILLS, J., by which he ordered the town clerk of Newcastle to make a further affidavit of documents in these proceedings. A

The proceedings were commenced in March, 1892, by way of information, the Attorney-General claiming a declaration that the foreshore and bed to mid-stream of the river Tyne on the south side opposite the manors of Gateshead and Wickham were vested in the Crown. The defendant corporation by their answer B claimed the whole of the foreshore and bed of the river Tyne within the limits of the port of Newcastle, which included the part claimed by the Crown. The defendants had from early times been conservators of the river. Interrogatories were delivered by the informant, and in their answer the defendants set out in a schedule a long list of charters, documents, and entries in books relating to the matters in question, and alleged they had no other relevant documents. They C declined to produce the books themselves for inspection or any documents except those relating to the manors of Gateshead and Wickham. The defendants relied on acts of ownership, but refused to show any documents which related to their acts as conservators of the river Tyne. The informant did not take exception to the answer, but moved for liberty to inspect the documents and books in the defendants' possession which contained entries relating to the acts of the defendants D with reference to the river Tyne, on the ground that they had no title to the foreshore at all, and that all their acts had been done as conservators and not as owners; and he contended that the defendants having set up a title to the whole foreshore as a defence, as he had established a right to discovery as to a part of it, he was entitled to discovery as to the whole, and as to their acts as conservators. The motion came before WILLS, J., who ordered the defendant Mr. Hill Motum, the E town clerk of Newcastle, who had been made a party for the purposes of discovery, to make a further affidavit of documents, and this was an appeal from that decision.

Robson, Q.C., and *W. Graham* (*Stuart Moore* with them) for the defendants.

The Attorney-General (*Sir Richard Webster, Q.C.*) and *Vaughan Hawkins* for the F Crown.

LOPES, L.J.—I am of opinion that the order of the learned judge in the court below ought to be maintained. The order is this:

> "It is ordered that the defendant Hill Motum do within twenty-eight days from the date of this order make and file a full and sufficient affidavit stating G what documents relating to the matters in question in this cause the defendant corporation have or have had in their possession or power and accounting for the same, and as to any document or entry which the defendants may object to produce stating the facts on which the defendants rely to show that the informant is not entitled to inspect the same."

H

In my opinion that was as lenient an order as the learned judge in the circumstances of the case could make. Among other things it was urged that the defendants had a grievance, because, while on the one hand discovery could not be compelled from the Crown, the subject was bound to discover. That grievance was entirely removed by what was said by the Attorney-General, who stated at once that he should afford the same discovery in this case as a subject would I be entitled to in a suit between subject and subject.

But then a point arises with regard to the merits. The defendants contend that all that is claimed by the information is the foreshore to two manors, and therefore all that they can be called upon to discover is documents and acts of ownership relating to those two manors; and if they have any other documents, or if there are any other acts of ownership which relate to other portions of the river Tyne, they cannot be called upon to discover them. I think the defendants have acted on a wrong principle. Directly the unum quid is shown as it is in this case (I mean

by unum quid a stream or common, whichever it may be), other acts of ownership on other parts of the common or of the river, as the case may be, are admissible as evidence and subject-matter of discovery by the opposite party, because they are acts which more or less may, and very often do, go to repel the title which is set up by the defendant.

It is most material in this case to bear in mind what the defendants claim. They claim in their answer the foreshore of the whole of the port of the river Tyne. They also are conservators of the river Tyne.

What the Crown desires to have discovered is any documents or acts of ownership which relate to other parts of the river Tyne outside the foreshore of those two manors, and also any acts of ownership or documents which have anything to do with their position as conservators of the river Tyne. It appears to me that they are clearly entitled to discovery of such matters. The case was very well put, if I may say so, by PARKE, B., in *Jones* v. *Williams* (1), where he says (2 M. & W. at p. 331):

> "Evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did."

I think that is applicable to the present case.

With regard to anything done by the defendants as conservators, it appears to me that there may be acts and documents relating to them as conservators which it may be most material for the Crown to have discovery of for the purposes of determining what the nature of those acts or the character of those documents may be. I mean by that whether they are acts referable to their agency as conservators, or whether they are referable to their being the owners of the soil. There are acts which may be done by conservators, such as (taking a case which was put to us by the Attorney-General) the erection of a pier or the creation of an obstruction in a river, which might, if they were not conservators, be a most formidable act of ownership, but which might be qualified or accounted for, so as not to be of any value as proving ownership of the soil if those same things were done by the defendants in their character of conservators.

I think, therefore, it is most material that discovery should be made of those matters. In my opinion the order of WILLS, J., is perfectly right, and I think the Crown are entitled to see all such documents as I have alluded to which repel the defence which has been set up by the defendants—I mean documents which have anything to do with the soil of the bed of the river. I think the appeal ought to be dismissed.

RIGBY L.J.—I am of the same opinion. In this case no doubt the Crown is claiming only the foreshore opposite to the manors on the south side of the river, that is the right bank, I presume, usque ad medium filum. But the defence set up by the corporation is, that they are the owners of the whole bed of the river from one end of the port to the other. If they are, the Crown cannot be owner of this part and must fail. Their defence is, that they are owners of the whole, including this part; that they are owners of this part because they are owners of the whole; and if they cannot make out that they are owners of the whole they cannot make out that they are therefore, as owners of the whole, owners of this part.

What is the right on general principles of a plaintiff or of an informant in cases of this sort? It makes no difference practically which it is. He has a right to discovery of everything that will make out his case, no one doubts that. But he has a right to a great deal more. He has a right to discovery of everything that will make out, or tend to make out, that the defence set up is not a good defence. In other words, in this case he has a right to discovery of anything which will or may tend to show that the defendants have not the

absolute ownership of the whole bed of the river within the limits of the port, which includes those manors in question. A

When we consider discovery from that point of view, it does not in the least matter whether these acts of ownership are on this particular part of the river. The informant can say, "You have not got that title which you set up as your defence," and it appears to me, both upon principle and upon authority, that the Crown is entitled to have discovery of every act of ownership which was exercised, in B order that the Crown may see under what circumstances those acts of ownership were exercised, and may have the opportunity of investigating whether they do not contain elements which will go to defeat the title to the whole bed of the river, which is the defence that is set up.

As regards the conservators, they are in that sense, I suppose, the agents of the Crown. They act under a charter, or something of the sort; and it may very C well be, as is pointed out by my brother LOPES, that they do a great many things as conservators which would be utterly unjustifiable if they were not conservators, and yet which conservators might do although they were not owners. I think it is very important indeed that the informant should have the opportunity of distinguishing what acts those were, and saying, "I cannot take the opinion, D however honest, however well supported by other legal opinions, of gentlemen who represent the corporation in this case; but, from the nature of the case, the informant ought to be able to see what the matter is in order to judge for himself."

I think that covers the whole ground, but I will say a word on one or two other matters. On the question of hardship, all that the court has to do is to investigate the state of the law; and if, for some reason known to the Crown, it E had been against the public interest in this case to produce documents, even then I should say I cannot help it—I have to administer the law. The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not. That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it. I may say that in these days the prerogative of the Crown is about equivalent to the rights of the public, and, therefore, there is F nothing so very hard in it; but in this case, as we have heard, no attempt has been made to depart from the practice that, to my knowledge, has existed for many years past. There has always been the utmost care to give a defendant that discovery which the Crown would have been compelled to give if in the position of a subject, unless there be some plain overruling principle of public interest concerned which cannot be disregarded. I think the order appealed from is G perfectly right.

Appeal dismissed.

Solicitors: *T. W. Gorst*, Solicitor to the office of Woods and Forests; *Collyer-Bristow, Russell, Hill & Co.*, for *Hill Motum*, Town Clerk, Newcastle-upon-Tyne.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*] H

A

UNIVERSAL STOCK EXCHANGE, LTD. *v.* STRACHAN

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten and Lord Morris), March 19, 20, 1896]

B

[Reported [1896] A.C. 166; 65 L.J.Q.B. 429; 74 L.T. 468; 60 J.P. 468; 44 W.R. 497]

Gaming—Gambling transaction—Stock Exchange—Contract for "differences"—No intention to deliver or take up stock—Recovery of deposited securities—Gaming Act, 1845 (8 & 9 *Vict.*, *c.* 109), *s.* 18.

C A transaction is only a gambling one if both parties to it so intend. Thus, if a person directs a broker to buy stock, this does not become a gambling transaction merely because the purchaser intends to sell again before the settling day arrives. If, however, there is a secret understanding that the stock should never be called for or delivered and that only differences should be dealt with, the agreement is null and void under the Gaming Act, 1845, D s. 18, and this is so even though the contract may expressly provide that it is not a gambling transaction, and that either party may require the completion of the purchase. Property deposited as security for the payment of such differences is not deposited to "abide the event of a wager" within that section, and may be recovered by action.

Decision of the Court of Appeal, [1895] 2 Q.B. 329, affirmed.

E **Notes.** Applied: *Wood* (*Trading as Stephens & Co.*) v. *Fevez* (1898), 14 T.L.R. 492. Considered: *Crawley* v. *White* (1898), 14 T.L.R. 247; *Re Gieve*, [1899] 1 Q.B. 794; *Re Duncan*, [1905] 1 Ch. 307. Applied: *Barnett* v. *Sanker* (1925), 41 T.L.R. 660. Considered: *Weddle, Beck & Co.* v. *Hackett*, [1928] All E.R. Rep. 539. Referred to: *Dowson* v. *Macfarlane, Cooke, Claimant* (1899), 81 L.T. 67; F *Kong Yee Lone* v. *Lowjee Nanjee* (1901), 17 T.L.R. 585; *Ironmonger* v. *Dyne* (1928), 44 T.L.R. 497; *Townsend* v. *Grundy* (1933), 18 Tax Cas. 140; *Woodward* v. *Wolfe*, [1936] 3 All E.R. 529.

As to contracts for differences, see 18 Halsbury's Laws (3rd Edn.) 183, and for cases see 42 Digest 834. For the Gaming Act, 1845, s. 18, and the Gaming Act, 1892, s. 1, see 10 Halsbury's Statutes (2nd Edn.) 755, and 777 respectively.

G Cases referred to in argument:

Universal Stock Exchange v. *Stevens* (1892), 66 L.T. 612; 40 W.R. 494; 42 Digest 835, *437*.

Universal Stock Exchange v. *Howat* (1891), 19 R. (Ct. of Sess.) 128; 29 Sc.L.R. 119; 42 Digest 834, *425ix*.

Shaw v. *Caledonian Rail. Co.* (1890), 17 R. (Ct. of Sess.) 416; 42 Digest 835, H *435iii*.

Thacker v. *Hardy* (1878), 4 Q.B.D. 685; 39 L.T. 595; 43 J.P. 221; 27 W.R. 158; sub nom. *Thacker* v. *Hardy*, *Same* v. *Wheatley*, 48 L.J.Q.B. 289, C.A.; 42 Digest 834, *432*.

Forget v. *Ostigny*, [1895] A.C. 318; 64 L.J.P.C. 62; 72 L.T. 399; 43 W.R. 590; 11 R. 474; 42 Digest 835, *435i*.

I *Manning* v. *Purcell* (1855), 7 De G.M. & G. 55; 3 Eq. Rep. 387; 24 L.J.Ch. 522; 24 L.T.O.S. 317; 3 W.R. 273; 44 E.R. 21, L.JJ.; 25 Digest (Repl.) 427, *94*.

Hampden v. *Walsh* (1876), 1 Q.B.D. 189; 45 L.J.Q.B. 238; 33 L.T. 852; 24 W.R. 607; 25 Digest (Repl.) 427, *91*.

Appeal by the defendants in the action from a decision of the Court of Appeal (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), reported [1895] 2 Q.B. 329, dismissing an application to set aside the verdict of the jury, or for a new trial on the ground of misdirection, in an action brought by the plaintiff to recover certain

securities which the former had deposited with the latter as "cover" in respect of certain speculative transactions on the Stock Exchange. A

The plaintiff bought from and sold to the defendants various stocks and shares in 1893 and 1894, the sales being subject to various "terms of business." These provided that all bargains were to be completed on the next settling day unless the defendants agreed to a postponement at the plaintiff's request; that the defendants were to receive interest at 5 per cent. per annum on the purchase money of all stocks from the date of purchase until completion; that the defendants were to have a lien upon certain of the plaintiff's property for the due performance of the contract; and that the contract was not one of gaming or wagering. The transactions were for very large amounts, but in no case were any stocks or shares delivered. The plaintiff brought this action to recover the securities deposited by him, which the defendants claimed to retain for the balance which they alleged was due to them as a result of the transactions in question. The plaintiff alleged that the transactions in question were gambling transactions, and at the trial, before CAVE, J., and a special jury, the jury found in his favour, being of opinion that the whole of the transactions in question were gambling transactions, and that he was entitled to have all the securities deposited by him with the defendants returned to him. The defendants appealed to the Court of Appeal on the grounds that the jury had been misdirected, and also that there was no evidence to go to the jury. Their appeal was dismissed, and they thereupon appealed to this House. B C D

By the Gaming Act, 1845, s. 18 (as amended by the Gaming Act, 1892, s. 1):

"All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and . . . no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. . . ." E

Sir E. Clarke, *Q.C.*, and *Pollard* for the appellants.

Bigham, *Q.C.*, and *Muir Mackenzie* for the respondent, were not called on to argue. F

LORD HALSBURY, L.C.—This case comes before your Lordships under circumstances which render it unnecessary to deal with it very elaborately, or as if it established any very important principle of law. The question of law intended to be argued originally was, whether CAVE, J., misdirected the jury. He said at the beginning of his summing-up:

"The question which you have to try is, whether these transactions were real bargains for purchase of stock, or whether they were simply gambling transactions intended to end in the payment of differences. . . . I have no doubt that most, if not all, of you are perfectly familiar with transactions on the Stock Exchange, but I may make use of that as an illustration of my meaning. A man goes to a broker and directs him to buy or sell so much stock, as the case may be. That may be in the eye of the purchaser a gambling transaction, or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock, if he means to sell again before the settling day arrives, that may be a gambling transaction so far as he is concerned; but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction, such as the law points at, it must be a gambling transaction in the intention of both the parties to it. . . . Notwithstanding the ostensible 'terms of business,' was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with? If there was that secret understanding, then the plaintiff is entitled to recover his securities. If there was not that secret understanding, he is not entitled to recover them, and that is the only question with which I need trouble you." G H I

A I am wholly unable to understand, after that direction to the jury, what possible misdirection could have been suggested. That was a most accurate direction to the jury of what they were to find upon the facts before them; and, although there is a direction at the close of his summing-up to the jury which, I think, it is possible might have been objected to on the other side as being too favourable to the appellants, yet, so far as the appellants are concerned, it seems to me that it is impossible B to say that the learned judge did not put before the jury the true question which they had to determine.

Therefore, the case resolves itself into an entirely different question, the only question of law to which I need refer, namely, whether or not there was any evidence to go to the jury. I cannot doubt that there was a very considerable amount of evidence to go to the jury, and I agree with the courts below in saying that one C does not adequately discuss that question by taking each part of the case by itself, or dissecting the case, and disposing of this or that piece of the evidence as if it were to be looked at alone. The whole transaction has to be looked at, and the whole nature of this institution, whatever it is.

Speaking now upon the evidence before us, it appears to me as if it were a concern expressly designed for the purpose of enabling people to gamble in such a way D as to evade the provisions of the law. It may or may not be that, it is not necessary to decide whether it is or not, it is not before us at this moment, but I say now, as justifying the finding of the jury, that that is what it seems to me to be, looking at the whole nature of the agreement. When I say "the agreement" I mean the "terms of business" which they call upon a customer to sign, which are to constitute the contractual relations between the parties. I will not rely too much upon the E circumstances of suspicion in it, namely, that they say that it is not to be a gambling transaction, but that it is to be a real bona fide transaction. When I look at the terms themselves the whole scheme seems to me to be intended with great ingenuity to pretend that this is to be a real transaction, and yet there is to be a payment in respect of the relations between the parties which is only reconcilable in my mind with its being an unreal transaction. They are to get 5 per cent. Each of the F learned counsel in turn has been asked what that was for, inasmuch as it was admitted that there was no purchase and no sale. In all these transactions not one single purchase or sale is proved to have existed during the whole period in which this business was going on. Then if the real meaning of the parties is this, that there is to be only a payment of differences, what is it but a gaming and wagering transaction between the two as to what shall be the payment on the one side or on the G other side? If I were on the jury I should come to that conclusion; but I am not under the necessity of trying this question as if I were upon the jury, because the jury have found that it was a gambling transaction upon evidence which seems to me extremely satisfactory.

The only question for your Lordships is whether there was evidence to go to the jury, because, under the circumstances of this case, it would be idle to contend that, H if there was evidence to go to the jury, this is a case in which your Lordships would say that the case should be tried again by another jury. I am satisfied, as far as I am concerned, that the jury were right, and that there was ample evidence to go to them which would justify them in the conclusion at which they arrived. I, therefore, move your Lordships that the appeal be dismissed with costs.

I **LORD HERSCHELL.**—I am of the same opinion. So long as the finding of the jury that it was a gambling transaction stands, it is impossible for the appellants to object to the judgment against them which has been pronounced. They say that the finding ought not to stand; that either there ought to be a new trial because the learned judge misdirected the jury, or because the verdict was against the weight of evidence, or that the verdict ought to be entered for them because there was no evidence to go to the jury in support of the respondent's case.

As to misdirection I can see none. The learned judge appears to have laid down

the law certainly not too favourably for the plaintiff. With regard to the verdict being against the weight of evidence, the learned judge who tried this case, and the Court of Appeal, have been satisfied with the verdict of the jury, and under those circumstances it would need a very overwhelming case to induce your Lordships to interfere. So far from there being any such case, the verdict is one of which, in my opinion, no complaint can properly be made.

It remains to consider whether there was evidence to go to the jury. The case on behalf of the appellants is this: that when you look at the documents which contain the contract between the parties you see that these were not upon the face of them gaming contracts, but, on the contrary, appeared not to be gaming contracts, that there was no evidence of anything passing between the respondent and the appellants to the effect that the real transaction should not be such as they represented, and consequently that there was no evidence to go to the jury. I cannot accept that view. I think that the character of the documents themselves, coupled with the nature of the transactions entered into, the position of the parties who entered into them, and other circumstances which I need not detail, raised a question for the jury whether they were real transactions of commerce, or whether they were a mere gambling for differences. I think that it is impossible to say that there was no evidence to go to the jury upon the point.

It has been said that whenever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither of the parties contemplated that that provision would ever become operative, yet, if it ever may become operative, the contract cannot be by way of gaming and wagering. The proposition amounts to this, that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a court of justice to recover their bets, could compel a court of justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in a certain event become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency; the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and to enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences.

I ought to observe upon one other point, though probably it was sufficiently disposed of in the course of the argument. It is said that although it may be a gambling contract, yet nevertheless the very provisions of the section against gaming and wagering prevent the plaintiff from recovering the security which he deposited with the defendants, inasmuch as it is an "article of value" deposited with them to "abide the event" of a wager. That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction. What the appellants are really seeking is to avail themselves of that security by virtue of a void contract, and it is impossible to say that it is an "article of value" deposited with the defendants to abide the event of a wager. That was not really the nature of the transaction at all.

LORD MACNAGHTEN and **LORD MORRIS** concurred.

Appeal dismissed.

Solicitors: *Last & Sons; Theodore Allingham.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

SHARP *v.* JACKSON AND OTHERS

[House of Lords (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris and Lord Shand), June 15, 1899]

[Reported [1899] A.C. 419; 68 L.J.Q.B. 866; 80 L.T. 841; 15 T.L.R. 418; 6 Mans. 264]

Bankruptcy—Fraudulent preference—Conveyance to make good breaches of trust —Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 48.

Without any pressure from his co-trustees or the beneficiaries, two days before his bankruptcy a bankrupt, who had committed breaches of trust, conveyed an estate on trust to make good the breaches of trust.

Held: the deed was not a fraudulent preference within s. 48 of the Bankruptcy Act, 1883, because the object of the bankrupt in executing it was not to prefer some creditors to others, but to shield himself from the consequences of his breaches of trust.

Trustee—Cestui que trust—Relationship of debtor and creditor.

Per the Earl of Halsbury, L.C.: The relation of debtor and creditor exists between a trustee and his cestui que trust.

Notes. The Bankruptcy Act, 1883, s. 48, has been replaced by the Bankruptcy Act, 1914, s. 44.

Applied: *Hermoux* v. *Harbord* (1898), 14 T.L.R. 243. Approved: *Re Blackburn, Buckley's Case*, [1899] 2 Ch. 725. Applied: *Re Vautin, Ex parte Saffery*, [1900] 2 Q.B. 325. Distinguished: *Re Blackpool Motor Car Co., Hamilton* v. *Blackpool Motor Car Co.*, [1901] 1 Ch. 77. Applied: *Re Pidcock, Penry* v. *Pidcock* (1907), 51 Sol. Jo. 514. Considered: *Radcliffe* v. *Abbey Road and St. John's Wood Permanent Building Society* (1918), 87 L.J.Ch. 557; *Re Cohen, Ex parte Trustee*, [1924] All E.R. Rep. 434; *Re M.I.G. Trust, Ltd.*, [1933] Ch. 542. Referred to: *Re Lake, Ex parte Dyer*, [1900-3] All E.R. Rep. 491; *Wigan* v. *English and Scottish Law Life Assurance Association*, [1908-10] All E.R. Rep. 449; *Re Moyle, Ex parte Trustee*, [1924] B. & C.R. 22; *Re Drage, Palmer and Roberts* v. *Knight* (1926), 134 L.T. 765; *Peat* v. *Gresham Trust, Ltd.*, [1934] All E.R. Rep. 82; *Re Lyons, Ex parte Barclays Bank, Ltd.* v. *The Trustee*, [1934] All E.R. Rep. 124; *Re Cutts, Ex parte Bognor Mutual Building Society* v. *Trustee in Bankruptcy*, [1956] 1 W.L.R. 728.

As to payments to creditors, and as to pressure and other circumstances negativing fraudulent intention, see 2 Halsbury's Laws (3rd Edn.) 555-556 and 558-559, and for cases see 4 Digest (Repl.) 58-59, 948-949. For the Bankruptcy Act, 1914, s. 44, see 2 Halsbury's Statutes (2nd Edn.) 381.

Cases referred to:

(1) *Re Goldsmid, Ex parte Taylor* (1886), 18 Q.B. 295; 56 L.J.Q.B. 195; 35 W.R. 148; 3 T.L.R. 109, C.A.; 5 Digest (Repl.) 919, *7581.*

(2) *Butcher* v. *Stead* (1875), L.R. 7 H.L. 839; 44 L.J.Bcy. 129; 33 L.T. 541; 24 W.R. 463, H.L.; 5 Digest (Repl.) 962, *7810.*

(3) *Thompson* v. *Freeman* (1786), 1 Term Rep. 155; 99 E.R. 1026; 5 Digest (Repl.) 958, *7779.*

Also referred to in argument:

Re Wilcoxon, Ex parte Griffith (1883), 23 Ch.D. 69; 52 L.J.Ch. 717; 48 L.T. 450; 31 W.R. 878, C.A.; 5 Digest (Repl.) 916, *7568.*

Re Bird, Ex parte Hill (1883), 23 Ch.D. 695; 52 L.J.Ch. 903; 49 L.T. 278; 32 W.R. 177, C.A.; 5 Digest (Repl.) 930, *7640.*

Tomkins v. *Saffery* (1877), 3 App. Cas. 213; 47 L.J.Bcy. 11; 37 L.T. 758; 26 W.R. 62, H.L.; 5 Digest (Repl.) 700, *6118.*

Re Wilkinson, Ex parte Stubbins (1881), 17 Ch.D. 58; 50 L.J.Ch. 547; 44 L.T. 877; 29 W.R. 653, C.A.; 5 Digest (Repl.) 948, *7732.*

Re Cherry, Ex parte Bolland (1871), 7 Ch. App. 24; 25 L.T. 646; 20 W.R. 136, L.JJ.; 5 Digest (Repl.) 929, *7628.*

Re Hutchinson, Ex parte Ball (1886), 35 W.R. 264; 3 T.L.R. 324, C.A.; 5 Digest (Repl.) 920, *7586.*

Re Craven and Marshall, Ex parte Tempest (1870), 6 Ch. App. 70; 40 L.J.Bcy. 22; 23 L.T. 650; 19 W.R. 137, L.JJ.; 5 Digest (Repl.) 944, *7728.*

Re Bell, Ex parte Official Receiver (1892), 10 Morr. 15, D.C.; 5 Digest (Repl.) 938, *7674.*

Re Fletcher, Ex parte Suffolk (1891), 8 T.L.R. 80; 9 Moor. 8, D.C.; 5 Digest (Repl.) 930, *7639.*

J. Lyons & Sons v. *Wilkins*, [1899] 1 Ch. 255; 68 L.J.Ch. 146; 79 L.T. 709; 63 J.P. 339; 47 W.R. 291; 15 T.L.R. 128, C.A.; 36 Digest (Repl.) 271, *238.*

Appeal from a decision of the Court of Appeal (LORD ESHER, M.R., A. L. SMITH and CHITTY, L.JJ.), reported sub nom. *New, Prance and Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19, affirming a decision of VAUGHAN WILLIAMS, J., at the trial before him without a jury.

Courtenay Connell Prance, a partner in the firm of Messrs. New, Prance and Garrard, solicitors, of Evesham, and a trustee of a number of estates, had committed breaches of trust by paying trust funds into the firm's general banking account instead of investing them. In November, 1893, New, the senior partner, died insolvent and the business was carried on by Prance and Garrard. By a deed dated Mar. 29, 1894, which was recited that Prance was the owner of the Longdon Hill Estate of about 89 acres in Worcestershire, yielding about £414 a year, and subject to mortgages amounting to £6,400, that he was the active trustee of certain scheduled estates and the breaches of trust committed by him, Prance conveyed to one William Hunting, a clerk in the firm, the Longdon Hill Estate in fee simple as trustee, subject to the mortgages, on trust to raise by way of sale or mortgage the sums mentioned in the deed, and to pay them to the trustees of the scheduled trust estates to be held by them on the trusts declared by the instruments of which they were the trustees; and the deed declared that if the moneys ultimately required for rectification and completely satisfying the recited breaches of trust should be less than the sum of £4,200, the difference between the moneys received by the trustee and that which should be actually required for the rectification of the trust estates should be held by the trustee in trust for Prance. Prance also instructed a clerk to put certain parcels of share certificates in the boxes containing the securities and papers connected with certain of the trusts, together with a memorandum in each case that the certificates were thereby deposited as further and additional securities for the amount owing to each of the several trust funds. The deed was executed and the deposits made by Prance without any pressure on the part either of his co-trustees of any of the properties or of the persons beneficially interested. On Mar. 31, 1894, a receiving order was made against Prance and Garrard on their own petition.

The trustee in bankruptcy of Prance brought an action claiming that the deed and the deposits of share certificates were void and conveyed no title as against him. The courts below upheld the conveyance and deposits of shares as against the general creditors, on the ground that Prance's object was not to prefer certain of his creditors to others, but to shield himself from the consequences of his breaches of trust, and that there was thus no fraudulent preference within the meaning of the Bankruptcy Act, 1883, s. 48. The trustee appealed.

The Solicitor-General (*Sir Robert Finlay, Q.C.*), *Muir Mackenzie* and *R. Harington* for the appellant.

Upjohn, Q.C., and *Van Neck* for the respondents.

THE EARL OF HALSBURY, L.C.—I confess that I am unable to entertain any doubt about the true decision in this case. It appears to me that the first thing which one has to do in dealing with this matter is to deal with the question of fact. Certainly this instrument, which was executed two days before the bankruptcy, is

an instrument which not unnaturally exposes itself to the inquiry what were the reasons why it was executed. So far as I am concerned, I wish to say that I entirely and absolutely agree with the view as to the question of fact on which this case was decided by the Court of Appeal. Lord Esher, M.R., says ([1897] 2 Q.B. at p. 27):

"The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also upon the state of mind of the person who made it. It must be shown not only that he has preferred a creditor, but that he has fraudulently done so. It depends upon what was in his mind. Whether it is called 'intention' or 'view' or 'object' does not appear to me to matter much. The question is whether in fact he had the intention to prefer certain creditors. It has been argued that the debtor must be taken to have intended the natural consequences of his act. I do not think that true for this purpose. I think that one must find out what he really did intend. The recitals in the deed seem to me to show what was really his object. It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose favour the deed was made, but was doing what he did for his own benefit. He wanted to render those particular persons disinclined to proceed to extremities against him. He knew that what he had done must be discovered very shortly, and that those persons had a hold upon him, because if they chose to proceed against him the consequences to him might be very serious. He thought that if he put them as far as he could into the same position as if he had not committed the breaches of trust, that might go in mitigation of the consequences to himself. It seems to me clear, therefore, that he made this conveyance not with the 'intention' or 'view' or 'object,' or whatever it may be called, of preferring these persons, but for the sole purpose of shielding himself. Under these circumstances, what he did is not a fraudulent preference within the Bankruptcy Act."

A. L. Smith, L.J., says (ibid. at pp. 29, 30):

"It appears to me that this case is really covered by the decision in *Ex parte Taylor* (1) where the facts were identical with those of the present case, with the exception that there appears to have been in that case an actual threat of proceedings, whereas in the present case, though there appears to have been no threat of proceedings, Prance knew perfectly well that his breaches of trust must be discovered almost immediately and that proceedings would certainly be taken against him in respect of them. The pressure upon him in either case is about identical."

Chitty, L.J., says (ibid. at p. 31):

"I ask myself what was really the view which Prance had in making this conveyance, was it to prefer these particular trust estates to other creditors? The answer to that question must, I think, be in the negative. It was to protect himself against the charges hanging over him."

That being the state of facts, the question comes back to what is the true construction of the statute which your Lordships have to construe, and, speaking for myself, I should hesitate very much to differ from the opinion, which I have already quoted during the argument, of Lord Cairns, L.C., uttered certainly without any dissent from any other member of your Lordships' House, in *Butcher* v. *Stead* (2). He said (L.R. 7 H.L. at p. 846):

"The Act [Bankruptcy Act, 1869], however, did not profess to express the existing law without making considerable changes in it. In the case of fraudulent preference, for example, in place of raising an inquiry whether it was done in contemplation of bankruptcy, the Act provided certain definite tests, namely, that the bankrupt should have been at the time unable to pay his debts as they became due from his own moneys, and that he should become bankrupt within

three months from the date of payment. The Act appears to have left the question of pressure as it stood under the old law; and indeed the use of the word 'preference,' implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used."

I entirely assent to that view of the construction of the statute, and it appears to me that the construction for which the learned counsel for the appellant have contended would impute absurdity to the legislature. Nothing could have been easier than to have enacted, if they had thought proper to do so, that any preference to one creditor over another creditor, or any greater advantage—I do not want to use the word "preference," because questions may arise as to the true construction of that word itself—but any advantage given by previous payment to one creditor, to which advantage all the other creditors were not parties, should of itself be a preference which should be void under the statute.

Nothing, I say, could have been easier than to have made such an enactment, if that was intended, but in my opinion no such intention is to be gathered from the statute. On the contrary, as Lord Cairns, L.C., said, subject to certain express alterations which it then made in the previous state of the law, it did intend to bring with it all those conditions which certainly for something more than a century have been imputed to these transactions, which must be regarded as fraudulent under the bankruptcy law, payments which the legislature had prohibited, because the policy of the bankruptcy law was that upon a cessio bonorum, the whole of the creditors should be equally treated; and the state of the law from that time to the present, I think, has not been a subject of doubt. I know that what A. L. Smith, L.J., has said with regard to what I might call the pressure upon a man's own mind, that he was not by his own voluntary act preferring one creditor to another, but was thinking of something else, has been contested at the Bar; but no authority in favour of that contention has been quoted, and there is one authority now not less than a century old—in fact 110 years old—in which that question was actually determined, and, so far as I know, it has never been disputed since.

The case to which I refer is *Thompson* v. *Freeman* (3), where the defendant had in the year 1780 joined in two bonds with the bankrupt, and had received a counter-bond of indemnity. When these bonds became due, the bankrupt, not having wherewithal to discharge them, applied again to the defendant, and engaged him to join with her in two new bonds, payable in July, 1784, for the purpose of raising money to take up one of the old bonds, and one of them was accordingly taken up on Jan. 14, 1784. The defendant took another counter-bond of indemnity upon his joining in the last two bonds. Previous to June 3, 1785, the day on which the act of bankruptcy happened, the bankrupt sent for the defendant, and proposed to him that he should take out his debts in goods, to which he acceded, and the warrant of attorney in question was given. It appears that her reason for sending for the defendant originated from a letter taking notice, though not in a threatening way, of her situation with respect to the defendant, which letter she had received just before from Messrs. Fosset and Bellamy, whom she knew to have acted in a former transaction as attorneys for the defendant, though upon this occasion they were not in fact concerned for him.

Just let us see what the facts were in that case. There was no threat, and no application for payment of the debt coupled with anything which involved legal procedure, or anything of the sort, but as a matter of fact the bankrupt in her own mind, from a mistaken sense of what was going to be done, thought that legal proceedings were going to be taken, and the assumption of the court is that it was that mistake which induced her to do the thing. Lord Mansfield, C.J., says (1 Term Rep. at p. 157):

"A bankrupt when in contemplation of his bankruptcy cannot by any voluntary act favour any one creditor, but if under fear of legal process he gives a preference, it is evidence that he does not do it voluntarily."

There is the principle stated. It is not a voluntary act; and, as LORD CAIRNS, L.C., says, the word "preference" here imports in it the voluntary act of a person who can do either the one thing or the other as he prefers. LORD MANSFIELD, C.J., proceeds:

> "And though the defendant in this case had taken no steps to secure himself in case he was called upon, yet the bankrupt, acting from mistake, was under the same apprehensions of legal process as if the defendant had actually threatened her, so that her execution of the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be."

It seems to me that after that decision, which, as I said, has now lasted more than a hundred years, and has never, so far as I know, been controverted or qualified, it is idle to suggest that you must have an actual threat of a creditor, or the actual pressure of a creditor.

Applying the principle laid down by LORD MANSFIELD, C.J., to the facts of this case, it is true that no one had threatened this particular bankrupt with criminal proceedings; but if the facts are such as each of the lords justices in turn described them (and in that I entirely concur), that what was in his mind was this, that when the examination in bankruptcy took place he would as a matter of fact probably be prosecuted, and sent to penal servitude for an act of misconduct of which he had been guilty, is not the belief and apprehension of such a criminal prosecution in the same position as the mistaken fear on the part of the debtor, which was commented upon by LORD MANSFIELD, that process would issue against her unless she did the thing which she did? If what the legislature had in view was the exercise of a voluntary right on the part of debtors to do what they pleased, the mere voluntarily deciding (I will not use the word "preferring") to pay one creditor, and leave another creditor unpaid—if that is really what the legislature intended to prohibit by positive enactment, then can it be said that it was a mere voluntary decision on the part of this particular bankrupt that he would favour one set of creditors rather than another, when in truth and in fact it was an endeavour to save himself from a criminal prosecution, which induced him to do the act in question? It becomes then no longer a voluntary act, but an act under pressure—pressure not the less because it is pressure upon his own mind and his own consciousness, from an apprehension of what will happen if bankruptcy takes place—not a pressure by threats of creditors to assert their rights. It becomes unnecessary to raise other questions which have been disposed of before.

The Solicitor-General suggested that there was a proposition which could be maintained, as to which I confess that I entertain grave doubts whether any decision goes to that extent, namely, that the relation between a cestui que trust and a trustee is not that of a creditor and debtor. That it may be something more than that is true, but that it is that of creditor and debtor I can entertain no doubt. As that question has been mooted and brought before your Lordships' House as one question for decision here, I certainly have no hesitation in saying that in my opinion no such proposition can properly be maintained, and that, although there are other and peculiar elements in the relation between a cestui que trust and a trustee, undoubtedly the relation of creditor and debtor can and does exist. It is admitted that the question as to the securities deposited must follow the same rule as is now enunciated in respect of the deed executed two days before the bankruptcy, therefore I give no separate judgment upon that. On the whole, I am of opinion that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD MACNAGHTEN.—I am of the same opinion. I quite agree with what was said by LORD CAIRNS, L.C., in *Butcher* v. *Stead* (2) (L.R. 7 H.L. at p. 846), in the passage cited by my noble and learned friend. I think that the law with regard to the question of pressure is left precisely as it was under the old law, and I think that the word "preference" in itself involves and imports a free choice. I

do not think that this gentleman at the time when he executed this deed was in a position to execute it with free choice at all. I think that he executed it under an overwhelming sense of very imminent peril. The fact that two years before he had had this deed prepared shows to my mind that he had a sense of his dangerous position before his mind at that time; and at the last moment, when it became certain that he would be exposed to bankruptcy and all its consequences, including the examination that would follow, he executed the deed. I think that he executed it simply with the view of protecting himself. I doubt whether he had any intention of preferring these particular creditors at all. I think that he only regarded himself. I think that if he regarded the creditors at all it was only with a very secondary view indeed. The case seems to me to be very clear, and I am very glad to find that the stream of authority on this subject is so uniform and consistent.

LORD MORRIS.—I am of the same opinion.

LORD SHAND.—I also am of opinion that the judgment of the Court of Appeal should be adhered to, and I prefer the grounds upon which the Court of Appeal have put their judgments to those of VAUGHAN WILLIAMS, J. It seems to me that by a stream of authority it has now been settled, whatever may have been the case a number of years ago, that it is necessary to consider, as A. L. SMITH, L.J., said ([1897] 2 Q.B. at p. 29), what was the dominant or real motive of the person making the preference, and I think that the dominant or real motive which led to the granting of this deed was that the bankrupt intended to protect himself. I think that was the true purpose which he had in executing it.

Appeal dismissed.

Solicitors: *Solicitor, Board of Trade; M. H. Prance*, for *Mann & Rodway*, Trowbridge; *Rowoliffes, Rawle & Co.*, for *Prance & Prance*, Plymouth; *R. White*, for *F. Treasure*, Gloucester; *Schultz & Son*, for *G. E. Garrard*, Evesham.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

RISHTON *v.* HASLINGDEN CORPORATION

[QUEEN'S BENCH DIVISION (Hawkins and Channell, JJ.), December 10, 11, 21, 1898]

[Reported [1898] 1 Q.B. 294; 67 L.J.Q.B. 387; 77 L.T. 620; 62 J.P. 85; 14 T.L.R. 155]

Street—Private street works—Expenses—Apportionment—Objection—Street repairable by inhabitants at large—Burden of proof—Private Street Works Act, 1892 (55 & 56 *Vict.*, *c.* 57), *ss.* 5, 6.

A local authority made proposals under the Private Street Works Act, 1892, for the sewering of a street. A provisional apportionment was made and notices of objections were given. The street in question was formed between 1806 and 1816, and was then, and had always remained since, open at both ends into old highways. The street and buildings had existed in their present condition and position for seventy years at least, and it was admitted that, since its formation, the street had been used by foot passengers without interruption. No repairs had ever been done to the street at the public expense, and there was some evidence to the effect that certain minor repairs and the removal of refuse had been done at private expense.

Held: (i) this was not a street within the meaning of the Private Street Works Act, 1892, being a footway repairable by the inhabitants at large; and (ii) the burden of proof was upon the authority to show that a street was a street within the meaning of the Private Street Works Act, 1892.

Notes. The Public Street Works Act, 1892, was repealed by the Highways Act, 1959. Sections 213 (1) and 174 (1)-(3) of the latter Act correspond to ss. 5 and 6 respectively of the 1892 Act. By s. 213 (1) of the 1959 Act a private street is now defined as being "a street not being a highway maintainable at public expense."

Considered: *Huyton-with-Roby U.D.C.* v. *Hunter*, [1955] 2 All E.R. 398. Referred to: *Kingston-upon-Thames Corpn.* v. *Baverstock* (1909), 100 L.T. 935; *Folkestone Corpn.* v. *Brockman*, [1914-15] All E.R. Rep. 720; *Poole Corpn.* v. *Blake*, [1955] 3 All E.R. 409.

As to objections to apportionments, see 19 HALSBURY'S LAWS (3rd Edn.) 443-446; and for cases see 26 DIGEST (Repl.) 615-618. For the Highways Act, 1959, ss. 174 (1)-(3), 213 (1), see 39 HALSBURY'S STATUTES (2nd Edn.) 598, 638.

Cases referred to:

(1) *Bonella* v. *Twickenham Local Board of Health*, *Holmes* v. *Twickenham Local Board of Health* (1887), 20 Q.B.D. 63; 57 L.J.M.C. 1; 58 L.T. 299; 52 J.P. 356; 36 W.R. 50; 4 T.L.R. 51, C.A.; 26 Digest (Repl.) 596, *2516*.

(2) *Handsworth Local Board* v. *Taylor* (1893), [1897] 2 Ch. 442, n.; 69 L.T. 798; 41 Digest 5, *22*.

Also referred to in argument:

Barry and Cadoxton Local Board v. *Parry*, [1895] 2 Ch. 110; 64 L.J.Q.B. 512; 72 L.T. 692; 59 J.P. 421; 43 W.R. 504; 39 Sol. Jo. 507; 15 R. 430, D.C.; 26 Digest (Repl.) 598, *2528*.

Bradford v. *Eastbourne Corpn.*, [1896] 2 Q.B. 205; 60 J.P. 501; sub nom. *Eastbourne Corpn.* v. *Bradford*, 65 L.J.Q.B. 571; 74 L.T. 762; 45 W.R. 31; 12 T.L.R. 479; 40 Sol. Jo. 602, D.C.; 41 Digest 4, *11*.

R. v. *Hastings Corpn.*, [1897] 1 Q.B. 46; 66 L.J.Q.B. 80; 75 L.T. 377; 60 J.P. 759; 45 W.R. 109; 13 T.L.R. 25; 41 Sol. Jo. 50, D.C.; 41 Digest 39, *291*.

Seal v. *Merthyr Tydfil U.D.C.*, [1897] 2 Q.B. 543; 67 L.J.Q.B. 37; 77 L.T. 303; 61 J.P. 551; 13 T.L.R. 509; 41 Sol. Jo. 678, D.C.; 41 Digest 4, *12*.

Handsworth District Council v. *Derrington*, [1897] 2 Ch. 438; 66 L.J.Ch. 691; 77 L.T. 73; 61 J.P. 518; 46 W.R. 168; 13 T.L.R. 505; 41 Sol. Jo. 640; 26 Digest (Repl.) 597, *2521*.

Walthamstow Local Board v. *Staines*, [1891] 2 Ch. 606; 60 L.J.Ch. 738; 65 L.T. 430; 7 T.L.R. 446, C.A.; 26 Digest (Repl.) 608, *2634*.

Case Stated by justices for the county of Lancaster.

Upon the hearing and determining of objections under the Private Street Works Act, 1892, to the proposals of the authority with reference to the sewering of Back Pleasant Street within Haslingden and the provisional apportionment of the expenses thereof. It was admitted before the justices that the Private Street Works Act, 1892, had been duly adopted by the authority, and that the usual notices had been served upon the owners of property fronting, adjoining, and abutting on the street, and had been duly posted and advertised, and that notices of objections had been duly given by ten of the fifteen property owners included in the provisional apportionment. The appellant was one of the ten objectors. The following were the grounds of objection stated by the appellant, and also by the other objectors in their several notices of objections. (i) That Back Pleasant Street is not or does not form part of a street within the meaning of the Private Street Works Act, 1892. (ii) That Back Pleasant Street is a highway repairable by the inhabitants at large. (iii) That the proposed works were unreasonable. (iv) That Back Pleasant Street has already been sewered to the satisfaction of the Haslingden Urban Sanitary Authority.

The estimate for the work was admitted to be reasonable and equitably apportioned among the various owners, but these objections were relied upon by the appellant as showing the non-liability of the owners to do or pay for the work, and were heard and decided by the justices as hereinafter appears. A plan of the street in question and proposed sewering was produced before the justices which was readily understood by them, as they both personally knew the locality well. The streets and buildings referred to in this case had existed in their present condition and position for seventy years at least. The question raised by objections numbered (i) and (ii) were first considered. It was admitted that Back Pleasant Street is a back street about 147yds. in length and varies in width, being 7ft. 6in. wide at the top and 8ft. 6in. wide at the bottom end nearest Deardengate and forms the north-west portion of a plot of land taken by a building association in the year 1806 for the erection of fifty houses, that these houses were erected by such association between the years 1806 and 1816, when the houses were conveyed by the trustees of such association to the several members thereof, that the houses were built twenty-five on each side of a new street made by the association, called Pleasant Street, which is 36ft. wide, with the backs of one row of houses abutting upon a street known as Far Back Pleasant Street, and the back of the other row of houses abutting upon Back Pleasant Street; that Pleasant Street and Back Pleasant Street, each run from Deardengate which is the main street of Haslingden to Bury Road which is one of the principal thoroughfares, that the houses erected by the association run the whole length of Pleasant Street and Back Pleasant Street from Deardengate to Bury Road, that Back Pleasant Street and Pleasant Street were respectively formed as they now exist at the time of the erection of the houses by the association, that there was never any chain, gate, or other barrier or obstruction in or at either end of Back Pleasant Street, that there is a passage of 4ft. in width leading from Back Pleasant Street to Pleasant Street, about half-way down the street, that the north-west boundary of Back Pleasant Street is a wall running the whole length of the street, which wall forms the boundary of the back yards and conveniences of houses erected on the opposite side thereof, and which houses front to Hindle Street in the Borough, that the wall forming the north-west boundary of the street belongs from Bury Road to a point about half-way down Back Pleasant Street to the owners on the Pleasant Street side thereof, and thenceforward into Deardengate, to the owners on the Hindle Street side thereof, that there are openings in that part of the wall which belongs to the owners on the Hindle Street side thereof for the emptying of the ashpits and conveniences of their houses, and that that part of the wall mentioned first, has been kept in repair, and re-built by the owners of property on the Pleasant Street side thereof and the other part by the owners of property on the Hindle Street side thereof, and that since its formation Back Pleasant Street has been used by foot passengers without interruption.

The following evidence was given for the respondents. Thomas Whittaker said:

> "I now own a house at the corner of Bury Road and Pleasant Street, until recently owned by my mother, abutting upon Pleasant Street and Back Pleasant Street. I have repaired the wall on the north-west side of Back Pleasant Street opposite to my house. A man used to temporarily repair and clean the street for my mother, opposite to our property, but only by clearing away refuse thrown over the wall out of the back yards in Hindle Street."

Thomas Sevire said:

> "I lived at the house at the corner of Back Pleasant Street and Bury Road for forty-seven years from the year 1845. Mr. Ramsay, agent for a former owner of the property belonging to the last witness, and the mother of the last witness, each repaired Back Pleasant Street, opposite to their property, many a time, and Mrs. Whittaker claimed Back Pleasant Street as a private

road. Their object in repairing was to clean the street opposite to their property. On one occasion, between 1845 and 1849, I saw Mr. Ramsay prevent a man with a horse and cart from going down Back Pleasant Street, and he told him it was a private street and the stranger had no right to go down the street. I only saw this one person stopped. I never heard of anyone else being stopped. It was not used by the public except by foot-passengers, who used the street without interruption. Pleasant Street would be better for passengers than Back Pleasant Street. Back Pleasant Street was only used by carts for the back privileges, taking away ashes, etc."

Richard Taylor, borough surveyor, produced the plan of the street and the proposed sewer. He had been surveyor to the authority about sixteen years. He had never repaired the street except on one occasion, and that was at the request of a solicitor who occupied an office at the corner of Back Pleasant Street and Deardengate, and the entrance to whose office was in Back Pleasant Street. The solicitor told him his landlord declined to do any repairs in the street, and he wanted a clean approach to his office. The solicitor offered out of his own pocket to pay for the paving of the street from a point opposite to his office door to Deardengate, if the surveyor would do the work. The surveyor did the work and sent the bill to the solicitor who paid it. Pleasant Street was originally and is now paved with cobbles, and he had from time to time repaired it in the same style. Pleasant Street is treated as a highway repairable by the public, but is not yet paved with modern setts.

Upon this evidence it was submitted on behalf of the appellant that the respondents had made out no case, that the onus probandi was upon the respondents, and it was for them to show that Back Pleasant Street was a street within the meaning of the Private Street Works Act, 1892, and to do this, having regard to a definition of a street in the Act, they must show and had failed to show that it was not a highway repairable by the inhabitants at large. Further, that the evidence already given proved that Back Pleasant Street was a highway repairable by the public, inasmuch as it had been used by foot-passengers uninterruptedly for eighty years, and had never been repaired in any real sense by the private owners at any time. Being satisfied that the evidence already given was, in the absence of rebutting evidence, sufficient for the respondents' purpose, the justices overruled the objection.

The appellant then called John Holt, who said he was born in December, 1820, in a house in Back Pleasant Street and lived there forty years. He had since then lived in Pleasant Street and Hindle Street. He had known Back Pleasant Street all his life, and never knew anyone stopped. Carts, horses, and foot-passengers had always used it. Pleasant Street and Back Pleasant Street were made before his time, and these streets were much used by people going between Bury Road and Deardengate. Manchester Road, which is a road going from Deardengate a little below Pleasant Street and joining Bury Road farther down, was not made until 1828. He remembered Manchester road being made. Richard Lord said he had known Back Pleasant Street forty years, and never knew it treated as anything but a public street. George Law said he was sixty-six years old, and had known Back Pleasant Street all his life. It was always, so far as he knew, open to the public for all purposes. John Ashworth, an old surveyor of highways, in flagging the footpath in Pleasant Street had put the scaplings which were left after the flags had been dressed upon Back Pleasant Street solely to save the trouble of carting them away. He took them through the house from the front street to the back. This would be in 1873.

After hearing the appellant's evidence on objections (i) and (ii) the justices were satisfied that no repairs of a permanent character had been executed by anyone in Back Pleasant Street, though occasionally refuse had been cleaned off and inequalities removed by scraping or laying down a few flags or stones here and there from time to time by private tenants or owners, and that Back Pleasant

Street has not up to the present time been paved or flagged, but the surface of the street is simply the original soil. From its limited width (being in no part of its length more than 8ft. 6in. in width), and from its close proximity to Pleasant Street, 36ft. in width, the justices were further satisfied that Back Pleasant Street was never intended nor ever used (in the ordinary meaning of the word "used") as a public road, though occasionally foot-passengers might pass along it, but it was made and practically used only by those desiring access to or egress from the back of the houses on the north-west side of Pleasant Street, also that from the manner in which the houses of the said association were built in 1816 it was evident that Pleasant Street was intended for and has ever since been used by the public as a highway, and that Back Pleasant Street and Far Back Pleasant Street were mere passages or back streets made for and as narrow as compatible with the requirements of the tenants occupying the houses in Pleasant Street. The justices, therefore, held that Back Pleasant Street had not at any time been used by the public as a thoroughfare, and was not a highway repairable by the public.

The following evidence was then called by the respondents on the question raised by objections (iii) and (iv), that the proposed works are unreasonable, and that Back Pleasant Street has already been sewered to the satisfaction of the Haslingden Urban Sanitary Authority.

Richard Taylor, the borough surveyor, said:

"Back Pleasant Street is not sewered. The Haslingden Local Board was formed in 1878, and Haslingden was incorporated in 1891. The present drain was laid when the houses were built in Pleasant Street except as to a short length at the Deardengate end of the street. The drain runs from the Bury Road end of Back Pleasant Street nearly the whole length of the street through the back yards of the houses abutting upon Back Pleasant Street, and drains the length of these houses. Near the Deardengate end there is a drain from some of the houses in Hindle Street, which crosses Back Pleasant Street, and is connected with the drain in the back yards. The present drain varies in depth from 2ft. 4in. to 3ft. 3in. below the surface. The cellars are not and cannot be drained by it. A part of the drain is constructed of earthenware pipes and the remainder is simply a stone drain. Near the Deardengate end of Back Pleasant Street the drain comes out of the back yards into Back Pleasant Street, and here, constructed as a sewer, runs down the centre of that street into the sewer in Deardengate. The latter portion of the sewer, which is 26ft. in length, was constructed some years ago by the authority at their own expense, and it is not intended to be relaid, and the expense of it is not included in the provisional apportionment. In 1886 Dr. Harrison, one of the objectors, re-built some property in Pleasant Street and Back Pleasant Street, and submitted plans to the Haslingden Local Board showing, inter alia, the present drain at that particular point, and how he proposed to divert the drain and connect with the sewer. The plans were approved and no objection was taken by the authority, to the drain, and its insufficiency has never been raised until notices were given in connection with the present proceedings. A general system of sewering of the district has been under consideration for some years, and has only recently been agreed upon. It is now intended to substitute for the present drain a sewer to run the whole length of Back Pleasant Street down the centre of the street at a depth suitable to, and in accordance with the general system of sewering of the town, and that each house be separately connected with such sewer."

For the appellant and the other objectors it was contended that the drains in the back yards of the property in Back Pleasant Street had been in existence for many years, not simply as a drain for a few houses, but as a sewer receiving the sewage of the houses on both sides of Back Pleasant Street and belonging to different owners, and the inaction of the town authorities in years past, and

particularly when Dr. Harrison's plans were before them, prohibited the respondents from treating this sewer now as simply a private drain; and further that, as all sewers were now vested in the urban authority, it was the duty of the respondents to make any alterations in its structure or position at the public expense. Further, that the passive attitude of the respondents in past years was evidence that Back Pleasant Street was sewered to their satisfaction and that the expense of constructing the new sewer must be borne by them.

After hearing this evidence the justices considered the question whether the drain was a sewer which had vested in and became repairable by the respondents, and decided in the negative. In their opinion the very construction and position precluded its ever having been sanctioned by any public authority as a suitable sewer. It was not uniform in construction, but where made of stone was certainly faulty. Its position prevented it draining the cellars; therefore to that extent the houses were not sewered at all. The delay in not requiring the owners to put in a proper sewer was fully understood as, until the present system of drainage was decided upon, the levels, etc., could not be stated, and further, that no unreasonable delay had taken place after a general system of drainage had been adopted. The justices therefore disallowed the objections and approved the proposals of the respondents, and the provisional apportionments of the expenses.

The questions for the consideration of the court are:—(i) Were the justices right in overruling the objection taken on behalf of the appellant that the onus probandi was upon the respondents to show that Back Pleasant Street was a street within the meaning of the Private Street Works Act, 1892, and that they had failed to do so? (ii) Were the justices justified upon the evidence in holding that Back Pleasant Street is not a highway repairable by the inhabitants at large? (iii) Were the justices justified upon the evidence in holding that Back Pleasant Street is a street not sewered to the satisfaction of the authority?

Loehnis for the appellant.

Temple Franks for the respondents, the authority.

Cur. adv. vult.

Dec. 21, 1898.—**CHANNELL, J.,** read the following judgment of the court.—This was a case stated by magistrates under s. 33 of the Private Street Works Act, 1892. The appellant Rishton had duly objected to being charged with a proportion of the expenses of sewering a street called Back Pleasant Street, in Haslingden, and the magistrates, having heard the objections, decided against him and stated this case. The objections resolved themselves into two: first, that Back Pleasant Street was a highway repairable by the inhabitants at large; and, secondly, that it had already been sewered to the satisfaction of the respondents. The Case states that Back Pleasant Street was formed between 1806 and 1816, and was then and has always remained since open at both ends into old highways; and that the street and buildings have existed in their present condition and position for seventy years at least, and there is an express admission that, since its formation, Back Pleasant Street had been used by foot-passengers without interruption. The Case then sets out the evidence of the witnesses both for the respondents and the appellant, and the magistrates state their reasons for coming to the conclusion that Back Pleasant Street was not a highway repairable by the public. They submit, as to this part of the Case, two questions: (i) Were we right in overruling the objection taken on behalf of the appellant that the onus probandi was upon the respondents to show that Back Pleasant Street was a street within the meaning of the Private Street Works Act, 1892, and that they had failed to do so? (ii) Were we justified upon the evidence in holding that Back Pleasant Street is not a highway repairable by the inhabitants at large. The first of these questions is not very important. The onus probandi clearly was on the respondents, but now that we have before us not only the evidence of the respondents but also that of the appellant, it becomes unnecessary to consider what would have been the

effect of the respondents' evidence had it stood alone, and whether or not it would have satisfied the onus. The second question is the one which must decide this part of the case. The magistrates ask, "Were we justified in finding?" It is contended that, as the magistrates can only state a Case upon a point of law, and must themselves decide a question of fact, the question means, "Was there any evidence upon which we could find as we did?" and this we must think is so.

If the whole matter were open to us, we should probably come to the conclusion that Back Pleasant Street was, and had been from the time of its formation, a highway not only for foot-passengers but also for carts and carriages. It is a very strong fact that it was from the first a thoroughfare open at both ends to old highways. The fact that no repairs have been done to it at the public expense is a matter of very small weight, having regard to the nature of the place, and the suggested repairs at private expense were only the cleaning of refuse away and other small matters. If it was a highway before 1835, it would be repairable by the inhabitants at large without any formalities having been gone through to take it over. The whole question, however, is not open to us, and as there is in the evidence of Thomas Sevire one case of a horse and cart being stopped, and as on the question of carriage-way the fact that the public have not repaired is a much stronger piece of evidence than it is in reference to a footway, we think that we cannot hold that there was no evidence upon which the magistrates could find that this was not a public carriage-way. On the question whether it was a public foot-way the admission appears to us conclusive, and there is nothing whatever in the evidence set out inconsistent with this.

The points urged before us by the counsel for the respondents as evidence justifying the finding of the magistrates, which we must assume to be, although they do not very distinctly state it, that there was, at least before 1835, no further footway are the absence of proof of public repairs, the suggested proof of private repairs, and the original construction of the passage in question. As to these, the construction appears to us to favour its being a public footway, the private repairs are not proved even in the view of the magistrates, and the absence of public repairs is accounted for by the nature of the place. We think, therefore, that this case must be dealt with upon the footing that this was prior to 1835 a public footway. It was urged that only one witness spoke as to the time before 1835, but any difficulty on that point is quite got over by the admissions. This being so, and there having been no addition to the old footway, it seems to us that the place in question is not a "street" within the definition in the Private Street Works Act, 1892. It is not like the case where there being an old footway, a new street has been formed by throwing into it more land. On this ground we think that the appeal must be allowed, and it becomes unnecessary for us to decide the other question whether the respondents can now declare themselves not satisfied with the sewering of Back Pleasant Street, or whether the case comes within the doctrine of *Bonella* v. *Twickenham Local Board of Health* (1) and the subsequent cases following that case.

It appears to us that it is in fact sewered, although very imperfectly and badly, and that as there has been no change whatever in this street for seventy years, and the respondents have been contented with it ever since they became an authority, they cannot say that they are dissatisfied with it. We think that the decision of ROMER, J., in *Handsworth Local Board* v. *Taylor* (2), which was quoted to us, applies only to a growing street, and that in the present case, if there had been new buildings fronting this street, the respondents might have said they had never been satisfied with the sewering of the street which it had become. They have, however, been satisfied with the sewering of the street which in fact it is. The necessity for the works now proposed has not arisen from any change of things in the street in question, but from a new general system of sewering of the district having been recently adopted. The new sewer for this locality is really wanted for two houses in Pleasant Street and Hindle Street, and it would be a

very remarkable result of the legislation if the fact of there being a private back passage between these two streets enabled the respondents to do at the private expense of the owners works which, if there were no such passage, would have to be done at the public expense. If this view is correct the appeal should be allowed on this ground also; but we have not very fully considered it, and base our judgment upon the ground that the place in question is not a street within the meaning of the Private Street Works Act, 1892, being a footway repairable by the inhabitants at large.

Appeal allowed.

Solicitors: *T. H. Philpots*, for *Whitaker & Hibbert*, Haslingden; *Harrison & Davies*, for *W. Musgrave*.

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

EDWARDS *v.* WALTERS AND ANOTHER

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), April 25, 27, 28, 1896]

[Reported [1896] 2 Ch. 157; 65 L.J.Ch. 557; 74 L.T. 396; 44 W.R. 547; 12 T.L.R. 359; 40 Sol. Jo. 477]

Promissory Note—Renunciation—Delivery to "maker"—Delivery to devisee of maker—Note payable "on demand"—Bills of Exchange Act, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 62.

Contract—Release—Release not under seal—Consideration required in law and equity.

W. borrowed a sum of money from E. and gave him a promissory note payable to him on demand. W. died, charging his real estate by will with the payment of his debts, and E. voluntarily handed the promissory note to one of W.'s devisees with the intention of releasing the debt, but without making any written renunciation. In an action to recover the sum lent,

Held: (i) at law a release not under seal must fall within the Bills of Exchange Act, 1882, s. 62 (as governed by s. 89), any inconsistent rule under the law merchant being no longer applicable; (ii) as a promissory note payable "on demand" was payable at once without any demand and might be sued upon accordingly, it matured as soon as it was made and delivered to the payee, and it was, therefore, capable of being renounced under s. 62; but, (iii) although a release might be effected under this section by delivery to the personal representative of the acceptor of a bill or of the maker of a promissory note, the delivery to his devisee was not sufficient; (iv) there was no release in equity as there was no consideration, and, there being no conduct on the part of the creditor which would make it inequitable to enforce the claim, the loan was recoverable; and (v) it did not matter that the plaintiff was unable to hand over the promissory note to the defendants as it was already in the defendants' possession; accordingly, there being no release or discharge at law or in equity and no conduct on the part of E. which precluded his representatives from obtaining payment from the devisees, the action succeeded.

Re George, Francis v. *Bruce* (1) (1890), 44 Ch.D. 627, applied.

Dictum of TURNER, L.J., in *Taylor* v. *Manners* (2) (1865), 1 Ch. App. 48, disapproved.

Notes. For the effect of a part payment by a person in possession of mortgaged land, see now the Limitation Act, 1939, s. 23 (1) (b). A

As to renunciation of bills of exchange and other negotiable instruments, see 3 HALSBURY'S LAWS (3rd Edn.) 227-228; as to release of a debt, see 8 HALSBURY'S LAWS (3rd Edn.) 217-218. For cases see 6 DIGEST (Repl.) 344. For the Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505 et seq.; and for the Limitation Act, 1939, s. 23, see 13 HALSBURY'S STATUTES (2nd Edn.) 1184. B

Cases referred to:

(1) *Re George, Francis* v. *Bruce* (1890), 44 Ch.D. 627; 59 L.J.Ch. 709; 63 L.T. 49; 38 W.R. 617; 6 T.L.R. 309; 6 Digest (Repl.) 343, *2490*.

(2) *Taylor* v. *Manners* (1865), 1 Ch. App. 48; 35 L.J.Ch. 128; 13 L.T. 388; 11 Jur.N.S. 986; 14 W.R. 154, L.JJ.; 12 Digest (Repl.) 211, *1511*. C

(3) *Foster* v. *Dawber* (1851), 6 Exch. 839; 20 L.J.Ex. 385; 17 L.T.O.S. 310; 155 E.R. 785; 6 Digest (Repl.) 342, *2473*.

(4) *Hyde* v. *Skinner* (1723), 2 P.Wms. 196; 24 E.R. 697, L.C.; 24 Digest (Repl.) 670, *6581*.

(5) *Crowe* v. *Clay* (1854), 9 Exch. 604; 23 L.J.Ex. 150; 23 L.T.O.S. 38; 18 Jur. 654; 2 W.R. 304; 156 E.R. 258, Ex. Ch.; 6 Digest (Repl.) 395, *2832*. D

(6) *Re Hollingshead, Hollingshead* v. *Webster* (1888), 37 Ch.D. 651; 57 L.J.Ch. 400; 58 L.T. 758; 36 W.R. 660; 4 T.L.R. 275; 23 Digest (Repl.) 364, *4321*.

(7) *Roddam* v. *Morley* (1857), 1 De G. & J. 1; 26 L.J.Ch. 438; 29 L.T.O.S. 151; 3 Jur.N.S. 449; 5 W.R. 510; 44 E.R. 622, L.C.; 32 Digest 398, *772*.

Also referred to in argument: E

Decroix Verley et Cie. v. *Meyer & Co.* (1890), 25 Q.B.D. 343; 59 L.J.Q.B. 538; 63 L.T. 414; 39 W.R. 2, C.A.; affirmed sub nom. *Meyer & Co.* v. *De Croix, Verley et Cie.*, [1891] A.C. 520; 61 L.J.Q.B. 205; 65 L.T. 653; 40 W.R. 513; sub nom. *Decroix Verley et Cie* v. *Meyer & Co.*, 7 T.L.R. 729, H.L.; 6 Digest (Repl.) 60, *537*.

Re England, Steward v. *England*, [1895] 2 Ch. 100; 72 L.T. 681; 43 W.R. 491; affirmed, [1895] 2 Ch. 820; 65 L.J.Ch. 21; 73 L.T. 237; 44 W.R. 119; 39 Sol. Jo. 704; 12 R. 539, C.A.; 32 Digest 408, *869*. F

Coope v. *Cresswell* (1866), 2 Ch. App. 112; 36 L.J.Ch. 114; 15 L.T. 427; 15 W.R. 242, L.C.; 32 Digest 397, *768*.

Appeal by the defendants, the devisees of the real estate of Walter Walters deceased, from an order of KEKEWICH, J., by which he ordered that the sum of £200 with interest should be raised out of this real estate and paid to the plaintiff as administratrix of the Rev. Abraham Edwards deceased. G

On Aug. 1, 1865, the Rev. Abraham Edwards lent £200 to his brother-in-law Walter Walters, for which sum Walters gave Edwards a promissory note payable on demand, with interest at 4 per cent. per annum. The note was made payable simply to Edwards, without the words "or order." In 1866 Walters died, leaving the debt of £200 unpaid. By his will he devised certain real estate specifically to his son and his daughter, Thomas Walters and Annie Evans, widow, and he also charged his real estate with the payment of his debts. His executors wound-up his estate and paid his debts, with the exception of the debt of £200, of the existence of which they were ignorant. In October, 1894, Edwards died, and in 1895 an action was brought by his administratrix against Thomas Walters and Annie Evans, as the devisees of the real estate of Walter Walters, and also against his executors, for the purpose of obtaining payment of the £200, with interest, out of the devised real estate. H I

The evidence showed that the defendants, Thomas Walters and Annie Evans, had during the life of Edwards voluntarily made him some payments by way of interest at 4 per cent. on the £200, the first of these payments being in 1878 and the last in 1889. There was also evidence that, in 1891, when Walter Walters's

daughter Annie Evans was on a visit to her uncle Mr. Edwards, he delivered up the promissory note to her, saying that he gave it to her.

By the Bills of Exchange Act, 1882, s. 8 (4):

"A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

By s. 62 (1):

"When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing unless the bill is delivered up to the acceptor."

By s. 83 (1):

"A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

By s. 89:

"(1.) (with certain exceptions) The provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes; (2.) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill."

By s. 97 (2):

"The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and cheques."

On Jan. 31, 1896 KEKEWICH, J., gave judgment for the raising of the £200, with interest, out of the devised real estate. From that decision the devisees, Thomas Walters and Annie Evans, now appealed.

Renshaw, Q.C., and *J. G. Butcher* for the defendants.
Bramwell Davis, Q.C., and *Griffith Jones* for the plaintiff.

Cur. adv. vult.

April 28, 1896. The following judgments were read.

LINDLEY, L.J.—This was an action by the administratrix of a creditor against the executors and the devisees of his debtor for the administration of his real and personal estate and for payment of £200 and interest.

On Aug. 5, 1865, Walters borrowed £200 from Edwards and gave him a promissory note for the amount. It is to be observed that the note was not negotiable when made, not being payable to order or bearer, but the Bills of Exchange Act, 1882, s. 8 (4), appears to apply to it and to make it negotiable after that Act came into force. Walters, the maker of the note, died in 1866; the defendants are his legal personal representatives and devisees of his real estate. By his will he charged his real estate with his debts. In October, 1894, Edwards, the creditor, died, and the plaintiff is his administratrix. The £200 has never been paid, and Walters's legal personal representatives have no personal assets with which to pay it. Whether they ever had I do not know. Interest on the debt was paid by Walters's devisees to Edwards up to 1889; the last payment was made within six years before the commencement of this action. If this were all, the devisees of Walters's real estate would have no defence to the action. But they

contend that Edwards in his lifetime released the debt. What he did was this. In April or June, 1891, he gave the note to Mrs. Evans, who was one of the devisees, telling her in effect that he never should make any claim under it and that she might keep it. Mrs. Evans has kept it from that time until now. The note was not endorsed to her, nor was there any writing at the time throwing any light on this transaction.

What, then, is the effect of this transaction? It is contended that it is a release at law, or at all events in equity. A release at law is sought to be established by the law merchant apart from the Bills of Exchange Act, and if not by the law merchant then by s. 62 of that Act. The law merchant is stated in *Foster* v. *Dawber* (3). I do not understand that it applied to bills or notes not negotiable, but this difficulty is removed by s. 8 (4), to which I have already alluded. The law merchant is adopted with modifications in s. 62 of the Bills of Exchange Act. The modification introduced is the necessity for a writing unless the bill is given up to the acceptor. In this particular the law merchant is inconsistent with the express provisions of s. 62. The argument of the defendants, based on s. 97 (2), and on the law merchant which before the Act formed part of the common law of England, cannot be supported.

Reliance is then placed on s. 62 of the Act. This section, though in terms applicable to bills of exchange, is by s. 89 made applicable to promissory notes and to promissory notes payable to a particular person without the addition of the words "or order or bearer:" see s. 8 (4). Section 62, therefore, applies to the promissory note which is in question here. The maker of a promissory note corresponds with the acceptor of a bill (s. 89 (2)). A promissory note payable on demand is payable at once without any demand and may be sued upon accordingly. Such a note, therefore, "matures" within the meaning of s. 62 as soon as the note is made and delivered to the payee: see *Re George*, *Francis* v. *Bruce* (1).

I will now paraphrase s. 62 and apply it to a promissory note payable on demand. The section will run thus: "When the holder of a promissory note payable on demand absolutely and unconditionally renounces his rights against the maker the note is discharged. The renunciation must be in writing unless the note is delivered up to the maker." In the present case there was no renunciation in writing. Can it then be said that it was delivered up to the maker? The maker had long been dead; but I am not prepared to say that the legal personal representatives of an acceptor or maker would not be included in the word acceptor or maker. The ordinary use of language and the general understanding of business men as well as of lawyers warrant such an interpretation of the word acceptor or maker in such a context. As Lord Macclesfield said in *Hyde* v. *Skinner* (4) (2 P. Wms. at p. 196), "the executors of every person are implied in himself:" Byles on Bills (11th Edn.), p. 53. But I cannot go further and say that acceptor or maker in this section means or includes a legatee or devisee. Such an interpretation is not warranted either by the ordinary use of language or by the general understanding of business men or of lawyers. Consequently, s. 62 does not justify the contention that this note was discharged by the gift of it to Mrs. Evans. In the course of the argument I expressed a doubt whether, as the plaintiff was not the holder of the note, she could sue the maker's representative either on the note or for money lent to the maker: see *Crowe* v. *Clay* (5); but as the devisees themselves hold the note and are not liable to be sued upon it by anyone, the reasoning on which that case was decided does not apply. I come, therefore, to the conclusion that there has been no release or discharge at law of the debt due to Edwards's estate from Walters's estate. The defence founded on the statute of limitations fails as regards the devisees of the real estates by reason of their payment of interest: see *Re Hollingshead*, *Hollingshead* v. *Webster* (6).

There remains only the question whether the devisees of the real estate have been discharged in equity though not at law. Edwards in his lifetime made no claim against Walters's executors, but there is no evidence to show that the

devisees had been prejudiced by the mode in which the personal estate has been dealt with. There is no evidence that there was any. Moreover, the devisees for many years paid interest on the £200, and, apart from the gift of the note to Mrs. Evans, there is no ground for saying that Edwards so conducted himself as to render it inequitable on his part to insist on payment of his debt out of the real estate devised to those who recognised his demand. The gift of the note to Mrs. Evans is unquestionably strong evidence of an intention to forgive the debt; but unfortunately the note was not endorsed by the payee. Mrs. Evans could not, therefore, sue on it in her own name, nor was there any consideration for the transaction. There was no consideration to support an agreement not to sue. There is, in fact, nothing except an intention not carried out. Such an incomplete transaction does not amount to a gift of the debt nor to an equitable release of it.

In *Taylor* v. *Manners* (2) TURNER, L.J., expressed a doubt whether a gift by a secured creditor of his security to the debtor might not amount even at law to a release of the debt if such was the intention of the creditor; but I confess I cannot adopt his suggestion. TURNER, L.J., came to the conclusion that there was an agreement to release, and a consideration for such agreement. KNIGHT BRUCE, L.J., differed. The decision, therefore, does not really assist the plaintiff.

At law exoneration before breach need not be under seal, but a release must be under seal except in the cases provided by s. 62 of the Bills of Exchange Act. A release in equity is often spoken of as something easy to establish. But I am not aware of any circumstances which amount to a release in equity and not at law except an agreement for valuable consideration to give a release or not to sue. Such an agreement, unless there is some reason for not enforcing it, has in equity the effect of a release. Again, a creditor may so conduct himself as to preclude himself from obtaining equitable relief and even from enforcing a legal demand. This I understand to have been TURNER, L.J.'s, meaning when he said (1 Ch. App. at p. 56) he was not satisfied that there might not be considerations which would in this court prevent a debt from being enforced, although it might be subsisting at law. But to call such conduct a release in equity suggests false analogies and misleads.

In this case there is no release or discharge at law or in equity, and no conduct on the part of Mr. Edwards which precludes his representatives from obtaining payment from the devisees. An intention to discharge them from their liability is established, but that unfortunately is insufficient to afford them a defence to the claim made against them. A court of equity cannot enforce a mere intention to give and forgive. The appeal must be dismissed with costs.

LOPES, L.J.—I will not recapitulate the facts, which have been already stated by LINDLEY, L.J. This note is payable to a person designated without the addition of "order" or "bearer," and would not have been negotiable before the statute—the Bills of Exchange Act, 1882. The old law, therefore, as stated by BYLES, J., in his book on BILLS, would be inapplicable, and the defendant would have had no answer. It was contended that the statute of 1882 did not apply, because this was not a negotiable instrument; but this contention cannot be maintained if s. 8 of the statute is looked at. Section 8 refers to a note, and clearly covers a note made payable to a specified person. This note is, therefore, within the statute and the case is governed by s. 62. [HIS LORDSHIP read that section, and continued:] The note must be mature; a note such as this, a note payable on demand, is at maturity immediately it is made.

The holder here has, in my opinion, by parol absolutely and unconditionally renounced his rights against the acceptor. But the statute says that the renunciation must be in writing, unless the bill or note is delivered up to the acceptor. There was no writing, and the bill was not delivered up to the acceptor, or in this case to the maker. It was delivered up to the devisees of the maker, who were no parties to the note, and could not have been sued on it. I am clearly of

opinion that this is not either within the words or the meaning of the statute. It may be that the words "acceptor" or "maker" would include any person liable on the bill, such, for instance, as the personal representative of the acceptor or maker; but I am quite clear that it cannot include the devisees of the maker or make the estate of the testator liable. The case is taken out of the statute of limitations by payments made by the devisees. There has been no release at law, and no discharge in equity. I am of opinion, therefore, that the appeal must be dismissed with costs.

KAY, L.J.—The administrator of a man named Edwards has brought this action against the executors and against the devisees of real estate of a person named Walters to recover a sum of £200 lent in 1865 by Edwards to Walters. Walters died in 1866. By his will he charged his real estate with payment of his debts. His executors were ignorant of the existence of this debt; and have completely administered his personal estate; but the devisees of the real estate of Walters paid interest upon the debt for some years, and up to 1889. The defence is that the debt has been released. It appears that Walters gave a promissory note to Edwards for the amount, and that in April or June, 1891, Edwards gave up to the devisees the promissory note with the intention of releasing the debt. The learned judge has found this to be the fact, and there seems no reason to doubt it.

The question is whether this operated as an effectual release at law or in equity. By the Bills of Exchange Act, 1882, s. 62:

> "When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor."

By s. 89 the provisions of the Act apply with the necessary modifications to promissory notes. Therefore, in s. 62 we must read in this case "maker" instead of "acceptor." The difficulty is to say that this note has been delivered up to the maker. The actual maker, of course, was Walters, and it was not delivered up to him; but if it had been delivered up to his executors after his death I should think that would do; because they might have been sued on the note as standing in the place of the maker. The devisees of his real estate are not in the same position as his executors for this purpose. There is nothing in the Act to bring them within the definition of makers of the note. They might be joined with the executors in an action to make the real estate which they took under the will of the maker of the note liable for its payment, as has been done in this case. Payment on account by them would keep this right against that real estate alive, as was determined in *Roddam* v. *Morley* (7) and in *Re Hollingshead* (6). But these considerations do not authorise the court to say that the devisees of the real estate of the maker are themselves makers within the meaning of s. 62 of this statute, or that they stand in the position of the deceased maker as his executors may be said to do.

Before the statute the liability of any party to the note might be discharged by an express renunciation, without writing and without consideration. This was by the law merchant: *Foster* v. *Dawber* (3); but it only applied to those who were parties to the note. The statute has altered this by requiring the renunciation to be in writing. I have no doubt that, if the renunciation was made as required by the Act, the debt would be completely discharged, and no action could be maintained on the note or to recover the loan.

It is argued that the case does not come within the Act at all; that the renunciation contemplated by the Act is only against the maker, and if these defendants are not makers, the matter may be treated as outside the statute, and that the loan has been effectually released so far as they were concerned. The only authority cited for this was *Taylor* v. *Manners* (2), where TURNER, L.J., intimated rather doubtfully an opinion that the giving up of a policy of insurance which was the

security for a debt might operate as a total release of the debt. KNIGHT BRUCE, L.J., dissented. I do not see how this could be a release in equity unless there was a valuable consideration for the release, and no case has been cited in which such a transaction has been held to be a release at law.

Then it was said that no one could sue for the debt in this case unless he was in a position to hand over the note to the defendants, and that would undoubtedly be so if there was any chance of the defendants being exposed to the risk of being sued upon the note by the holder. But no such danger can possibly arise, because the note is in the defendant's own hands. With every desire to assist the defendants in a case in which it seems clear that the payee of the note intended to release all claim against them, I feel bound to hold that he has not carried out that intention effectually. He might have made the renunciation in writing, in which case I incline to think it would have been sufficient. He has not done this; he has made an attempt to give up the claim, which, being without consideration, and not complying with the statute, in my opinion, has not discharged the real estate devised to these defendants from liability.

Appeal dismissed.

Solicitors: *Robbins, Billing & Co.*, for *C. Owen*, Pwllheli, Carnarvon; *Minshall, Parry-Jones & Co.*, for *Smith & Davies*, Aberystwith.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

COOK AND ANOTHER *v.* SPRIGG

[PRIVY COUNCIL (The Earl of Halsbury, L.C., Lord Watson, Lord Hobhouse, Lord Macnaghten and Lord Morris), November 30, December 1, 2, 7, 9, 1898, August 1, 1899]

[Reported [1899] A.C. 572; 68 L.J.P.C. 144; 81 L.T. 281; 15 T.L.R. 515]

Constitutional Law—Act of State—Cession of territory to the Crown—Effect on private property.

Lands and other rights were granted to the appellants by the paramount chief of Eastern Pondoland, which was later ceded to the Crown and became part of the colony of the Cape of Good Hope. In an action by the appellants against the Prime Minister of Cape Colony under the Crown Liabilities Act, 1888 (an Act of that colony which in certain cases gave power to sue the Prime Minister in his representative capacity) for a declaration that the appellants were entitled to such lands and rights,

Held: (i) the Act gave no power to make such a declaration; and (ii) in any event, the acquisition by the Crown, whether by cession or otherwise, was an act of State, and although according to the well-understood rules of international law a change of sovereignty by cession ought not to alter private property, no municipal tribunal had authority to enforce such an obligation.

Notes. Applied: *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K.B. 391. Considered: *Secretary of State* v. *Sardar Rustam Khan*, [1941] 2 All E.R. 606. Referred to: *Salaman* v. *Secretary of State in Council of India*, [1906] 1 K.B. 613; *Johnstone* v. *Pedler*, [1921] All E.R. Rep. 176; *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] 2 All E.R. 93.

As to Acts of State, see generally 7 HALSBURY'S LAWS (3rd Edn.) 279 et seq.; and for cases see 11 DIGEST (Repl.) 627 et seq.

Cases referred to:

(1) *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 13 Moo. P.C.C. 22; 7 Moo. Ind. App. 476; 19 E.R. 388; sub nom. *East India Co.* v. *Kamachee Boye Sahiba*, 7 W.R. 722, P.C.; 11 Digest (Repl.) 617, *442*.

(2) *Doss* v. *Secretary of State for India in Council* (1875), L.R. 19 Eq. 509; 32 L.T. 294; 23 W.R. 773; 11 Digest (Repl.) 617, *443*.

Also referred to in argument:

United States v. *Parchemin* (1833), 7 Peters, 51.

Strother v. *Lucas* (1838), 12 Peters, 410.

Smith v. *United States* (1836), 10 Peters, 326.

United States v. *Auguisola* (1863), 1 Wallace, 352.

Appeal by the plaintiffs in the action from a decision of the Supreme Court of the Colony of the Cape of Good Hope (DE VILLIERS, C.J., BUCHANAN and UPINGTON, JJ.), dated Mar. 11, 1895, whereby the court refused (inter alia) a declaration that they were entitled to certain lands and rights granted to them by Sigcau, a former paramount chief of Eastern Pondoland, and entered judgment for the defendant, the Prime Minister of that colony, who was sued in his official capacity.

The appellants claimed to be entitled to certain rights to be exercised in Eastern Pondoland under the four several documents hereinafter mentioned. Eastern Pondoland was geographically a tract of country on the south-eastern coast of Africa, which in 1878, was occupied by divers barbaric tribes or clans under chiefs or headsmen, of whom one Umquikela, as being the most powerful by virtue of his descent and in military force, was paramount. At that time the internal condition of the district had become unsettled and dangerous, and for the protection of British subjects resident or trading there, as well as in the interests of the neighbouring colonies, Her Majesty asserted and established her supreme authority over the district by a proclamation dated Sept. 4, 1878. A British Resident was appointed under that proclamation, and such appointment was duly notified to the native chiefs. From 1878 until the district was annexed to Cape Colony, as hereinafter mentioned, Her Majesty was represented by a Resident in Eastern Pondoland. On Jan. 5, 1885, Her Majesty, by Her High Commissioner in South Africa, publicly notified the exercise of her Protectorate over the whole coast of Pondoland. The Customs dues prevailing in the Cape Colony were and had from a period anterior to the date of the earliest of the alleged concessions, herinafter mentioned, been applicable to goods imported into Eastern Pondoland.

In 1888 Umquikela died, and one Sigcau succeeded to him as paramount among the local chiefs in Eastern Pondoland. The appellants obtained from Sigcau certain concessions contained in four documents, as follows. By a document dated April 10, 1889, Sigcau purported to grant to the appellants, their heirs, executors, administrators, or assigns, and to whomsoever they might transfer the whole or any part of their right, the sole and exclusive right to search for, remove, and enjoy all minerals, metals, and precious stones, including coal, derivable, lying, or contained in Eastern Pondoland, for the term of ninety-nine years from Jan. 1, 1889. The document purported to confer divers other rights, including the right to import into Eastern Pondoland, free of charge or impost, plant, stores, and provisions, and to construct railways, tramways, roads, bridges, and canals. By another document dated Oct. 24, 1890, Sigcau purported to grant to the appellants as aforesaid the sole and exclusive right to construct, maintain, and work a railway in Eastern Pondoland, starting, if practicable, at the extreme mouth of the St. John's River on the eastern bank thereof, and to proceed in any direction and take such route through Eastern Pondoland as the appellants should think fit, and to maintain and work the same when constructed for a term of ninety-nine years. The document purported to grant other sole rights, including the right to take and retain free of

charge land at Port St. John's, in Her Majesty's possession, and at the terminus of the proposed railway. By another document of Oct. 4, 1891, Sigcau purported to grant to the appellants as aforesaid, for a period of ninety-nine years from Oct. 4, 1891, renewable at the expiration thereof for a further period of ninety-nine years, two pieces of land in Eastern Pondoland, each piece not to be of less extent than 3,000 Cape morgen (being 6,000 acres or upwards in English measurement). The document did not define the situation of the pieces of land, except that they were to be respectively at the starting point and the terminus of the said proposed railway. By another document dated June 30, 1893, Sigcau purported to grant to the appellants for a term of ninety-nine years, with the right of renewal reckoned from June 30, 1893, 160 square miles of land in Eastern Pondoland, the site and selection whereof was to be determined by the appellants at any time after the signing of that document, and he also thereby purported to grant to the appellants the right to trade throughout Eastern Pondoland free of all duty so far as the said country was concerned.

The document of Oct. 24, 1890, purported to be signed by certain chiefs in addition to Sigcau, and each of the documents purported to be witnessed by certain chiefs. On Mar. 31, 1894, a corporation styled the Pondoland Incorporation, claiming as assignees of the appellants, applied to the Premier of Cape Colony for the ratification of the alleged concessions, but such ratification was refused, and the alleged concessions were never ratified or recognised. The appellants never at any time were in possession of the land granted to them by the aforesaid documents. On Mar. 17, 1894, Eastern Pondoland was, with the assent of all, or a great majority, of the chiefs, formally ceded to Her Majesty.

On Aug. 14, 1894, an Act called the Pondoland Annexation Act, 1894, was passed by the colonial legislature, and received the assent of the Governor (Colonial Statute, No. 5 of 1894). This Act, after reciting that it was the intention of Her Majesty the Queen to issue her Royal Letters Patent to authorise the Governor of the Cape of Good Hope, by proclamation under his hand and the public seal of the colony, to declare that from and after a day to be therein mentioned the country known as Pondoland, comprising the territories of East and West Pondoland, should be annexed to and form part of the colony, in case the legislature of the colony should have passed an Act providing that the said country should become part of the colony, it was enacted as follows :

> "1. From and after such day as the Governor shall, pursuant to the powers in that behalf contained in any Royal Letters Patent which may be issued for that purpose by proclamation under his hand and the public seal of the colony, fix in that behalf the country in the preamble to this Act mentioned and with the name of Pondoland shall be annexed to and become part of the colony.
>
> 2. From and after the date of such proclamation as aforesaid the territory known as East Pondoland shall become a part of that portion of the colony known as Griqualand East, and the territory known as West Pondoland shall become a part of that portion of the colony known as Tembuland, and the same territories shall be subject to such laws, statutes, and ordinances as have already been proclaimed by the High Commissioner, and such as after the annexation of the colony the Governor shall from time to time by proclamation declare to be in force in such territories. Provided always that all such laws made under or by virtue of this Act shall be laid before both Houses of Parliament within fourteen days after the beginning of the session of Parliament next after the proclamation thereof as aforesaid, and shall be effectual unless in so far as the same shall be repealed, altered, or varied by Act of Parliament."

On Sept. 4, 1894, a proclamation was made and issued under the Act, declaring that the territory of Eastern Pondoland, with the adjoining territory of Western Pondoland, should be annexed to and form part of the Cape Colony, and Eastern Pondoland has thenceforward been part of the colony.

The appellants commenced their action in the Supreme Court, under the Crown Liabilities Act, 1888, by summons against the Hon. Cecil John Rhodes, then Prime Minister of Cape Colony, whereby they claimed a declaration of their alleged rights under the respective four documents, and £5,000 as damages alleged to have been sustained by them by reason of the prevention of their exercising their alleged rights. The action was tried before the Supreme Court in March, 1895, and judgment was given as hereinbefore stated. The appellants obtained leave to appeal. In 1896 the respondent became the Prime Minister of Cape Colony in place of the Hon. Cecil John Rhodes, and by order of the Supreme Court the respondent was substituted in these proceedings for the Hon. Cecil John Rhodes, and he represented the government of the colony.

Asquith, Q.C., *Roger Wallace, Q.C.*, and *Mackarness* for the appellants.
Sir Edward Clarke, Q.C., *Swinfen Eady, Q.C.*, and *Waggett* for the respondent.

Aug. 1, 1899. **THE EARL OF HALSBURY, L.C.**—This is an appeal from the Supreme Court of the Cape of Good Hope, wherein judgment was given for the defendant. The action is brought against the Prime Minister of the colony in his official capacity under the powers of an Act of the Parliament of the Cape of Good Hope intituled the Crown Liabilities Act, 1888, which permits such an action to be brought in terms hereafter to be referred to.

The case made on behalf of the plaintiffs was that certain agreements or concessions were made by a native chief, described as "Paramount Chief of Pondoland," granting certain privileges and rights to the appellants. It appears to be established by proof that the appellants never in fact obtained possession of the lands or exercised the rights which these documents purported to convey, but it is argued that some effort was made to search for "graphite" in pursuance of these documents. A considerable amount of evidence appears to have been given with the object of showing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland at the time when they purported to be granted; that Sigcau was a lawless despot; and that any rights purporting to be granted by him were subject to his arbitrary power to recall them at any moment. And, further, that Sigcau did not understand the meaning or object of the documents which he was supposed to execute. Their Lordships do not differ with the finding of fact by the Chief Justice that at the time that Sigcau executed the instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed professed to convey. Their Lordships do not think it material to enter into such questions, inasmuch as they are of opinion that the statute which gives a power to sue the Prime Minister does not involve the power of making any declaration of right in such a case. And as mere matter of form it does not contain any clause empowering the court to make a declaration of right as against the Crown; but there is a more complete answer to any claim arising from these instruments.

The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State, and treating Sigcau as an independent sovereign- which the appellants are compelled to do in deriving title from him—it is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well-understood bargain between the ceding potentate and

A the government to which the cession is made that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.

In this case it certainly cannot be said that there was any bargain by the British government that Sigeau's supposed concessions should be recognised. Indeed, the only intelligible sense in which the allegations in the declaration can be understood B is that the breach of duty complained of consists in the refusal of the Cape government to recognise the appellants' concessions. To quote the language of this Board used by LORD KINGSDOWN in *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1) (13 Moo. P.C.C. at p. 86) and cited in *Doss* v. *Secretary of State for India in Council* (2) (L.R. 19 Eq. at p. 534):

C "Of the propriety or justice of that act [here the refusal to recognise] neither the court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, D it is a wrong for which no municipal court of justice can afford a remedy."

At the same time their Lordships are by no means prepared to differ from the observation of the Chief Justice that the appellants "have strong claims to the favourable consideration of the government and Parliament of the country." Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be E dismissed, the parties on each side to pay their own costs.

Solicitors: *Grant, Bulcraig & Co.; Wilson, Bristows & Carpmael.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

F

Re PRINCE. GODWIN *v.* PRINCE

G [CHANCERY DIVISION (Stirling, J.), April 26, May 24, 1898]

[Reported [1898] 2 Ch. 225; 67 L.J.Ch. 531; 78 L.T. 790; 47 W.R. 25]

Probate—Costs—Action opposing probate—Payment as "testamentary expenses" under challenged will.

H The costs of an unsuccessful plaintiff in a probate action brought to challenge the validity of a will proved in solemn form by the executors and to establish a former will **held** not to be "testamentary expenses" within the meaning of the challenged will, and, therefore, not to be allowed out of the residuary real estate (the personal estate having been exhausted by payment of the defendant executors' costs) which the will devised to beneficiaries subject inter alia to I payment of testamentary expenses.

Circumstances in which costs of a probate action would be allowed as testamentary expenses discussed at p. 779, post.

Notes. The Land Transfer Act, 1897, s. 2 (2), which related inter alia to payment of costs out of real estate, is replaced with amendments by s. 2 of the Administration of Estates Act, 1925 (9 HALSBURY'S STATUTES (2nd Edn.) 721).

As to costs of probate actions, see 16 HALSBURY'S LAWS (3rd Edn.) 209 et seq., and 356, para. 690; and for cases see 23 DIGEST (Repl.) 270 et seq.

Cases referred to in argument:

Young v. *Dendy* (1867), L.R. 1 P. & D. 344.

Charter v. *Charter* (1876), 3 Ch.D. 218; 45 L.J.Ch. 705; 34 L.T. 412; 24 W.R. 874.

Re Price, *Williams* v. *Jenkins* (1886), 31 Ch.D. 485; 55 L.J.Ch. 501; 54 L.T. 416; 34 W.R. 291.

Re Shaw, *Bridges* v. *Shaw*, [1894] 3 Ch. 615; 64 L.J.Ch. 47; 71 L.T. 515; 43 W.R. 159; 8 R. 555; 23 Digest (Repl.) 275; *3343*.

Brown v. *Burdett* (*No. 2*) (1883), 53 L.J.Ch. 56; 48 L.T. 753; 31 W.R. 854; 23 Digest (Repl.) 275, *3344*.

Sharp v. *Lush* (1879), 10 Ch.D. 468; 48 L.J.Ch. 231; 27 W.R. 528; 24 Digest (Repl.) 751, *7385*.

Patching v. *Barnett* (1881), [1907] 2 Ch. 154, n.; 51 L.J.Ch. 74; 45 L.T. 292, C.A.; 24 Digest (Repl.) 906, *9083*.

Re Mayhew, *Rowles* v. *Mayhew* (1877), 5 Ch.D. 596; 46 L.J.Ch. 552; 37 L.T. 48; 25 W.R. 521, C.A.; 23 Digest (Repl.) 276, *3356*.

Summons taken out by the executors of the will of John Prince, deceased, for directions and for liberty to raise money by mortgage or sale of the real estate of the testator for the purpose of paying the costs of all parties to an action in the Probate Division of *Prince* v. *Godwin*, wherein an order had been made directing that the costs of all parties should be paid out of the estate. The testator, by his will dated April 1, 1895, devised and bequeathed his residuary real and personal estate subject to the payment of his just debts and funeral and testamentary expenses to his children therein named, and he authorised and empowered his executors to raise by sale or mortgage of his real estate any sum which might be necessary for the purposes of his estate and for the payment of the legacies thereby bequeathed.

M. L. Romer for the plaintiffs, the executors of the will.

Martelli for the residuary devisees.

E. P. Hewitt for the testator's widow.

Cur. adv. vult.

May 24, 1898. **STIRLING, J.,** read the following judgment.—The question which arises on this summons is as to the payment out of the real estate of the testator of the costs of the plaintiff in the probate action. The testator made a will dated April 1, 1895, as to the terms of which I shall say a word in a moment. On May 29, 1896, the testator died. On Nov. 19, 1896, the will was proved in solemn form by the executors. On Jan. 15, 1897, the widow of the testator commenced an action, and I have thought it right, in the circumstances of the case, to see the pleadings and ascertain exactly the nature of the case which she raised. She alleges that the defendants, who are the executors, obtained probate in solemn form, that the alleged will was not duly executed, that the deceased at the time of the execution of the will did not approve of the contents and that he at the time when the will purports to be executed was not of sound memory and understanding. She claims that the court should pronounce against the will of April 1, 1895, revoke the grant of probate and decree probate of a will dated June 10, 1891. The defendants put in a defence in which they denied the various allegations and claimed that the court should pronounce against the will set up by the plaintiff and decree probate in solemn form of the will of 1895. The case came on to be heard on Nov. 19, 20 and 22, 1897, so that the trial of it ran over I do not say the whole, but, at any rate part of three days. The result was that the judge pronounced on Nov. 22, 1897, for the force and validity of the last will and testament of the testator [viz., the will dated April 1, 1895] and ordered the costs of both parties to be paid out of the estate, and the probate of the will to be handed to the defendants.

The result has been—there being a very small personal estate—that the personal estate was exhausted in the payment of the costs of the executors, and the question

now is whether the widow, the plaintiff in this action, is entitled to payment of any costs out of the real estate? It was admitted upon the argument before me and according to the authorities it is quite clear that the order of the Court of Probate on Nov. 22, 1897, affected only the personal estate of the testator. It will hereafter have to be borne in mind that the Land Transfer Act, 1897, which came into operation on Jan. 1, 1898, has made alterations in that respect and that the Court of Probate, as I understand, has now jurisdiction to deal with the realty as well as the personality of the estate. However, that is not the point which arises in the present case. The testator devised all the residue of his real estate and the residue of his personal estate subject to the payment of all mortgages and encumbrances and subject to the payment of his just debts, funeral and testamentary expenses to his children, and he authorised and empowered his executors to raise by mortgage of his real estate any sum which might be necessary for the purposes of his estate and for the payment of the legacies. The question is whether the costs of the plaintiff in that probate action can be paid out of the real estate as "testamentary expenses"?

This court has certainly not drawn a very narrow line as regards the meaning of testamentary expenses, and I have no wish to do anything to narrow the definition which the expression "testamentary expenses" has received in this court. It has been held that where an action has been properly brought by an executor or administrator for the administration of personal estate, and the proper parties appear, the costs both of the executor and of the defendants are, in a proper case testamentary expenses within the meaning of such a will as this. Moreover it is not necessary that the action for administration or for getting the direction of the court should be brought by the executors. The same thing applies if the person beneficially entitled comes here as plaintiff and asks that directions may be given to the executors for the proper administration of the estate, and, although I have not been referred to any case which defines the meaning of testamentary expenses as regards an action in the Probate Court, I should be sorry to lay down any very narrow definition with regard to it; for example, if there were an action brought by the executor properly for probate of the will in solemn form in which it was necessary to summon various parties who might be interested in disputing the validity of the will, and if those parties appeared and contented themselves with simply cross-examining the plaintiffs' witnesses or producing such further evidence as might in the judgment of the court be proper in order to enable the court to arrive at a proper determination whether the will ought to be proved in solemn form or no I should not be willing to say, if the Court of Probate said these were proper costs to be paid out of the personal estate, that they were not also, or might not be testamentary expenses within the meaning of such a will as this. Again, even if the step was not taken by the executor but by some one interested in upholding the will and it was considered by the Court of Probate that it was a reasonable course for the upholding of the will, although the step was not taken by the executor but by another person, I should be unwilling to hold that necessarily on that ground the plaintiff in the action would be excluded from the benefit of the disposition of the real estate under which the testamentary expenses were charged on the property.

But what I find here is that the plaintiff in the probate action comes challenging the will and disputing the will, and it is not a mere mode of getting the decision of the court upon the validity of the will by requiring the will to be proved in solemn form, but there was a contest,—as I have ascertained from the learned judge who tried the case—there was a serious contest raised by this lady as to the validity of the will. That the costs of the executors were testamentary expenses appears to me to be beyond controversy, they are costs properly incurred in upholding the will which is the will of the testator. On the other hand, these costs, or at all events the bulk of them—and they are very considerable—were incurred by the plaintiff in contesting the will, in asserting that it was a will which

ought not to be recognised as the will of the testator, and it does not appear to me, however wide the definition of testamentary expenses may be, that those costs ought to be included. I think, therefore, that the plaintiff's application for payment of the costs out of the real estate fails.

Solicitors: *Morton, Cutler & Co.*, for *Challinors & Shaw*, Leek; *Preston, Stow & Preston*, for *W. J. Tomkins*, Leek.

[*Reported by* W. L. Richards, Esq., *Barrister-at-Law.*]

TREW *v.* PERPETUAL TRUSTEE CO. AND OTHERS

[Privy Council (Lord Herschell, L.C., Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Shand, Lord Davey and Sir Richard Couch), January 23, February 23, 1895]

[Reported [1895] A.C. 264; 64 L.J.P.C. 49; 72 L.T. 241; 43 W.R. 636; 11 T.L.R. 259; 11 R. 423]

Will—Trust—Referential trusts—Construction against multiplication of charges. By his will, dated Nov. 29, 1887, the testator, who died on the same day, gave the whole of his estate to trustees on trust (a) to pay the income thereof up to £20,000 to his wife for life so long as she remained a widow; (b) on her re-marriage, to pay the income arising from £10,000 to her for life; (c) on her death, to pay the income arising from the £20,000 for the maintenance, education and advancement of all or any of his children; (d) in the event of his wife's re-marriage to apply the interest of the balance of the £20,000 on the trusts lastly declared; (e) subject to the aforesaid trusts, to pay to each of his children who should attain twenty-one or marry, one half of the capital sum devised on trust; (f) out of the residue, to pay £10,000 to his brother; (g) the ultimate residue to be held on the trusts thereinbefore declared with reference to the sum of £20,000. The testator was survived by his two children and his widow who subsequently re-married. The ultimate residue amounted to about £34,000 and the wife contended that on her re-marriage she was by cl. (g) entitled for life to the income either of the whole of the ultimate residuary estate or at least of an additional sum of £10,000, but it was contended for the children that she was entitled to the income of only one sum of £10,000.

Held: in the absence of a clear intention shown in the will, a trust in a will created by reference to other trusts ought not to be read so as to make a multiplication of trusts in the nature of charges; and, there being no such intention shown in the will, the court would not impute one; accordingly, the widow on her re-marriage was entitled to the income of only one sum of £10,000 and not to any share in the ultimate residue.

Notes. Considered: *Re Bristol, Grey* v. *Grey*, [1897] 1 Ch. 946; *Re Beaumont, Bradshaw* v. *Packer*, [1911-13] All E.R. Rep. 144; *Re Campbell's Trusts, Public Trustee* v. *Campbell*, [1922] All E.R. Rep. 79; *Re Arnell, Re Edwards, Prickett* v. *Prickett*, [1924] 1 Ch. 473. Referred to: *Re Fraser, Ind* v. *Fraser*, [1913] 2 Ch. 224; *Re Hickman's Will Trusts, Re Playfair, Palmer* v. *Playfair*, [1950] 2 All E.R. 285.

As to referential trusts and multiplication of charges, see 34 Halsbury's Laws (3rd Edn.) 493 et seq.; and for cases see 43 Digest 606 et seq.

A Case referred to:

(1) *Hindle* v. *Taylor* (1855), 5 De G. M. & G. 577; 25 L.J.Ch. 78; 26 L.T.O.S. 81; 1 Jur.N.S. 1029; 4 W.R. 62; 43 E.R. 994, L.C.; 43 Digest 606, *523*.

Also referred to in argument:

Boyd v. *Boyd* (1863), 2 New Rep. 486; 9 L.T. 166; 43 Digest 607, *524*.

B *Cooper* v. *Macdonald* (1873), L.R. 16 Eq. 258; 42 L.J.Ch. 533, 539; 28 L.T. 693; 21 W.R. 833; 43 Digest 607, *527*.

Appeal by the testator's widow in an administration suit against a decision of the Supreme Court of New South Wales (DARLEY, C.J., and FOSTER, J., MANNING, J., dissenting), affirming a decision of the Chief Judge in Equity (OWEN, J.).

The suit was brought for the administration of the will of Louis Samuel, deceased, C and the question in dispute was as to the interest which the appellant, who was the widow of the testator, took under the will upon her re-marriage. The respondents were a trustee company, and the testator's two children.

Cozens-Hardy, *Q.C.*, and *T. R. Warrington*, *Q.C.*, for the appellant.

Warmington, *Q.C.*, and *Vaughan Hawkins* for the respondents.

D

Feb. 23, 1895. **LORD HOBHOUSE** delivered the following judgment of the court. —This is a suit for the administration of the estate of Louis Samuel, who died on Nov. 29, 1887, having made a will on the day of his death. The appellant, now Mrs. Trew, was his wife. The respondents are his two children and a company appointed to be trustees of his will. The matter in question is the amount of E interest given by the will to the appellant.

The testator first gave his whole estate to trustees upon trust to sell and convert it into money. It will conduce to clearness if his directions as to the application of the money, which in the will are written consecutively, are now quoted as separate clauses:

"(a) To pay the income of so much thereof as shall amount to the sum of F £20,000 to my wife, Mary Ruth Samuel, during her life and so long as she shall remain my widow for her sole and separate use, free from the control of any husband. (b) And from and immediately after her marrying again in trust to pay the income arising from £10,000 to my . . . wife for her life, free from the control of any future husband as aforesaid. (c) And from and immediately after the death of my . . . wife to pay the income arising from G the . . . £20,000 for the maintenance and education and advancement of all and any children of mine by my . . . wife, whether born or to be born hereafter. (d) And in the event of my . . . wife marrying again to apply the interest of the balance of the £20,000 upon the trusts last hereinbefore declared. (e) And I further declare that the trustees shall, subject to the aforesaid trusts, pay to each of my . . . children upon their attaining the H age of twenty-one years, or upon their or either of their marriage, one half of the capital sum hereinbefore devised upon trust. (f) As to the residue of my . . . estate [he gave £10,000 to his brother Edward]. (g) And as to all my residuary estate I give and bequeath the same upon the trusts hereinbefore declared with reference to the sum of £20,000."

I The ultimate residue was large. It was stated by the appellant to amount to £34,000 or thereabouts. Her contention is that by virtue of cl. (g) she is entitled for life to the income either of the whole residuary estate, or at least of an additional sum of £10,000. For the children it is contended that on her second marriage she became entitled to no more than the income of one sum of £10,000. The case was heard before the Chief Justice in Equity, who declared that the appellant was entitled, in the events which had happened, to the income arising from £10,000, part of the estate of the said testator, during her life, and was not entitled to any further interest under the will. She appealed to the full court, who dismissed the

appeal, MANNING, J., dissenting from his colleagues. She now seeks to reverse those adverse decrees.

It has hardly been contended before their Lordships that the lady is entitled to the first alternative of her claim—viz., the moiety of the whole residue—but it was strongly urged that she is entitled to a second sum of £10,000 for her life. Their Lordships pass over the conjectures made as to the intentions of the testator not expressed in words. The will shows marks of hasty construction; but it is consistent enough with itself, and on the point in question its literal construction presents no great difficulty. On the literal construction the argument pressed in favour of the appellant is, to use the words of MANNING, J., that where there is a trust by reference

> "the only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first."

Then it is said, that if the words "residue of my estate" be written in where the words "£20,000" occur, that would carry to the widow the income of £10,000 on her re-marriage. But, in the first place, their Lordships cannot accept the proposed canon of construction in any sense which would give to it the general effect of multiplying charges upon the trust estate, or trusts in the nature of charges. Of course such may be the intention or effect of a particular will. But in the absence of anything in the will to show such an intention the rule is that the court will not impute it to the testator. In *Hindle* v. *Taylor* (1) LORD CRANWORTH held that in almost all cases it was not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated, and so make a duplication, as it were, of trusts in the nature of charges. That opinion has been recognised as sound in subsequent cases. That in this case the widow's interest after re-marriage is in the nature of a charge hardly admits of dispute.

In the second place, even supposing that the suggested process were applied to this will, their Lordships cannot see how the appellant makes out her right to a second sum of £10,000. Let the residue be substituted for "£20,000" as suggested, cl. (a) would then carry the income of the residue to the widow, but only pending widowhood. Clause (b) does not relate to the £20,000, but to a substituted sum of £10,000. Clause (c) would give the income of the residue to the children at the death of the widow. Clause (d) would give the income of the balance of the residue to the children after the marriage of the widow. Clause (e) would give them at twenty-one or marriage one-half of the capital of the residue. It is one of the inaccuracies of the will that there is no express gift of the other half. It has probably been assumed by everybody that the gift of the whole income and an accelerated gift of half the capital implies that the whole capital is intended to be given ultimately. In all these prior provisions there is no gift to the widow after re-marriage, except in cl. (b), and that is not expressed to be one of the trusts of the £20,000. There is no trust declared of "the £20,000" as a whole in favour of the widow after her second marriage. For the appellant it is contended that such a trust is implied in cl. (d) by the expression "balance of the £20,000." No doubt the widow's £10,000 will have to be answered out of the £20,000, or out of the bulk of the estate, before any residue can be ascertained. Her interest is made to come first; and "the balance of the £20,000" means that part as to which no direction is given after the direction regarding the £10,000. But it seems somewhat fanciful to say that the introduction of cl. (d) into the residuary gift would amount to a direction that another sum of £10,000 is to be taken out of the residue and added to that which is alone given to the widow by cl. (b) on her re-marriage.

That is what their Lordships find to be the result of actual introduction of the prior clauses into the residuary gift. If on the whole will there were any sufficient indication of an intention that the widow should on re-marriage take two sums of £10,000 effect could doubtless be given to it, though it might not be expressed in

precise terms. But, as above observed, there is no such indication; the appellant is relying on the strictest literal construction, and that is found not to be in her favour. The result is that the judgment below ought to be affirmed and the appeal dismissed. The courts below have thought fit to charge upon the estate the costs of the two former hearings. But it would hardly be right to burden the estate with the costs of a second fruitless appeal, and their Lordships must order the appellant to pay the costs. They will humbly advise Her Majesty accordingly.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Russell, Hill & Co.; Want & Co.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re NICKELS. NICKELS *v.* NICKELS

[CHANCERY DIVISION (Stirling, J.), March 30, 31, 1898]

[Reported [1898] 1 Ch. 630; 67 L.J.Ch. 406; 78 L.T. 379; 46 W.R. 422; 42 Sol. Jo. 414]

Trust—Appropriation—Settled legacies—Appropriation of stock to one legacy before final distribution of fund.

By his will the testator settled the residue of his estate in equal shares in trust for his six children, namely five sons and one daughter, and their children. There was special power to advance each son one-half of his share, but there was no such power in respect of the daughter's share although under a general power in the will the trustees were entitled to advance to her one-third of her share. In 1881, in exercise of these powers, the trustees advanced each son one-half of his share and advanced to the daughter one-sixth of her share. In order to put the daughter and her children on an equal footing the trustees in the same year allotted certain stock to the daughter which at the then market values made up one moiety of the one-sixth share to which the daughter and her children were entitled. An account reading "Stocks allotted to Mrs. Morton [the testator's daughter]" was opened by the trustees regarding this stock and the allotment was recognised and referred to in accounts rendered by subsequent trustees down to the daughter's death. Moreover, during her life the daughter received the income from the stocks, and advances out of the corpus were from time to time made to her children. At the date of the daughter's death in 1896 the stock had materially increased in value. The trustees proposed to distribute the daughter's share to her children.

Held: the trustees in 1881 were entitled to appropriate, and had validly appropriated, the stock to the daughter's share, and the distribution to her children should be made on that footing.

Notes. Referred to: *Re Beverley, Watson* v. *Watson*, [1901] 1 Ch. 681; *Re Ruddock, Newberry* v. *Mansfield*, [1908-10] All E.R. Rep. 725.

As to power to appropriate, see 16 HALSBURY'S LAWS (3rd Edn.) 372 et seq.; and for cases see 24 DIGEST (Repl.) 645 et seq.

Cases referred to:

(1) *Re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210; 61 L.J.Ch 153; 66 L.T. 360, C.A.; 24 Digest (Repl.) 646, *6381*.

(2) *Re Richardson, Morgan* v. *Richardson*, [1896] 1 Ch. 512; 65 L.J.Ch. 512; 74 L.T. 12; 44 W.R. 279; 40 Sol. Jo. 225; 24 Digest (Repl.) 649, *6398*.

Originating Summons taken out by the trustees of the will of Christopher Nickels deceased to determine (i) whether the trustees had power to sever the trust premises into divided sixth parts prior to the period for division of the estate, and (ii) if so, whether any appropriation had been made in the year 1881.

By his will made in 1859 the testator gave his real and personal property to trustees on trust for sale and conversion and to invest the proceeds of sale. As to a one-sixth part of the trust funds the trustees were directed to hold such parts on trust to accumulate one-half of the income thereof for twenty-one years and as to the other half of the income, during the period of twenty-one years, and after the expiration of that period as to the whole of the income, on trust to pay the same to the testator's son Edward Nickels during his life, subject to certain trusts, and after his death on trust to pay the income to his widow, and after her death on trust as to both capital and income of the one-sixth part, in trust for the children of Edward Nickels when they should attain twenty-one. The will gave the trustees discretionary power to apply moneys for the maintenance and advancement of Edward Nickels' children, such advancement not to exceed one-half of the principal of the presumptive share of any child. The trustees were also empowered in their discretion to place any portion of the one-sixth share, not exceeding one-half thereof, at the disposal of Edward Nickels. The will contained similar trusts of other one-sixth parts of the trust funds in favour of the testator's other four sons, George Nickels, Charles Nickels, Henry Nickels and Walter Nickels, and their respective widows and children. The remaining one-sixth part of the funds was given on similar trusts as to accumulation and payment of income to the testator's daughter, Elizabeth Amelia Morton, for her separate use without power of anticipation, and after her death in trust for her children with a similar power, as in the case of the children of the testator's sons, to apply moneys for their maintenance and advancement; but with regard to the daughter's share there was no special power to place any portion of it at her disposal. There was however a general power in the will empowering the trustees

> "To apply any portion not exceeding one-third part of the share or respectively shares of the said trust estates, funds and premises to the income of which any of my said six children or their children respectively shall be entitled for or towards the putting him, her, or them respectively in any business, or otherwise advancing him, her, or them in the world, in the discretion of my said trustees or trustee for the time being, anything in this my will to the contrary thereof in anywise notwithstanding."

The testator died in 1860 leaving his six children surviving him, some of whom married and had issue who on the death of their respective parents became entitled under the trusts to the principal and income of their respective parents' one-sixth share.

In or about the year 1881, after the expiration of twenty-one years from the testator's death, the then trustees of the will, in exercise of the special powers contained in the will, applied for the benefit of each of the five sons a sum equivalent to one-half of the one-sixth share of each son; and in exercise of the general power in the will the trustees applied for the benefit of the daughter a sum equivalent to one-sixth of her one-sixth share. Subsequently, in the same year, the trustees set aside £1,053 London, Chatham and Dover four-and-a-half per cent. debentures and £300 London and Greenwich five-and-a-half per cent. ordinary stock and paid the income thereof to the testator's daughter during her life. As appeared from the cash books an account was opened by the trustees with respect of these stocks

which, after setting out the advances made to the daughter's children, read "Stocks allotted to Mrs. Morton to balance remaining two-thirds set aside for her children, 300 London and Greenwich 5½ at £216; 1,053 London, Chatham and Dover 4½ at £1,284 13. 3d.; total £1,500 13. 3d." In subsequent accounts rendered down to the daughter's death in 1896 that allotment of stock was recognised and referred to, and the income from the stocks was paid to the daughter during her life and advances were made to her children, under the general power in the will, out of the corpus.

The plaintiffs, the present trustees of the will, now proposed to distribute the residue of the one-sixth share given to the testator's daughter among her children and their respective assigns on the basis of the present value of the securities, stocks and shares subject to the trusts of the will. The daughter had died on Nov. 7, 1896, leaving five children surviving her, one of whom had assigned his share in the trust funds to to the defendant Alfred Ross Clyne. The question arose whether there had been any valid appropriation of specific portions of the trust funds to answer the one-sixth share given to the daughter and her children. It was contended on behalf of the daughter's children that the London, Chatham and Dover debentures were set aside for their benefit and they were absolutely entitled to them. On behalf of the testator's other children it was contended that no complete appropriation had been made by the transaction in 1881 and that the then trustees had no power to make such an appropriation which would result in a distribution greatly to the prejudice and disadvantage of the testator's other children.

Ward Coldridge for the plaintiffs.
A. W. Rowden for the defendant Henry Nickels.
Gatey for the defendant Luther Nickels, a son of Edward Nickels.
Stewart Smith for the defendant Elizabeth A. Baker, a daughter of Mrs. Morton.
Buckmaster for the defendant Alfred Ross Clyne.

STIRLING, J.—The question that arises on this summons is whether the trustees of the will of the testator made an effectual appropriation of part of the testator's estate towards a particular share of that estate. [HIS LORDSHIP stated the facts, and continued:] The first question is, whether in point of fact there was then [viz., in 1881] made an irrevocable appropriation on the part of the trustees. What is suggested on behalf of the present trustees, and on behalf of the children entitled to the other five-sixths, is that this was a mere book-keeping arrangement in order to avoid any question as to what rate of interest has to be charged on the advances made to Mrs. Morton and her children. It seems to me that that is not a sufficient explanation of what was done and of the entries made. If it was a mere book-keeping entry that might be, but it has been acted upon, and if the appropriation was not made or intended Mrs. Morton and the other children have ever since that time been receiving the income on a wrong footing. The income of these appropriations has been applied to Mrs. Morton. That could not be right if it was not meant as an effective appropriation, whether she got too much or too little does not matter, the other parties have conversely received too little or too much. The fund has been dealt with on that footing ever since the year 1881, and it seems to me upon the evidence the trustees did mean in the year 1881 to make a final and complete appropriation of this stock and of these shares, and that no explanation suggested in this case is adequate to account for what they did both in their books and by their acts.

Then comes the question, is this appropriation one which the trustees were entitled to make? There is no question raised here as to the bona fides of the transaction. It was done in perfect good faith, and the sole question is whether it was within the power of the testator's trustees. No authority has been cited to show it was not. What has been relied upon is a statement in MR. LEWIN'S well-known book where this is said (LEWIN ON TRUSTS (9th Edn.), p. 667):

"Where the residue consists of a great variety of securities the question arises whether the trustees, in the absence of any special power, can virtute officii where infants are concerned divide the residue by apportioning some securities to another, but so that the distribution is a fair one according to the market price of the day of the funds so appropriated. The court can make such apportionment, for in a suit guardians ad litem of the infants are appointed and are heard on their behalf to protect their interests, but out of court, where the voice of the infants cannot be heard, it would be unsafe for trustees to make such apportionment on their own responsibility. However, where trustees are directed to invest the infant's share on any particular securities they might accept securities of the value prescribed at the market price, as the transaction when resolved would be the payment of so much money and the investment of it by the trustees in the requisite securities. Where there are no special powers the trustees should turn the whole of the irregular species of property into money and divide the proceeds."

That is merely a statement to this effect, that the trustees where there is no express power would not act wisely in making an appropriation without getting the sanction of the court. That is very sound advice for a conveyancer to give to a trustee who was about to act by making an appropriation, but the question is, Supposing he does it, is it bad? and MR. LEWIN does not say so. He says the court can make such an appropriation, and that seems to me to imply that it is within the power of the trustee to make it, because the court has no power to alter the rights of parties and property. It has simply power to administer trusts.

Beyond that there are two cases which I agree do not in point of decision govern the present case, but at all events go a long way to support the view which is contended for, namely, that the trustees have power in a proper case to make such an appropriation. The first is *Re Lepine* (1). I do not propose to deal with the specific facts, but LINDLEY, L.J., dealing with the case says this ([1892] 1 Ch. at p. 215):

"One of the persons entitled to one-sixth was a person who was of age and capable of entering into an agreement with the executor as to how he would take his sixth; and instead of taking it in cash, he and the executor agree together that he should take a mortgage for £700 in part payment of his legacy. Assuming for the moment that there were assets, and that the £700 in addition to what he got in cash or other securities did not exceed the amount due to him, what is there amiss with that? What is there to prevent the trustee or the executor making such a transaction? It is said that he cannot do it. . . ."

So that it is there laid down that, where one legatee comes and wants payment of his share, the executor or trustee, without the assent of the persons entitled to the other shares, may take a specific asset and hand it over at a proper value to that legatee. Then FRY, L.J., says (ibid., at p. 218):

"Supposing an executor or trustee divides the estate in such a manner as that he gives to one legatee or cestui que trust property or securities worth twenty shillings in the pound, and he gives to another rubbish and trash which is not worth its nominal value, or the value at which he takes it, I have no doubt that such trustee or executor is guilty of a breach of trust, and that any legatee who takes the good securities, with notice of what has been done, may be made liable for that breach of trust."

He does not say that the executors, acting fairly, may not divide the property in the proper shares between the legatees. The subsequent case of *Re Richardson* (2) was before NORTH, J. There there was an appropriation by executors to themselves of a certain portion of the property, although certain of the shares were settled, and although there was no corresponding appropriation in respect of the settled shares, and NORTH, J., makes this remark ([1896] 1 Ch. at p. 516):

"It has been suggested that there could be no appropriation of this stock to the daughters' share till the final division. I do not assent to that. I have heard no authority and see no reason for such proposition. I see no reason why if part of the estate can be distributed before the final division, it should not be distributed among all the shares, proper investments being appropriated to the trust shares without waiting for the final division."

What happened in the present case was that in effect the sons got a division of one-half of their share, and in order to put the daughter and her children on an equal footing with the sons, there being no power to make over an equal amount to the daughter and her children in cash they put apart a fair amount of the estate to put the daughter and her children on the same footing as the sons. It seems to me, having done that, in fact it was within their power to do it, and I think, therefore, the appropriation was good.

Order that the trustees had power to sever the trust funds prior to the period of division.

Solicitors: *E. G. Saunders; T. W. Hall; Douglas Norman & Co.*

[*Reported by* W. L. RICHARDS, ESQ., *Barrister-at-Law.*]

SHEARS *v.* GODDARD

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), February 27, 28, 1896]

[Reported [1896] 1 Q.B. 406; 65 L.J.Q.B. 344; 74 L.T. 128; 44 W.R. 402; 3 Mans. 24.]

Bankruptcy—Property available for distribution—Relation back of trustee's title—Bona fide transaction before date of receiving order without notice of any act of bankruptcy—Transaction itself an act of bankruptcy.

A bona fide transaction for valuable consideration with a bankrupt before the date of the receiving order and without notice of any available act of bankruptcy, **held** to be protected by s. 49 of the Bankruptcy Act, 1883 [now s. 45 of the Bankruptcy Act, 1914], and to be valid, although the transaction was itself an act of bankruptcy.

Notes. As to protection of bona fide transactions without notice of any act of bankruptcy see now s. 45 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 382), which re-enacts s. 49 of the Bankruptcy Act, 1883.

Considered: *Bullock* v. *Ardern* (1901), 17 T.L.R. 285. Referred to: *Re A. Gunsbourg & Co., Ltd., Ex parte Cook*, [1920] All E.R. Rep. 492.

As to protection of bona fide transactions, see 2 HALSBURY'S LAWS (3rd Edn.) 562; and for cases see 5 DIGEST (Repl.) 974.

Case referred to:

(1) *Smith* v. *Cannan* (1853), 2 E. & B. 35; 22 L.J.Q.B. 290; 17 Jur. 911; 1 W.R. 338; 118 E.R. 682; sub nom. *Cannan* v. *Smith*, 1 C.L.R. 179; 21 L.T.O.S. 231, Ex. Ch.; 4 Digest (Repl.) 60, *516*.

Also referred to in argument:

Re Clark, Ex parte Beardmore, [1894] 2 Q.B. 393; 63 L.J.Q.B. 806; 70 L.T. 751; 10 T.L.R. 459; 38 Sol. Jo. 492; 1 Mans. 207; 9 R. 498, C.A.; 5 Digest (Repl.) 793, *6718*.

Bevan v. *Nunn* (1832), 9 Bing. 107; 2 Moo. & S. 132; 1 L.J.C.P. 175; 131 E.R. 555; 4 Digest (Repl.) 60, *512*.

Hall v. *Wallace* (1841), 7 M. & W. 353; 10 L.J.Ex. 133; 5 Jur. 198; 151 E.R. 802; 5 Digest (Repl.) 978, *7889*. A

Re Tollemache, Ex parte Revell (1884), 13 Q.B.D. 727; 54 L.J.Q.B. 92; 51 L.T. 379; 33 W.R. 289, C.A.; 4 Digest (Repl.) 358, *3257*.

Appeal from a decision of WRIGHT, J., at the trial in Middlesex and an interpleader issue directed to be tried between the plaintiffs, Messrs. Shears, and the defendant, the trustee in bankruptcy of one, Mrs. Sills, as to the right to a sum of £377 in the hands of Ward, the owner of a horse repository. B

The plaintiffs, who were cab proprietors, purchased on May 25, 1895, from Mrs. Sills, another cab proprietor, her horses and cabs for £300, and paid her £150 in gold and £150 by cheque. She returned them the cheque and they gave her cash instead. On the same day Mrs. Sills disappeared. On May 27 the plaintiffs removed the horses and cabs to Ward's repository, where they were sold on the following day and realised £377 net. On June 20 a receiving order was made against Mrs. Sills, which stated as the acts of bankruptcy committed by her that she had, on May 25, with intent to defeat or delay her creditors, departed from her dwelling-house, and on the same day made a fraudulent delivery or transfer of her property, or some part thereof, to the plaintiffs. She had not committed any prior act of bankruptcy. Mrs. Sills was adjudicated a bankrupt, and the defendant, her trustee in bankruptcy, claimed the sum of £377, which still remained in the hands of Ward. The plaintiffs contended that there was a bona fide purchase for value without notice of any prior act of bankruptcy committed by Mrs. Sills, and that the transaction was protected by s. 49 of the Bankruptcy Act, 1883. C D

WRIGHT, J., found that the plaintiffs had made a bona fide purchase for value without notice of any fraudulent intent on the part of the bankrupt; and held that the transaction was protected by s. 49 of the Bankruptcy Act, 1883. He therefore gave judgment for the plaintiffs. The defendant appealed. E

Witt, Q.C., and *Muir Mackenzie* for the defendant.

Herbert Reed, Q.C., and *Duke*, for the plaintiffs, were not called on to argue. F

LORD ESHER, M.R.—This case has been very elaborately argued, and a great deal has been said about what was the law before the Bankruptcy Act, 1883, and about the general law of bankruptcy. The bankruptcy law is always the creation of statute, and, as a general rule, each succeeding statute has swept away those which preceded it. Since the decisions which have been cited, the legislature has passed the present statute, and we have to determine what is the law of bankruptcy under this statute. G

This statute contains s. 49. That section was meant to protect innocent people from the consequences of acts which would otherwise leave them unprotected; that is, to protect innocent people who have parted with their money and paid for a conveyance or for goods. Such are to be protected where they have given valuable consideration, which need not be money, for that which it is sought to take away from them. Let us see, then, what this statute does provide. Section 49 is as follows: H

"Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy, . . . (d) any contract, dealing or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely, (1) The . . . contract, dealing or transaction . . . takes place before the date of the receiving order; and (2) the person (other than the debtor) . . . with whom the contract, dealing or transaction was made . . . has not at the time of the . . . contract, dealing or transaction notice of any available act of bankruptcy committed by the bankrupt before that time." I

I think that it is impossible for words to be more plain than those are. We have, then, to see whether this case comes within those words.

The argument for the defendant has attempted to evade the provisions of s. 49 by reading a whole sentence into the section. That is contrary to every rule of construction in connection with Acts of Parliament, to add something to a statute not necessary to explain it. Taking the words, then, in their ordinary sense, is this case within the section? According to the finding of Wright, J., the plaintiffs did enter into a dealing with the bankrupt before the date of the receiving order. At the time of that dealing they had no notice of, and knew nothing of, any act of bankruptcy committed by the bankrupt before that time; there was, in fact, no such act of bankruptcy. If they had known at the time of the dealing that it was an act of bankruptcy, and that it was an attempt to defraud creditors, it would not have been a bona fide transaction. They would have been parties to a fraudulent transaction and would not have been protected by s. 49. But, when a man has had such a dealing as this with a bankrupt, it is within the very words of the Act of Parliament, and he is protected by s. 49. That is justice to an innocent man; the contrary would be most unjust to an innocent man.

I am of opinion, therefore, that the legislature intended what it has said in plain words, and that the meaning of the section is a fair and honest meaning which avoids a gross injustice to an innocent person who has paid his money bona fide. That is the true meaning of s. 49, and any other decisions upon previous Acts have nothing to do with it. The judgment of Wright, J., must be upheld, and this appeal dismissed.

LOPES, L.J.—I am of the same opinion. A person, who was the owner of certain cabs and horses and was in business as a cab proprietor, entered into a transaction with the plaintiffs, and sold to them a number of horses for £300. The plaintiffs then re-sold the horses. Wright, J., had all the facts before him, and he came to the conclusion that, although the vendor had committed a fraud upon her creditors, the plaintiffs had no knowledge of such conduct and were innocent purchasers. I think that he was justified in coming to that conclusion.

It is now contended that the transaction is not protected by the provisions of s. 49 of the Bankruptcy Act, 1883; that the transaction, being itself an act of bankruptcy, is not protected by s. 49. I cannot think that that is a sound argument. In order to decide this question we must look only at the terms of this Act of Parliament, and not at those of previous Acts. Looking at the provisions of s. 49 it is perfectly clear that this transaction comes within the section. In this case the act of bankruptcy was one created by s. 4 (1) (b). That is very material when we come to consider the provisions of s. 49, which says that "nothing in this Act shall invalidate, in the case of a bankruptcy," certain transactions. Those words beyond all question include the act of bankruptcy created by s. 4, which relates to the present transaction. It was a transaction for valuable consideration, and it cannot be said that there was anything suspicious about it, so far as the purchasers were concerned. It took place before the date of the receiving order. At that time the plaintiffs had no notice of any act of bankruptcy committed by the bankrupt; they could not have had such notice, because there was no previous act of bankruptcy. Every condition of s. 49 has been complied with, and the transaction, though itself an act of bankruptcy, is protected by the section.

A case has been cited which was decided under the Bankruptcy Act, 1849, where Parke, B., said (2 E. & B. at pp. 39, 40):

> "If the transaction is itself an act of bankruptcy, it is not protected, though there is no notice of the act of bankruptcy to those claiming under it:"

Smith v. *Cannan* (1). The words of that statute were entirely different from those of the present statute; the words there were only "notwithstanding any prior act of bankruptcy." We have not to decide this case under the words of that statute.

Perhaps the words in s. 49 of the present Act have been made different in order to meet cases of that kind. I think, therefore, that this appeal fails and must be dismissed.

RIGBY, L.J.—Two questions, which are entirely distinct, are raised in this case, one of fact and the other of law. As to the question of fact, I have very little to say. The learned judge did not disbelieve the evidence of the plaintiffs, and that disposes of the question of fact. Then, as to the question of law. It has been argued that we ought to read words into the Act of Parliament, and not simply construe the words as they stand. It is clear that the words "nothing in this Act shall invalidate," in s. 49, as far as their literal interpretation goes, include this case. There are some express exceptions in the section, i.e., executions, attachments, settlements, and preferences. The absolute generality of the succeeding words "nothing in this Act" is clearly shown by those express exceptions. Certain transactions are included in the section, which are not to be invalidated by anything in the Act, in case of bankruptcy. That protection is given subject to two conditions, that the transaction must take place before the date of the receiving order, and without notice of any previous available act of bankruptcy.

We have no right to alter the provisions of the section, and it follows that the protection of the section is given to the present transaction. The cases which have been cited were decided upon different statutes, the words of which were different from those of this Act. The words in those Acts were "notwithstanding any prior act of bankruptcy." The interpretation to be put upon those decisions is, that the provisions of the old Acts were to be read as being equivalent to saying only that transactions were not to be invalidated by a prior act of bankruptcy. There is nothing in the present Act of Parliament to support a similar interpretation. This Act of Parliament says that, with certain exceptions, nothing which is made invalid by the Act shall be invalid in certain cases and under certain conditions. In s. 49 a transaction for valuable consideration means a bona fide transaction for any valuable consideration, and does not include any fraudulent transaction. It must be clear that the transaction in question is really that which it appears to be, and that the person who has dealt with the bankrupt for valuable consideration has really and bona fide so dealt with him. Whether or not, but for the provisions of s. 49, this transaction would be invalidated by the previous sections, the protection of s. 49 is given to this transaction. I agree that the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *George Reader & Co.; B. Burton.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

Re OTWAY. Ex parte OTWAY

[Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), March 15, 1895]

[Reported [1895] 1 Q.B. 812; 64 L.J.Q.B. 521; 72 L.T. 452; 2 Mans. 174; 14 R. 389]

B *Bankruptcy—Petition—Dismissal—"Other sufficient cause" for dismissal—Attempt to extort money by petitioning creditor—Destruction of debtor's only asset by bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict., c.* 52), *s.* 7 (3).

By the Bankruptcy Act, 1883, s. 7 (3): "If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the C service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition."

The creditor presented a petition in bankruptcy against the debtor consequent on the debtor's non-compliance with a bankruptcy notice in respect of a judgment debt of £128 owed by the debtor. Thereafter the debtor became entitled D to a life interest under a trust, subject to forfeiture on bankruptcy, which was his only asset. The creditor asked the debtor for £25 as the price of his consent to an adjournment, but the debtor refused. On a further adjournment made by the registrar a receiving order was made. On appeal by the debtor,

Held: as the creditor's attempt to extort money from the debtor amounted to fraudulent conduct, and as destruction of the debtor's only asset would result E from proceeding with the bankruptcy, each was a "sufficient cause" within s. 7 (3) of the Bankruptcy Act, 1883, for dismissal of the petition, and, therefore, the receiving order would be rescinded.

Notes. Section 7 (3) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 5 (3) of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 334).

Explained and Distinguished: *Re Leonard, Ex parte Leonard*, [1896] 1 Q.B. 473; F *Re Birkin* (1896), 3 Mans. 291. Distinguished: *Re De Murrieta, Ex parte South American and Mexican Co.* (1896), 12 T.L.R. 238; *Re Scott, Ex parte Paris-Orleans Rail. Co.* (1913), 58 Sol. Jo. 11. Referred to: *Re Shaw, Ex parte Gill* (1901), 83 L.T. 754; *Re Debtor*, [1927] All E.R. Rep. 267.

As to grounds for refusal of a receiving order, see 2 Halsbury's Laws (3rd Edn.) 300, 310; and for cases see 4 Digest (Repl.) 171 et seq.

G Cases referred to:

(1) *Re Atkinson, Ex parte Atkinson* (1892), 9 Morr. 193, C.A.; 4 Digest (Repl.) 175, *1605*.

(2) *Re Robinson, Ex parte Robinson* (1883), 22 Ch.D. 816; 48 L.T. 501; 31 W.R. 553, C.A.; 4 Digest (Repl.) 48, *414*.

H **Appeal** by the debtor against a receiving order made by the registrar.

The petitioning creditor, Moore, having obtained a final judgment against the debtor for £128 for money lent, thereupon served on him a bankruptcy notice. Upon non-compliance therewith by the debtor, the petitioning creditor presented a petition in bankruptcy against him on Oct. 24, 1894. After the presentation of the petition the debtor became entitled to a life interest in certain trust funds which, by I the terms of the trust, would be forfeited if he became bankrupt or alienated. This was the only asset of the debtor. The hearing of the petition was adjourned to Dec. 12, 1894. On that date the petitioning creditor told the debtor that he would consent to a further adjournment if the debtor would give him £25, and asked him to give that sum. The debtor refused. The hearing was further adjourned by the registrar and at this adjourned hearing a receiving order was made.

Muir Mackenzie for the debtor.

F. Cooper Willis for the petitioning creditor.

LORD ESHER, M.R.—On both points I think that the order was not a proper one. The sum of £25 was asked by the petitioning creditor from the debtor as the price of an adjournment. *Re Atkinson, Ex parte Atkinson* (1) says that that is fraudulent conduct on the part of a petitioning creditor. On that ground the petitioning creditor ought not to be allowed to go on with his petition.

As to the other point, *Re Robinson, Ex parte Robinson* (2) seems to show clearly that it would be doing merely a "vain thing" to make a receiving order in a case like this, and that, therefore, a receiving order ought not to be made. Here it is clear that, if the debtor is made a bankrupt, the only asset of the debtor would upon bankruptcy be put an end to and destroyed. In such circumstances the case comes within the words of s. 7 (3) of the Bankruptcy Act,

> ". . . if the court is . . . satisfied that for other sufficient cause no order ought to be made, the court may dismiss the petition,"

and may properly refuse to make a receiving order. This order ought not to have been made, and the appeal must be allowed.

LOPES, L.J.—I am of the same opinion. No receiving order ought to have been made. Both points made by the debtor are good. If the petition is used as a means of extorting, or endeavouring to extort, money, a receiving order ought not to be made upon that petition. I think that that objection is made out in this case. The petitioning creditor has nothing to gain by a bankruptcy, but on the contrary will get nothing. I think that the petitioning creditor was proceeding in the hope of squeezing money out of the debtor or his relations. I am of opinion that, upon that ground, the receiving order ought not to have been made. *Re Atkinson, Ex parte Atkinson* (1) is an authority for that. I am of the same opinion also upon the other ground. An adjudication in this case would be useless; it would be doing a "vain thing," as said in *Re Robinson, Ex parte Robinson* (2) by Sir George Jessel, M.R. The debtor's only asset would be forfeited upon bankruptcy, and the creditors would get nothing. I am, therefore, of opinion that a receiving order ought not to have been made, and that the appeal must succeed.

RIGBY, L.J.—I am of the same opinion. I think that a fraud was attempted by the petitioning creditor in making his request for £25 from the debtor. On that ground I think that the receiving order ought not to have been made. On another ground also the order ought not to have been made. The debtor has no other asset except one which would be destroyed by bankruptcy.

Appeal allowed.

Solicitors: *Michael Abrahams, Son & Co.; A. J. Benjamin.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

Re RUSSELL. DORRELL *v.* DORRELL

[Court of Appeal (Lord Halsbury, L.C., Lindley and Rigby, L.JJ.), July 25, August 9, 1895]

B [Reported [1895] 2 Ch. 698; 64 L.J.Ch. 891; 73 L.T. 195; 44 W.R. 100; 12 R. 499]

Perpetuities—Will—Gift to the daughters of testator's niece—Direction to settle share of such daughter—Daughter living at death of testator—Validity although birth of other daughters possible after testator's death.

The testator gave the residue of his estate to trustees on trust for his niece C for life and on her death for her daughters who should attain twenty-one or marry in equal shares, and he directed his trustees to stand possessed of the share of any such daughter on trust to invest the same and pay the income to her for life and on her death on certain trusts in favour of her children.

Held: the provision for settlement of the shares of the daughters was not void as against the rule against perpetuities in the case of a daughter living at the D death of the testator and would have been valid though other daughters had been born after the death of the testator to whose shares the provision could not legally apply.

Notes. Applied: *Re Game*, *Game* v. *Tennent*, [1907] 1 Ch. 276; *Re Morrison's Will Trusts*, *Walsingham* v. *Blathwayt*, [1939] 4 All E.R. 332. Referred to: *Bates* E v. *Kesterton*, [1896] 1 Ch. 159; *Re Hey's Settlement Trusts*, *Hey* v. *Nickell-Lean*, [1945] 1 All E.R. 618.

As to the application of the rule against perpetuities where there is a gift to members of a class, see 29 Halsbury's Laws (3rd Edn.) 315 et seq.; and for cases see 37 Digest 101 et seq.

Cases referred to:

F (1) *Griffith* v. *Pownall* (1843), 13 Sim. 393; 60 E.R. 152; 37 Digest 112, *440*.

(2) *Cattlin* v. *Brown* (1853), 11 Hare, 372; 1 Eq. Rep. 550; 68 E.R. 1319; sub nom. *Catlin* v. *Brown*, 1 W.R. 533; 37 Digest 67, *95*.

(3) *Wilson* v. *Wilson* (1858), 28 L.J.Ch. 95; 32 L.T.O.S. 122; 4 Jur.N.S. 1076; 7 W.R. 26; 37 Digest 101, *364*.

(4) *Knapping* v. *Tomlinson* (1864), 34 L.J.Ch. 3; 10 L.T. 558; 10 Jur.N.S. 626; G 12 W.R. 784; 37 Digest 64, *68*.

Also referred to in argument:

Pearks v. *Moseley*, *Re Moseley's Trusts* (1880), 5 App. Cas. 714; 50 L.J.Ch. 57; 43 L.T. 449; 29 W.R. 1, H.L.; 37 Digest 68, *98*.

Evers v. *Challis* (1859), 7 H.L.Cas. 531; 11 E.R. 212; sub nom. *Doe d. Evers* v. H *Challis*, 29 L.J.Q.B. 121; 33 L.T.O.S. 373; 5 Jur.N.S. 825; 7 W.R. 622, H.L.; 37 Digest 103, *384*.

Proctor v. *Bishop of Bath and Wells* (1794), 2 Hy. Bl. 358; 126 E.R. 594; 37 Digest 105, *393*.

Re Bence, *Smith* v. *Bence*, [1891] 3 Ch. 242; 60 L.J.Ch. 636; 65 L.T. 530; 7 T.L.R. 593, C.A.; 37 Digest 105, *396*.

I *Leake* v. *Robinson* (1817), 2 Mer. 363; 35 E.R. 979; 37 Digest 92, *290*.

Re Michael's Trusts (1877), 46 L.J.Ch. 651; 37 Digest 120, *526*.

Lord Dungannon v. *Smith* (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E.R. 1523, H.L.; 37 Digest 55, *9*.

Greenwood v. *Roberts* (1851), 15 Beav. 92; 21 L.J.Ch. 262; 19 L.T.O.S. 100; 51 E.R. 471; 37 Digest 99, *347*.

Re Ridley, *Buckton* v. *Hay* (1879), 11 Ch.D. 645; 48 L.J.Ch. 563; 41 L.T. 336; 43 J.P. 588; 27 W.R. 527; 37 Digest 56, *11*.

Herbert v. *Webster* (1880), 15 Ch.D. 610; 49 L.J.Ch. 620; 37 Digest 120, *527*.

Webster v. *Boddington* (1858), 26 Beav. 128; 53 E.R. 845; 37 Digest 100, *351*. A
Arnold v. *Congreve* (1830), 1 Russ. & M. 209; Taml. 347; 8 L.J.O.S.Ch. 88; 39 E.R. 80; 44 Digest 767, *6256*.

Appeal by the plaintiff from a decision of CHITTY, J., holding that a direction by the testator that the plaintiff's share of his residuary estate should be settled upon herself and her children did not infringe the rule against perpetuities, and was consequently not void and that the plaintiffs therefore did not take absolutely. B

By his will, dated Sept. 11, 1877, the testator, George Russell, gave his trustees all his real and the residue of his personal estate upon trust to permit his wife to receive the rents, interests, and annual produce during the term of her natural life, and, after her decease, upon trust to pay the legacies therein mentioned; and he directed his trustees to stand possessed of his real estate and the residue of his personal estate upon trust to allow the same to remain in its then actual state of C investment, or to call in and convert the same into money, and to invest the proceeds arising therefrom as therein mentioned, and upon trust to pay the income to his niece Mary Dorrell, the wife of James Dorrell, for her natural life, as therein mentioned; and after her decease to James Dorrell, her husband, for the term of his natural life, and after his decease upon trust to sell and dispose of his real estate, D and to dispose of and convert into money his residuary and personal estate, and to stand possessed of the proceeds.

> "In trust for all and every the children or child of the said Mary Dorrell, who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age, or marry under that age, to be divided between them if more than one in equal shares and proportions, and if E there shall be only one such child, in trust for that one and only child."

Then followed a proviso for the settlement of the share of any daughter of Mary Dorrell in these terms:

> "Provided also, and I do hereby expressly declare, that the trustees or trustee for the time being of this my will shall stand possessed of the share of any F daughter under the provision hereinbefore made upon trust to invest the same as hereinbefore expressed, and to pay the rents, interest, and dividends arising therefrom unto her for the term of her natural life, for her sole and separate use and benefit free from the debts, control, or engagements of any husband with whom she may intermarry, and her receipt alone to be a good discharge for the same and from and after her decease, then upon similar trusts for the G benefit of her children as are hereinbefore provided for the children of the said Mary Dorrell."

By a fourth codicil to his will, dated June 2, 1883, the testator revoked the bequest of any share or interest any son or sons of Mary Dorrell might become entitled to under the trusts of his will arising from the proceeds of sale of his real estate and the conversion of his residuary personal estate after the decease of Mary H and James Dorrell, and he directed that his trustees should stand possessed of the whole of such proceeds

> "in trust for the daughter or daughters of the said Mary Dorrell as in my said will directed."

The effect of the codicil was to exclude sons of Mary Dorrell, and to make the I trustees hold the proceeds of sale and conversion of the real and residuary personal estate subject to the life interests in trust for the daughter or daughters of Mary Dorrell who should attain twenty-one or marry under that age.

The testator died in October, 1885, leaving him surviving his wife, the first tenant for life, who died in December, 1885; his niece, Mary Dorrell, who died in 1894; and her husband, James Dorrell, who was still living, and was the present and last tenant for life. Mary Dorrell, the niece, had three children, viz., a son; a daughter, who died an infant and unmarried; and the plaintiff, Catherine Mary Dorrell, who

had attained the age of twenty-one years when the testator died. Under the combined effect of the will and fourth codicil, and subject only to the life interests and the settlement, the plaintiff immediately on the death of the testator became entitled to all the proceeds of the testator's real and residuary personal estate for a vested interest liable only to be partially divested in the event (which never took place) of any sister or sisters living to attain twenty-one or marrying under that age. After the death of her mother and sister this vested interest became absolute, subject only to a life interest in her father and the proviso on which the question in this case turned. The plaintiff took out an originating summons to determine whether she was entitled absolutely, or whether she took a life interest only.

Upjohn and *W. L. Richards* for the plaintiff.

E. P. Hewitt for the heir-at-law and next of kin of the testator.

Oldham for the trustees.

Cur. adv. vult.

Aug. 9, 1895. **RIGBY, L.J.,** read the following judgment of the court, in which, after stating the facts, he said: There can be no question that the plaintiff takes an absolute interest but for the proviso above referred to. It is suggested that the proviso is void for remoteness, inasmuch as there might have been a daughter of Mary Dorrell, born after the testator's death, who would live to take a vested interest, and whose children would not necessarily attain twenty-one within the period allowed by law for the postponement of the vesting of a benefit. No doubt in the case of such a daughter the settlement over directed by the proviso would have been void, but it would be perfectly good as to the interest taken by the plaintiff, who was alive at the testators' death, unless the possible operation of the proviso with reference to the share of a daughter not in existence at the testator's death makes the whole proviso void. Looking at the state of things at his death, it was then clear that the plaintiff must take either the whole or a share, and other daughters of Mary Dorrell might come in and take shares. Assuming them to do so, yet the share of the plaintiff and the share of the other daughters would be perfectly separate and distinct, and completely ascertained and separated within the time allowed by the law. The proviso in no way mixes them up, but operates separately upon each share. The settlement of the plaintiff's share directed by it is perfectly legal, and would have been so even though there were other shares to which the proviso could not legally apply.

If indeed there had been a proviso which could only operate upon all the possible shares if it operated at all, the case would have been different; but the settlement of the plaintiff's share is to take place whether there are other shares or not, and take place from the testator's death in favour of the children of a person then living, and is quite unobjectionable. This is not the case of a gift over which depends upon events so stated as to involve a possibility of its taking place outside the permitted limits, or in favour of persons who might take interests vesting beyond those limits. No splitting of the clause is necessary, since it is so framed as to apply separately to the plaintiff's share. On principle, therefore, the judgment of CHITTY, J., ought to be supported.

The supposed conflict of authority, when the decisions are looked into, is not so great as the plaintiff's counsel attempted to make out. No case binding on the Court of Appeal has been cited which in any way conflicts with the conclusion above arrived at, and indeed there is no case in which after argument as to this point any conflicting decision has been arrived at. On the other side, *Griffith* v. *Pownall* (1), *Cattling* v. *Brown* (2), *Wilson* v. *Wilson* (3), and *Knapping* v. *Tomlinson* (4), decided respectively by SHADWELL, V.-C., PAGE WOOD, V.-C., and KINDERSLEY, V.-C., are all authorities in support of the conclusion arrived at, so that the weight of authority is clearly in favour of it. *Appeal dismissed.*

Solicitors: *Crowders & Vizard*, for *S. B. Garrard*, Worcester; *Kingsford, Dorman & Co.*, for *Willoughby*, Daventry.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

R. *v.* ENTWISTLE. Ex parte JONES

[Queen's Bench Division (Darling and Channell, JJ.), April 15, 1899]

[Reported [1899] 1 Q.B. 846; 68 L.J.Q.B. 580; 80 L.T. 657; 63 J.P. 423; 43 Sol. Jo. 417; 19 Cox, C.C. 317]

B

Criminal Law—Vagrancy—Fortune telling—"Pretending or professing to tell fortunes"—Need to prove intent to deceive—Averment of intent in information—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4.

By s. 4 of the Vagrancy Act, 1824: ". . . every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of His Majesty's subjects . . ." C shall be deemed a rogue and a vagabond."

In order to justify a conviction of pretending or professing to tell fortunes under s. 4 of the Act, it must be shown that there was an intent to deceive, but it is not necessary to aver an intent to deceive in the information charging the offence. An intent to deceive is implied if the information charging the offence contains the words "pretending or professing." D

Notes. The Vagrancy Act, 1824, s. 4, has been partially repealed by the Fraudulent Mediums Act, 1951, s. 2 (30 Halsbury's Statutes (2nd Edn.) 40), but not so as to affect this case.

Considered: *Davis* v. *Curry*, [1918] 1 K.B. 109; *Stonehouse* v. *Masson*, [1921] All E.R. Rep. 534.

As to fortune telling, see 10 Halsbury's Laws (3rd Edn.) 699; and for cases see E 15 Digest (Repl.) 924, 925. For the Vagrancy Act, 1824, s. 4, see 18 Halsbury's Statutes (2nd Edn.) 202.

Cases referred to:

(1) *Smith* v. *Neilson* (1896), 23 R. (Ct. of Sess.) 77; 15 Digest (Repl.) 925, **5677.* F

(2) *Monck* v. *Hilton* (1877), 2 Ex.D. 268; 46 L.J.M.C. 163; 36 L.T. 66; 41 J.P. 214; 25 W.R. 373, D.C.; 15 Digest (Repl.) 924, *8861.*

Also referred to in argument:

Penny v. *Hanson* (1887), 18 Q.B.D. 478; 56 L.J.M.C. 41; 56 L.T. 235; 35 W.R. 379; 3 T.L.R. 409; 16 Cox, C.C. 173, D.C.; 15 Digest (Repl.) 924, *8862.*

R. v. *Middlesex Justices* (1877), 2 Q.B.D. 516; 41 J.P. 629; 25 W.R. 510; sub G nom. *R.* v. *Middlesex Justices, Slade's Case*, 46 L.J.M.C. 225, D.C.; 15 Digest (Repl.) 925, *8870.*

R. v. *Padbury* (1879), 5 Q.B.D. 126; 49 L.J.M.C. 55; 44 J.P. 361; 28 W.R. 182; 3 Digest (Repl.) 463, *465.*

R. v. *Inhabitants of Hellingley* (1859), 1 E. & E. 749; 28 L.J.M.C. 167; 23 J.P. 628; 5 Jur.N.S. 626; 7 W.R. 413; 120 E.R. 1091; 16 Digest (Repl.) 481, H *3003.*

R. v. *Higham* (1857), 7 E. & B. 557; 26 L.J.M.C. 116; 29 L.T.O.S. 105; 22 J.P. 6; 3 Jur.N.S. 691; 119 E.R. 1352; 16 Digest (Repl.) 479, *2984.*

Rule Nisi for a writ of certiorari to remove into the High Court for the purpose of quashing the same a record of conviction by justices of the city of Manchester, on Jan. 5, 1899, whereby Georgina Jones was convicted that she, on Dec. 22, 1898, I at the city of Manchester, unlawfully pretended to tell fortunes contrary to the form of the statute. The rule was obtained by Georgina Jones on the ground that the alleged offence of which she was convicted was not an offence against the Vagrancy Act, 1824, s. 4.

The information laid by a police constable against Georgina Jones stated that

"she on Dec. 22, 1898, at the city of Manchester, did pretend and profess to tell fortunes contrary to the form of the statute in such case made and provided."

A At the hearing of the charge, one of the witnesses (a woman) said:

> "At 6.45 p.m., on Dec. 22, 1898, I accompanied Mrs. Potts to the shop of the defendant. Shortly after entering we were asked by the defendant: 'Do you ladies want speaking to?' We said 'Yes.' I then went into another room alone and sat down; the defendant said 'Which way do you want telling, one
B shilling, half-a-crown, or five shillings?' I said 'One shilling.' She then took hold of my left hand and looked at it both sides, then told me I had had to work hard, that I had not very many good friends, always more ready to take from me than give. She asked me if I had had an offer of a ring. I said 'Yes'; she then said, 'May I ask if you have lost your husband?' I said 'He is not dead, but I have not seen him lately.' She then said I should meet him again next
C year and that I should be better off and that my marriage had not made a lady of me. She asked me if I was satisfied. I said 'Yes' and paid her a shilling."

The other witnesses, who had paid the defendant a shilling, gave similar evidence, the defendant saying to each that next year there would be a great change in their fortunes.

In an affidavit made by one of the justices it was stated that the court

D "were satisfied on the evidence given on the hearing of the charge, that Georgina Jones had, on Dec. 22, 1898, unlawfully pretended to tell fortunes, and further that she had so unlawfully pretended to tell fortunes to deceive and impose on certain of Her Majesty's subjects."

W. C. Ryde showed cause.

E *T. P. Perks* in support of the rule.

DARLING, J.—This is an application to bring up, in order to quash, a conviction against Georgina Jones who was charged under the Vagrancy Act, 1824, s. 4, on an information which charged her that she did unlawfully pretend to tell fortunes. The material words in the section are: [HIS LORDSHIP read the section, and con-
F tinued:] The information did not allege anything beyond that Georgina Jones did unlawfully pretend to tell fortunes, and it is said that that information is bad, and that the conviction on it is bad, because the information did not go on to charge that Georgina Jones did pretend to tell fortunes to deceive and impose on some of Her Majesty's subjects. In other words, what is said is that the averment on the information of doing this in order to deceive is necessary. It is said that you
G must not read this section in the sense that it is forbidden simply to pretend or profess to tell fortunes, but that you must read it in such a way that those words "to deceive and impose on any of His Majesty's subjects" are necessary in the sense that they must not be merely found as a fact or as sufficiently imported into the words "pretending or professing," but that they must be alleged in the information in addition to the words "pretending or professing."

H Certain cases have been cited to us and among others *Smith* v. *Neilson* (1), in the Court of Justiciary in Scotland, which is said to be an authority that those words "to deceive and impose on" are a necessary part of the averment. I am not prepared to say that, if that case does definitely hold that, I do not take the same view, but the judgment of LORD YOUNG differs from the judgment of the Lord Justice-Clerk in that LORD YOUNG says:

I "There is the word 'pretend' used, but the case for the prosecutor here is that it is not necessary that there should be an intent to deceive and impose upon."

He goes on to say: "I think that that is extravagant." I think so too. I do not intend to hold that it is not necessary there should be an intent to deceive and impose on. But here the magistrates have found that

> "the said Georgina Jones had on Dec. 22, 1898, unlawfully pretended to tell fortunes, and further that she had so unlawfully pretended to tell fortunes to deceive and impose upon certain of Her Majesty's subjects."

In the Court of Justiciary in Scotland, it was contended not only that it was not necessary to aver on the information that telling fortunes was done with intent to deceive and impose on, but that it was not necessary that any such intent should exist on the part of the fortune-teller.

CLEASBY, B., in *Monck* v. *Hilton* (2) makes use of these words (2 Ex.D. at p. 276):

> "The clause includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so)."

I agree with that. I think that the use in a statute of the words "pretending or professing to tell fortunes," without going to the part of the statute which contains the words "to deceive and impose on," does import that deception is practised by doing so. In my opinion, if a person were to say: "I am not a real fortune-teller; I cannot tell fortunes; what I am about to tell you by means I am about to take must not deceive in any way, but I will pretend to tell your fortune or I will profess to tell your fortune; I will make use of the ordinary means which people take to do it," I think no offence would be committed, because in such a case as that it would be sufficient, if that person were indicted for that offence, to prove that there was no intention to deceive at all, but that the whole thing was done in fun and done to amuse the people at a concert, or in a drawing-room, or simply as an amusement. I think that the words are wide enough to cover a real intent to deceive, and that they do, as CLEASBY, B., says, import that deception is practised, and so, if you prove that deception was practised, or that deception was intended, it is not necessary to aver anything more than what was averred in this case, namely, to pretend to tell fortunes. I come to that conclusion not only because of what CLEASBY, B., says —and I do not trouble to inquire whether it was obiter dictum or was not—but because, in my opinion, it is perfectly good sense and perfectly good law. I come to this conclusion because I agree with what was said whether it is binding on me or not.

I am further confirmed in this opinion by looking at the words

> "or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of His Majesty's subjects."

I ask myself if it is not necessary to put the words to "deceive and impose on" after "to tell fortunes" because to pretend to tell fortunes imports deceiving and imposing on, why is it necessary to put them after the subsequent words. It seems to me that it was necessary to put them. You could not give any effect to the subsequent words unless they had been put there. Take the case of a person being charged with using some subtle craft, means, or device by palmistry or otherwise and it is proved that it was not palmistry. In my opinion, the putting of the words "or otherwise to deceive and impose on" is made necessary because the word "otherwise" might include the using of perfectly innocent means or a perfectly innocent device.

Therefore, I think that this information was perfectly good as it stood, and that it did not need the averment which it is complained is absent, and that the conviction must stand. Further, I think that, if it were necessary to amend we could do so, though I do not think it is necessary to make any amendment.

CHANNELL, J.—I am of the same opinion. I think that, in order that there may be a conviction under the Vagrancy Act, 1824, s. 4, in respect of fortune-telling, it is necessary that the act should be done in order to deceive. I think that that is so, not because the words "in order to deceive and impose on" apply to the words "pretending or professing to tell fortunes," but because that meaning is imported and is included in the words "pretending or professing." I think that pretending or professing bears the meaning of representing, intending that the representation should be believed, and that, if it is not a representation of that character, it is not a pretending and is not a professing within the meaning of the words here used.

A As I said in the course of the argument, I think that persons who are acting do not "pretend." It is a serious offence, I believe, to pretend to be a policeman, but I do not think that, when a man acts the part of a policeman in a pantomime, he pretends to be a policeman. I think that the use of the words "to deceive and impose on" after the words "pretending or professing to tell fortunes" would have been redundant, and, therefore, I think that the offence is sufficiently set out in this B conviction.

I agree with what my brother has said as to the amendment, and my present opinion is that the conviction might be amended if necessary, but I am not prepared to decide it. There is a little difficulty about amending the description of an offence, but if grammatically the words "to deceive" at the end of the sentence apply to the former part of the sentence, I think that it might be amended, because C intent to deceive is already contained in the other expression "pretending," and, therefore, the amendment would be a mere matter of form. That is my view of it, but I would prefer to put my decision on the other point.

Rule discharged.

Solicitors: *Jaques & Co.*, for *Dodson & Co.*, Stainland; *Austin & Austin*, for *T.* D *Hudson*, Manchester.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

E

MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* NEW YORK LIFE INSURANCE CO. AND ANOTHER

F [COURT OF APPEAL (Lindley and A. L. Smith, L.JJ.), November 10, 1896]

[Reported 75 L.T. 528; 13 T.L.R. 32; 41 Sol. Jo. 47]

Injunction—Contract for personal service—Restraint against breach—Agreement by employee to "act exclusively for" employers—Need to prove sufficiently clear and definite negative covenant not to enter employment of others.

G Before an injunction can be granted to enforce a contract of personal service there must be a clear and definite negative covenant, or, if one is implied, it must be so definite that the court can see exactly the limit of the injunction it is to grant. Where, therefore, there is a stipulation in a contract for personal service that a man should "act exclusively for" an employer, that employer has H no right to an injunction against the employee to restrain him from entering the employment of another as the terms of the contract are too vague to imply a negative covenant.

Whitwood Chemical Co. v. *Hardman* (1), [1891] 2 Ch. 416, considered and applied.

Lumley v. *Wagner* (2) (1852), 1 De G.M. & G. 604, distinguished.

I **Notes.** Applied: *Chapman* v. *Westerby* (1913), 58 Sol. Jo. 50.

As to protection of contractual rights by injunction, see 21 HALSBURY'S LAWS (3rd Edn.) 379 et seq.; and for cases see 28 DIGEST (Repl.) 818 et seq.

Cases referred to:

(1) *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; 60 L.J.Ch. 428; 64 L.T. 716; 39 W.R. 433; 7 T.L.R. 325, C.A.; 43 Digest 55, *564*.

(2) *Lumley* v. *Wagner* (1852), 1 De G.M. & G. 604; 21 L.J.Ch. 898; 19 L.T.O.S. 264; 16 Jur. 871; 42 E.R. 687, L.C.; 28 Digest (Repl.) 829, *726*.

Appeal by the plaintiff association from a decision of POLLOCK, B., sitting at chambers, affirming the refusal by a master of an interlocutory injunction to restrain the defendant Harvey from acting for the defendant company and the defendant company for employing him.

The plaintiffs were the Mutual Reserve Fund Life Association, an American association duly established according to American law, the head office being at New York. The plaintiffs had a branch office in Great Britain, situate in the City of London, where they carried on business as an insurance company. The defendant Alfred Robert Harvey was an insurance agent, carrying on business at Liverpool.

By an agreement in writing, dated June 16, 1894, the defendant Harvey was appointed supervisor of the plaintiff association for the purpose of procuring, effecting, and completing satisfactory applications for membership in the plaintiff association, and for the purpose of collecting the first payment on the application so effected, and also for the purpose of appointing competent and acceptable agents in any unoccupied territory in England, Scotland, Ireland, Wales, or the Isle of Man. By the agreement the defendant Harvey agreed to "act exclusively for" the plaintiff association, in so far as to tender to them all risks obtained by him or under his control; to thoroughly and efficiently occupy the territory specified in the agreement by the appointment of competent and satisfactory agents, and to faithfully discharge all the duties of his appointment as such supervisor; to devote his time and best energies to the service of the plaintiff association, and efficiently occupy and work the territory assigned to him, otherwise the agreement, so far as it related to future new business, was to be void and of no effect. He also agreed to guard the interests of the plaintiff association, and encourage members in the payment of their premium calls. The contract was to continue in force for the period of five years from the date thereof, upon the condition that the terms and provisions of the agreement were complied with by the defendant Harvey, unless he failed to obtain a volume of business satisfactory to the president or executive committee at the home office of the plaintiff association in New York.

On June 20, 1896, the defendant Harvey entered into an agreement with the defendant company, an American company having a branch office in London, whereby he was appointed agency director of that company for Great Britain and Ireland, for the purpose of canvassing for applications for assurance on the lives of individuals to that company, and of organising agencies for that company in Great Britain and Ireland. The plaintiff association thereupon commenced this action against the defendant Harvey, and the defendant company. They alleged by their statement of claim that subsequent to the date of the agreement, and before the expiration of the period of five years referred to therein, the defendant company well knowing that the defendant Harvey was in the service and employment of the plaintiff association under the agreement, and in order to secure to the defendant company the business connection of the plaintiff association, and in order to damage and injure the plaintiff association in their business, wrongfully enticed and procured the defendant Harvey, unlawfully and without the consent and against the will of the plaintiff association, to depart from the service of the plaintiff association, and to enter the defendant company's service, and to break his aforesaid agreement with the plaintiff association. They alleged that he did this (a) by entering the service and employment of the defendant company before the expiration of the said period of five years; (b) by wholly repudiating the agreement, and refusing to be bound thereby; (c) by neglecting to perform the agreement or any part thereof; (d) by not tendering to the plaintiff association all risks obtained by him or under his control, and by tendering the same to the defendant company; (e) by endeavouring to induce the agents of the plaintiff association to depart from their service, and to enter the employment of the defendant company; and (f) by endeavouring to alienate, and alienating from the plaintiff association, their policy-holders and intending policy-holders.

The plaintiff association accordingly claimed (i) a declaration that they were exclusively entitled to the services of the defendant Harvey for a period of five years from June 16, 1894, in accordance with the provisions of the agreement; (ii) an injunction to restrain the defendant company, until after the expiration of the said period of five years, from retaining the services of, or employing or continuing to employ the defendant Harvey as supervisor or as director of agents, or in any capacity whatsoever not in accordance with the provisions of the agreement; (iii) an injunction to restrain the defendant Harvey, until after the expiration of the said period of five years, from acting, or continuing to act for, or being employed by, the defendant company, or any other person or body corporate, in the capacity of supervisor or director of agents, clerk, agent, servant, or in any capacity whatsoever not in accordance with the provisions of the agreement, and from alienating or seeking to alienate from the plaintiff association their policy-holders or intending policy-holders, and from tendering to any person or persons other than the plaintiff association, any insurance risk or risks obtained by him, his servants or agents, or under his control: and (iv) an inquiry as to what policies had been issued by the defendant company since June 16, 1894, in respect of risks obtained by the defendant Harvey, his servants or agents, or under his control. They also claimed £5,000 damages against each defendant for the wrongful acts complained of.

Subsequently the plaintiff association took out a summons for an interlocutory injunction. The master refused the application, and his refusal was affirmed by POLLOCK, B., sitting at chambers on Aug. 12, 1896. The plaintiff association now appealed.

Lawson Walton, Q.C. (with him *F. M. Abrahams* and *Mallinson*) for the plaintiff association.

Bigham, Q.C. (with him *Muir Mackenzie*) for the defendant Harvey.

Robson, Q.C. (with him *Bremner*) for the defendant company.

LINDLEY, L.J.—This case is, like many others, rather near the line. It must turn on the true construction of the contract of June 16, 1894, and the true application, when that contract is properly construed, of the principles on which the court is in the habit of acting in such cases as the present.

As regards those principles, I do not think that I need do more than refer to the case which has been cited of *Whitwood Chemical Co.* v. *Hardman* (1), because the principles, so far as I am acquainted with them, will be found most fully explained there. I quite agree that, although there may not be a covenant which is absolutely and clearly negative in terms, still, if you can extract from a contract of this kind a negative covenant which is sufficiently clear and definite to enable you—as I used the expression before—to put your finger upon it, and state exactly what a man is not to do, that is as good as a covenant absolutely and clearly negative in terms. The difficulty I have here is in coming to the conclusion that the implied negative covenant is sufficiently definite to warrant the court in granting an injunction as asked. My impression is that it is not. I think that the plaintiffs have taken a much wider view of their rights than the contract justifies.

I say nothing at all about the release of the contract or the cancellation of it, or the substance of it. Let me deal with it on the assumption that it is a subsisting contract between the plaintiffs and the defendant Harvey. One thing the contract does not contemplate—and it is all important—it certainly does not contemplate that Mr. Harvey is to do no business of any kind except performing the duties of his agency for the plaintiffs. He is at liberty to do anything he likes that is consistent with that, and when we come to look at the supposed negative covenant, or the clause that imports a negative covenant, we shall find that it is very carefully and very narrowly restricted.

The plaintiffs are an insurance company—an American company, as I understand, having business in this country—and they appointed Mr. Harvey what they called their supervisor to act in a certain district for the purpose of procuring, effecting,

and completing satisfactory applications for membership in that association, and for the purpose of collecting the first payments on the said applications and so on; and also for the purpose of appointing agents in any unoccupied territory. Then we come to a clause, and the only clause which can be said to import a negative covenant. The supervisor, Mr. Harvey, agrees to "act exclusively for" the plaintiffs in so far as to tender to them all risks obtained by him or under his control. Before I comment on that I will go a little further, because the agreement binds Mr. Harvey thoroughly and efficiently to occupy the territory and faithfully to discharge all the duties of his appointment, and to devote his time and best energies to the service of the plaintiffs, and efficiently occupy and work the territory; otherwise the agreement, so far as relates to the future of the new business, shall be void. Then there is a clause—there are other clauses which I do not think it is important to refer to—that, upon condition that the terms and provisions of the agreement are complied with by Mr. Harvey, the contract is to continue in force for five years. Of course, no lawyer could contend that Mr. Harvey was at liberty to break this arrangement, and to take advantage of his own wrong, and to say that there was an end of the contract. That cannot be the meaning of it. But it is very important to observe that the period of five years specified in the agreement is not an absolutely fixed term; it is a term which depends on what the plaintiffs do. Supposing Mr. Harvey does commit a breach, the plaintiffs are at liberty, if they choose, to waive the breach, and to hold him to his five years, or to put an end to the contract, and then there is an end to the five years. The plaintiffs by their statement of claim seem to take the very extraordinary view that they can treat him as having broken the contract, and yet hold him to the five years. But it is manifest that they must either waive the breach, or let the five years go. They must waive their right at all events to take advantage of those breaches.

The whole difficulty arises from the introduction of the word "exclusively" into the clause which I have read, namely, that the supervisor agrees to "act exclusively for" the association in so far as to tender to them all risks obtained by him, or under his control. Bearing in mind that Mr. Harvey is bound to do the best he can under that clause for the plaintiffs, what does it mean? Does it mean that he is to do more than send to the plaintiffs such life assurance risks as he can procure for them? Supposing that a person goes to him and asks him to send on a risk to a totally different company, and Mr. Harvey, acting bona fide, says, "I am the agent for the Mutual Reserve Association, give me a risk for them; make me an offer to insure with them." I should say, on the true construction of this contract, that he is bound to do that. Supposing, however, a person says, "No, I will not have anything to do with that company," there is nothing whatever in the contract, under those circumstances, to prevent Mr. Harvey from sending the risk on to somebody else, for this simple reason that in the case I put the risk would not be risk "obtained by him, or under his control," such as is contemplated by the contract.

The plaintiffs have put a construction on the terms of the contract far wider than they are justified in doing when you come to work the matter out, bearing in mind that you have not got any clear definite negative covenant, nor anything to show what is the exact limitation of the negative covenant. Here the contract appears to me to be of sufficient vagueness to bring this case within the principle of the authority, to which I have already referred, of *Whitwood Chemical Co.* v. *Hardman* (1), and not of *Lumley* v. *Wagner* (2). As I have pointed out, and I repeat it, I do not think that it is, in accordance with the view taken in this class of case, desirable to extend the principle established thereby. I look upon *Lumley* v. *Wagner* (2) and the whole of the cases of that class as rather anomalous. I should be bound by them, and of course follow them, where I have to decide cases of a similar kind. But before an injunction can be granted, in order to enforce a written contract of personal service—because this is a contract of personal service—there must be a clear and definite negative covenant; or, if one is to be implied, which is quite possible, it must be so definite that the court can see exactly the limit of the

injunction that it is to grant. I think that this contract is far too hazy, far too indefinite, to do anything of the kind. Therefore it appears to me that the appeal ought to be dismissed, and dismissed with costs.

A. L. SMITH, L.J.—I agree. This is an appeal from my brother POLLOCK, sitting at chambers, he having refused to grant the injunction asked for by the plaintiffs, the Mutual Reserve Fund Life Association, against the defendant Harvey and the defendant company, the New York Life Insurance Co. I think my brother POLLOCK was quite right in the course he adopted. This is a contract for personal service—there cannot be a doubt about that. It is a contract of June 16, 1894, and it cannot be doubted that there is no negative covenant in terms by the defendant Harvey not to carry on business with any insurance company other than the Mutual Reserve Fund Life Association. That is clear. But it is said that there is an implied covenant sufficiently definite that he will not do so. I wish to point out that the substance of the plaintiffs' application, and what they really in substance want, and what they take this step for, is to prevent Mr. Harvey from treating with any other company till the five years have run out from the commencement of the agreement on June 16, 1894. That is what they want.

I pass by the suggestion which was made by counsel for the defendant that the contract of June 16, 1894, had lapsed. I do not think that there is much in that, and moreover I doubt very greatly whether it is true. I am not going to decide that point one way or the other; but I am only shortly stating what my opinion is on the affidavits which I have heard read on the one side and the other. I will proceed on the assumption that the contract is a still subsisting contract. First of all, does the contract bind Mr. Harvey not to carry on insurance business with any other company at all? Certainly not. There is no covenant that he shall not do so, and I cannot read into the contract any such implied obligation to be inferred from the contract. But the point taken—and this is only taken under the stress of circumstances— is, that if there be no sufficient definite implied contract that Mr. Harvey should not deal with any other insurance company, still there is an implied contract that he will not deal with them in so far as to tender to them any risks obtained by him or under his control for the plaintiff company. That is the second branch of the argument, but it was not much insisted upon when it was pointed out to the learned counsel that there was no general covenant such as he was trying to assert that there was. I should point out that I am not at all satisfied that the plaintiffs have made out upon the affidavits that Mr. Harvey is going to do anything of this limited character which they assert he is. But if it be so, where do I find any such express negative covenant to bind him not to do what they say he is doing, in what I call the subsidiary case about these risks? I do not see it.

But when I come to authority—though I agree that a case on one contract is not necessarily to apply to another case on another contract—I must say that *Whitwood Chemical Co.* v. *Hardman* (1) is to my mind most uncommonly like this. Without splitting straws, what is the difference between a man undertaking to give his whole time to a person, to his employer, or to one side—and his undertaking that he will act exclusively for him, or that he will not act for anyone else? If you put those phrases before you and ask what is the difference, I should say that there is very little difference between the two; and it would be splitting straws to try and define the difference between them. As I have before observed, the authority has been cited in this court of *Whitwood Chemical Co.* v. *Hardman* (1), in which it was held—and I have no doubt rightly held—that where there is a contract for a man to give his whole time to another, there is no negative implied covenant there that he will not act for another. Where a person has contracted to act exclusively for another, how can this court logically say, if *Whitwood Chemical Co.* v. *Hardman* (1), which I apprehend is good law, stands, that there is a negative covenant? I cannot myself bring my mind to a point so fine as that, and I have expressed my opinion on what I think is the true construction of this contract. But I declare that, if I had been

sitting at chambers I should have done exactly what apparently POLLOCK, B., did —that is, say that I did not find any negative covenant in this case, or any such implied covenant, not to do that which the defendant is asked to be restrained from doing. This case comes, in my opinion, within *Whitwood Chemical Co.* v. *Hardman* (1), which is a binding authority upon us. For these reasons I think that this appeal ought to be dismissed, and with costs.

Appeal dismissed.

Solicitors: *Michael Abrahams, Sons & Co.; Brook, Freeman & Bailey*, for *Wright, Becket & Co.*, Liverpool; *Ashurst, Morris, Crisp & Co.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

TREGO *v.* HUNT

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Ashbourne, Lord Macnaghten and Lord Davey), June 25, 27, 28, December 5, 1895]

[Reported [1896] A.C. 7; 65 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80]

Trade—Goodwill—Sale—Right of vendor to set up competing business—Partnership—Dissolution—Goodwill to belong to one partner—Right of other partner to set up competing business—Right to canvass customers of partnership business.

When the goodwill of a business is sold the vendor does not, by reason only of that sale and in the absence of any stipulation to the contrary, impose upon himself any obligation not to carry on a competing business. But, as the connection formed with customers constitutes the goodwill of a business, a man who has parted with the goodwill must not avail himself of his special knowledge of the old customers to attract them to his competing business.

Trade—Goodwill—Defined—Reputation and connection of trader.

Per LORD HERSCHELL: It is the connection with the customers, formed by years of trading, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business.

Per LORD MACNAGHTEN: What goodwill means must depend on the character and nature of the business to which it is attached. Generally speaking it means much more than what LORD ELDON took it to mean in *Crutwell* v. *Lye* (1) (1810), 17 Ves. 335, where he said: "The goodwill which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place." Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage of the reputation and connection of the firm which may have been built up of years of honest work or gained by lavish expenditure of money.

Pearson v. *Pearson* (2) (1884), 27 Ch.D. 145, overruled.
Labouchere v. *Dawson* (3) (1872), L.R. 13 Eq. 322, approved.

Notes. Applied: *Jennings* v. *Jennings*, [1898] 1 Ch. 378; *Gillingham* v. *Beddow*, [1900] 2 Ch. 242. Considered: *Bevan* v. *Webb*, [1900-3] All E.R. Rep. 206. Applied: *Curl* v. *Webster*, [1904] 1 Ch. 685. Considered: *Hill* v. *Fearis*, [1905] 1 Ch. 466. Distinguished: *Green & Sons (Northampton), Ltd.* v. *Morris*, [1914-15] All E.R. Rep. 942. Applied: *Boorne* v. *Wicker*, [1927] All E.R. Rep. 388. Considered: *Farey* v. *Cooper*, [1927] All E.R. Rep. 311. Referred to: *West London Syndicate* v. *I.R. Comrs.*, [1898] 2 Q.B. 507; *Re David and Mattews*, post p. 817; *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (1900), 83 L.T. 259; *Morris* v. *Saxelby*, [1915] 2 Ch. 57; *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society*, [1919] A.C. 548; *Livock* v. *Pearson* (1928), 33 Com. Cas. 188; *Gilford Motor Co., Ltd.* v. *Horne*, [1933] Ch. 935; *Simpson* v. *Charrington & Co.*, [1934] 1 K.B. 64; *Eastern National Omnibus Co.* v. *I.R. Comrs.*, [1938] 3 All E.R. 526; *Aubanel and Alabaster, Ltd.* v. *Aubanel* (1949), 66 R.P.C. 343; *R. J. Reuter & Co.* v. *Mulhens* (1953), 70 R.P.C. 102; *Moriarty (I. of T.)* v. *Evans Medical Supplies, Ltd., Evans Medical Supplies, Ltd.* v. *Moriarty (I. of T.)*, [1957] 3 All E.R. 718.

As to the sale of goodwill, see 38 HALSBURY'S LAWS (3rd Edn.) 11-14; and for cases see 43 DIGEST 77 et seq.

Cases referred to:

(1) *Crutwell* v. *Lye* (1810), 1 Rose, 123; 17 Ves. 335; 43 Digest 84, *880*.

(2) *Pearson* v. *Pearson* (1884), 27 Ch.D. 145; 54 L.J.Ch. 32; 51 L.T. 311; 32 W.R. 1006, C.A.; 43 Digest 85, *898*.

(3) *Labouchere* v. *Dawson* (1872), L.R. 13 Eq. 322; 41 L.J.Ch. 427; 25 L.T. 894; 36 J.P. 404; 20 W.R. 309; 43 Digest 82, *866*.

(4) *Ginesi* v. *Cooper & Co.* (1880), 14 Ch.D. 596; 49 L.J.Ch. 601; 42 L.T. 751; 43 Digest 78, *826*.

(5) *Leggott* v. *Barrett* (1880), 15 Ch.D. 306; 51 L.J.Ch. 90; 43 L.T. 641; 28 W.R. 962, C.A.; 43 Digest 85, *903*.

(6) *Walker* v. *Mottram* (1881), 19 Ch.D. 355; 51 L.J.Ch. 108; 45 L.T. 659; 30 W.R. 165, C.A.; 43 Digest 83, *872*.

(7) *Churton* v. *Douglas* (1859), John. 174; 28 L.J.Ch. 841; 33 L.T.O.S. 57; 5 Jur.N.S. 887; 7 W.R. 365; 70 E.R. 385; 43 Digest 78, *823*.

(8) *Cook* v. *Collingridge* (1823), Jac. 607; 1 L.J.O.S.Ch. 74; 37 E.R. 979, L.C.; 43 Digest 864, *3102*; subsequent proceedings (1825), 27 Beav. 456; 54 E.R. 180; 43 Digest 88, *864*.

(9) *Johnson* v. *Helleley* (1864), 2 De G. J. & Sm. 446; 5 New Rep. 211; 34 L.J.Ch. 179; 11 L.T. 581; 13 W.R. 220; 46 E.R. 447, L.JJ.; 43 Digest 82, *865*.

(10) *Hall* v. *Barrows* (1863), 4 De G.J. & Sm. 150; 3 New Rep. 259; 33 L.J.Ch 204; 9 L.T. 561; 28 J.P. 148; 10 Jur.N.S. 55; 12 W.R. 322; 46 E.R. 873, L.C.; 43 Digest 88, *933*.

(11) *Harrison* v. *Gardner* (1817), 2 Madd. 198; 56 E.R. 308; 43 Digest 82, *869*.

(12) *Hookham* v. *Pottage* (1872), 8 Ch.App. 91; 27 L.T. 595; 21 W.R. 47, L.JJ.; 36 Digest (Repl.) 604, *1649*.

Also referred to in argument:

Shackle v. *Baker* (1808), 14 Ves. 468; 33 E.R. 600, L.C.; 43 Digest 54, *550*.

Kennedy v. *Lee* (1817), 3 Mer. 441; 36 E.R. 170, L.C.; 43 Digest 81, *862*.

Vernon v. *Hallam* (1886), 34 Ch.D. 748; 56 L.J.Ch. 115; 55 L.T. 676; 35 W.R. 156; 3 T.L.R. 154; 43 Digest 73, *774*.

Mogford v. *Courtenay* (1881), 45 L.T. 303; 29 W.R. 864; 36 Digest (Repl.) 602, *1634*.

Appeal from a decision of the Court of Appeal (LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ.), [1895] 1 Ch. 462, affirming a decision of STIRLING, J.

Graham Hastings, Q.C., Cozens-Hardy, Q.C., and *Clare* for the appellants.

Sir Richard Webster, Q.C., Buckley, Q.C., and *G. Henderson* for the respondent.

Their Lordships took time for consideration. A

Dec. 5, 1895. The following opinions were read.

LORD HERSCHELL. (a)—A very important question, which has given rise to much difference of judicial opinion, presents itself for decision in the present case.

For some years prior to 1876 William Henry Trego, the husband of the appellant B Anna Trego, had carried on business as a varnish and japan manufacturer, at Bow and in London, under the name of Tabor, Trego & Co. In that year he took the respondent into partnership, but upon the terms that the goodwill of the business should be and remain the sole property of William Henry Trego. The partnership continued until his death. In February, 1889, a partnership agreement was made between the appellants and the respondent that they should carry on the business C under the old style of Tabor, Trego & Co., for a term of seven years. The agreement provided that the goodwill should nevertheless be and remain the sole property of Anna Trego. In December, 1894, the appellants found that the respondent had employed a clerk of the firm, out of office hours, to copy for him the names, addresses, and businesses of all the firm's customers. The respondent admits that his object in having the copy made was to acquire information which would enable D him, when the partnership came to an end, to canvass these persons and to endeavour to obtain their custom for himself. The appellants, accordingly, brought this action, and moved for an injunction to restrain the respondent from making copies of or extracts from the partnership books for any purposes other than the business of the partnership. STIRLING, J., in the course of his judgment said:

> "It has been admitted in the argument, and for the purposes of it, that the E defendant intends, in the event of the partnership coming to an end at the beginning of next year, to use this list for the purpose of soliciting the customers of the present firm. He proposes then to engage in a business of a similar nature to that carried on by the firm, and the question which I have to decide is whether he is entitled to make such use of the list."

F

It seems clear, therefore, that the point in contest before the learned judge who heard this motion was whether the respondent was entitled to make use of the list of the customers of the firm which he had obtained in order to canvass them when he started business on his own account. I mention this because it may have been open to contention on behalf of the respondent that he was at all events entitled, while he remained a partner, to make copies of the partnership books, and that it G was premature to come to the court to restrain the use of these copies even if he were not entitled when he ceased to be a partner to canvass the customers of the firm; but, in view of the fact that the respondent threatened to use the list for the purpose of canvassing the persons named therein, and having regard to the course taken before the learned judge, I think it would have been open to him to grant an injunction, though not in the terms prayed for, if the canvassing of those customers H would be a wrongful act on the part of the respondent. STIRLING, J., and the Court of Appeal had, I think, no alternative but to refuse to grant any injunction. They were bound by the decision of the Court of Appeal, in *Pearson* v. *Pearson* (2), that even though the goodwill belongs to one of the partners, it is lawful for the other, on the termination of the partnership, to canvass the customers of the firm. Consistently with that decision, I think it would have been impossible to hold that the I appellants were entitled to an injunction. That case is, however, open to review by your Lordships, and the real question in the present case is whether it was well decided.

The question whether a person who had sold the goodwill of his business was entitled afterwards to canvass the customers of that business came first before the courts for decision in *Labouchere* v. *Dawson* (3). LORD ROMILLY, M.R., answered in

(a) Between the argument of the case and the decision LORD HERSCHELL ceased to be Lord Chancellor owing to a change of government.

A the negative. He was of opinion that the principles of equity must prevail, and that persons are not at liberty to depreciate the thing which they have sold. He considered that the defendant was not entitled personally, or by letter, or by his agent or traveller, to go to anyone who was a customer of the firm, and to solicit him not to continue business with the old firm, but to transfer it to him—that this was not a fair and reasonable thing to do after he had sold the goodwill. He accord-
B ingly granted an injunction to restrain the defendant, his partners, servants, or agents, from applying to any person who was a customer of the old firm prior to the date of the sale, privately, by letter, personally, or by a traveller, asking such customer to continue to deal with the defendant and not to deal with the plaintiffs.

In *Gincsi* v. *Cooper & Co.* (4) Sir George Jessel, M.R., followed the decision in *Labouchere* v. *Dawson* (3) and expressed in very strong terms his concurrence with
C it. He granted an injunction restraining the defendants, their clerks, servants, agents, workmen, or others, from soliciting or in any way endeavouring to obtain the custom of or orders for goods similar in character to those dealt in by the old firm from such of the customers as were customers of the old firm, or from attempting to take away any portion of the business bought by the plaintiff. This was all the plaintiff in that case asked for, but the learned judge went further, and expressed
D a strong opinion that a man who sold the goodwill of his business must not only refrain from soliciting the old customers to deal with him, but must not deal with them. It was not, he said, necessary to decide it on that occasion, but he stated it because he thought what the meaning of selling the goodwill of a trade or business is should be thoroughly understood. In *Leggott* v. *Barrett* (5), which came before the same learned judge shortly afterwards, he acted upon the same view, and ex-
E tended the injunction to restrain the defendant from dealing with the customers of the old firm. From this judgment there was an appeal; but the appellant confined his appeal to that part of the order which restrained him from dealing with the customers of the old firm. He made no objection to the injunction so far as it restrained him from canvassing those customers. The Court of Appeal dissolved that part of the injunction of which the appellant complained. They thought they
F could not on any just principle prevent the defendant from supplying a man with goods if he applied to him; that there was no implied obligation upon him either legal or moral to shut his door against a customer who came to him of his own free will; that a sale of goodwill did not involve an implied contract not to deal with any customers of the old business, the goodwill of which was sold. The case is chiefly important for present purposes, in so far as it discloses the view taken by the learned
G judges who on that occasion constituted the Court of Appeal on the point now under consideration.

In *Pearson* v. *Pearson* (2), to which I shall have occasion to refer immediately, Cotton, L.J., stated that the decision in *Labouchere* v. *Dawson* (3) was doubted in *Leggott* v. *Barrett* (5) by James, L.J., and himself. This is no doubt correct so far as Cotton, L.J., is concerned, but I am unable to find any very clear indication that
H this was the view of James, L.J. It is quite true that in an early part of his judgment he said (15 Ch.D. at p. 309):

> "I do not like going much into the case because what I should say might, perhaps, be considered to mean that the injunction which is submitted to is too wide."

I But in a latter part of the judgment he says (ibid. at p. 310):

> "At first it did appear to me that we might, from the equitable view of the case, say that the defendant should be prevented from dealing with any customer or customers whom he had solicited; but it appeared to me that that was too vague and too wide."

He pointed out that a man might give the order afterwards without any reference to previous solicitation. Further on, when discussing the effect of the agreement, and showing that there was no implied obligation not to deal with the customer, he

says (ibid. at p. 311): "It means that you are not to solicit customers." The impression produced upon my mind by the whole of the judgment is that the learned judge had not arrived at the conclusion that *Labouchere* v. *Dawson* (3) was wrong. BRETT, L.J., expressed a decided approval of that decision. He was of opinion that on the sale of a goodwill for a valuable consideration there was an implied contract that the vendor would not solicit former customers who were really the people who formed the goodwill.

The next case in which the matter was brought under consideration of the Court of Appeal was *Walker* v. *Mottram* (6). In that case the goodwill of the business carried on by a bankrupt had been sold by his trustees in bankruptcy. It was sought afterwards to restrain the bankrupt from soliciting the customers of that business. SIR GEORGE JESSEL, M.R., refused to grant an injunction on the ground that the doctrine laid down in *Labouchere* v. *Dawson* (3) did not apply to the case of a bankrupt whose business had been sold by his trustees. This judgment was affirmed by the Court of Appeal. Of the lords justices who then constituted the court, BAGGALLAY, L.J., expressed a strong doubt as to the correctness of the decision in *Labouchere* v. *Dawson* (3). He said that it appeared to him as at present advised that it went far beyond what any of the previous decisions would have sanctioned. LUSH and LINDLEY, L.JJ., the other members of the court, said that the rule laid down in *Labouchere* v. *Dawson* (3), had, it was believed, been recognised and acted upon in practice, and whatever else might be said of it the rule was in accordance with the general opinion of what was fair and right, and was easily applied in practice.

In *Pearson* v. *Pearson* (2) the question came again before the Court of Appeal. The facts were there less favourable to the plaintiff than in *Labouchere* v. *Dawson* (3), and BAGGALLAY and LINDLEY, L.JJ., both considered that, even if *Labouchere* v. *Dawson* (3) was rightly decided, the case then before them was not governed by it. BAGGALLAY and COTTON, L.JJ., however, distinctly rested their judgments on the ground that the decision in *Labouchere* v. *Dawson* (3) was wrong, and ought to be overruled. LINDLEY, L.J., on the other hand, was of opinion that it was rightly decided. The reason of BAGGALLAY, L.J., for dissenting from *Labouchere* v. *Dawson* (3), so far as it is disclosed by the report of his judgment, appears to be that it went beyond a number of decisions of a higher court, and, as he thought, without sufficient reason. Even assuming that the decision in *Labouchere* v. *Dawson* (3) went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions. COTTON, L.J., examined the earlier decisions, and arrived at the conclusion that LORD ELDON was against the notion that the vendor of the goodwill of a business was, in the absence of express contract, to be restrained from carrying on a similar business in the way in which he might lawfully carry it on if there had been no sale of the goodwill. The learned lord justice pointed out that LORD ROMILLY, M.R., rested his decision in *Labouchere* v. *Dawson* (3) on the principle that a man could not derogate from his grant. He said (27 Ch.D. at p. 157):

> "But it is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business, yet such proceedings manifestly tend to prevent the old customer from going to the old place. I cannot see where to draw the line. If he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so? I think it would be wrong to put such a meaning on 'goodwill' as would give a right to such an injunction as has been granted in the present case."

I propose now to examine the older authorities. I may state at once, however, that I can find nothing in them inconsistent with the decision in *Labouchere* v. *Dawson* (3). It no doubt went beyond them, inasmuch as it dealt with a question

not determined by them, but this seems to me to be no demerit, nor to afford any indication that it was wrong. The earliest case which has any bearing upon the point is that of *Crutwell* v. *Lye* (1), before LORD ELDON. The business of a bankrupt, who was a carrier between Bristol and London, had been sold by his assignees in bankruptcy. He afterwards commenced carrying on the trade of a carrier between Bristol, Bath, and London, but though the termini were the same the route employed was different. He addressed direct solicitation to the public for the carriage of their goods, stating that he had been reinstated in his business, and there was further, in the opinion of the Lord Chancellor, so much probability of direct solicitation to the customers of the old concern, in some few instances, that the fact might fairly be assumed. Under these circumstances the purchaser of the bankrupt's business applied for an injunction. The case was therefore the same as *Walker* v. *Mottram* (6) where SIR GEORGE JESSEL, M.R., than whom no one has more strongly insisted upon the propriety of the decision in *Labouchere* v. *Dawson* (3), was of opinion that no injunction should be granted. The bankrupt was no party to the contract of sale; there could, therefore, be no implied contract on his part to be derived from it.

It is most material also to observe what was the question relating to the nature of the injunction then claimed. It was whether the bankrupt was to be restrained from carrying on the trade which he was pursuing of carrying goods between Bristol, Bath, and London. The Lord Chancellor held that he could not be so restrained, and I think it must now be taken as settled that the sale of the goodwill of a business, even when the vendor himself is a party to the contract, does not impose upon him any obligation to refrain from carrying on a trade of the same nature as before. But LORD ELDON certainly did not decide that such a vendor was entitled to solicit the customers of the old firm. He was not asked for an injunction to restrain the defendant from so doing. It was sufficient for the decision of that case that, in the opinion of the Lord Chancellor, there was no principle arising out of the provisions of the bankruptcy law upon which the court could hold that the bankrupt ought not to engage in the same trade and by the same road as before, though I think that, so far, the opinion of the Lord Chancellor would have been the same if the sale of the business had been effected by the bankrupt himself, and not by his assignees. The importance of the case consists in the definition which LORD ELDON gave of the goodwill there sold. He said (17 Ves. at pp. 346, 347):

> "The goodwill which has been the subject of the sale is nothing more than the probability that the old customers will resort to the old place. Fraud would form a different consideration, but if that effect was prevented by no other means than those which belong to the fair course of improving a trade in which it was lawful to engage I should, by interposing, carry the effect of my injunction to a much greater length than any decision has authorised or imagination suggested."

These observations were much relied on by COTTON, L.J., in *Pearson* v. *Pearson* (2). If the language of LORD ELDON is to be taken as a definition of goodwill of general application, I think it is far too narrow, and I am not satisfied that it was intended by LORD ELDON as an exhaustive definition. In *Churton* v. *Douglas* (7), WOOD, V.-C., said (John. at p. 188):

> " 'Goodwill', I apprehend, must mean every advantage, every positive advantage, if I may so express it, as contrasted with the negative advantage of the late partner not carrying on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business."

The learned Vice-Chancellor pointed out in this connection that it would be absurd to say that when a large wholesale business is conducted, the public are mindful whether it is carried on in Fleet Street or in the Strand. The question, what is

meant by "goodwill," is, no doubt, a critical one. Sir George Jessel, M.R., discussing in *Ginesi* v. *Cooper & Co.* (4), the language of Wood, V.-C., which I have just quoted, said (14 Ch.D. at p. 600):

> "Attracting customers to the business is a matter connected with the carrying on of it. It is the formation of that connection which has made the value of the thing that the late firm sold, and they really had nothing else to sell in the shape of goodwill."

He pointed out that, in the case before him, the connection had been formed by years of work. The members of the firm knew where to sell the stone, and he asks:

> "Is it to be supposed that they did not sell that personal connection when they sold the trade or business and the goodwill thereof?"

The present Master of the Rolls [Lord Esher] took much the same view as to what constitutes the goodwill of a business.

I cannot myself doubt that they were right. It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has acquired a goodwill. The former trader has to seek out his customers from among the community as best he can. The latter has a custom ready made. He knows what members of the community are purchasers of the articles in which he deals, and are not attached by custom to any other establishment.

What obligations, then, does the sale of the goodwill of a business impose upon the vendor? I do not think that they would necessarily be the same under all circumstances. In *Cook* v. *Collingridge* (8), Lord Eldon, L.C., had to determine what orders were to be given where a partnership had expired by effluxion of time, and where the goodwill had to be valued. He declared that there existed no obligation upon the partners to restrain them from carrying on the same trade, or any of them wanting to do so; that a claim to have an estimated value put upon any subject that could be considered as described by the term "goodwill" could not be supported upon the same grounds or principles as those on which a value was received from a partner buying the share of the partner going out of the business and retiring from the trade altogether. He thought that all that could be valued was the chance of the customers adhering to the old establishment notwithstanding that the previous partners or any of them carried on a similar business elsewhere.

In *Johnson* v. *Hellely* (9) a bill was filed by the surviving partner to wind-up the business of the partnership. The usual decree was made. The chief clerk certified that it was most beneficial that the business should be sold as a going concern. The Master of the Rolls ordered it to be stated in the advertisement and particulars that the surviving partner would be at liberty to continue carrying on the business of a wine merchant in the same town and place. This judgment was affirmed by the lords justices.

In *Hall* v. *Barrows* (10), Lord Westbury, L.C., said (4 De G.J. & Sm., at p. 159):

> "I think the direction to value the goodwill should be accompanied by a declaration defining what is meant by it, at least negatively—that is to say, that a declaration that the goodwill is not to be valued upon the principle that the surviving partner, if he were not the purchaser, will be restrained from setting up the same description of business."

In cases of this description, where a partnership has been dissolved by effluxion of time or death, the goodwill is regarded as a part of the assets, and subject, therefore, to realisation on winding-up the partnership; but it would obviously be absurd that, because a partnership becomes thus dissolved, those who formerly constituted the firm, or the survivors thereof where the dissolution has been due to death, should

thereafter be restrained from carrying on what trade they pleased. Whatever restriction the sale of the goodwill may impose, it is clear that in this class of cases it could not extend to prevent the former partners carrying on a similar trade to that in which they were previously engaged. It is noteworthy that in *Johnson* v. *Hellely* (9) it was thought necessary to warn intending purchasers that, though the goodwill was being sold, one of the persons who had previously carried on the business might continue to trade in the same town, and LORD WESTBURY thought it necessary to give the same warning to the person who was to value the goodwill in *Hall* v. *Barrow* (10).

These circumstances appear to me to afford an indication that the courts recognised that their view of what was meant by "goodwill" and the effect of a sale of it differed from the popular conception. Where the goodwill of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that whenever the goodwill of a business is sold the vender does not, by reason only of that sale, come under a restriction not to carry on a competing business.

This is really the strong point in the position of those who maintain that *Labouchere* v. *Dawson* (3) was wrongly decided. COTTON, L.J., says (27 Ch.D. at p. 157):

> "It is admitted that a person who has sold the goodwill of his business may set up a similar business next door, and say that he is the person who carried on the old business. Yet such proceedings manifestly tend to prevent the old customers from going to the old place. I cannot see where to draw the line; if he may, by his acts, invite the old customers to deal with him and not with the purchaser, why may he not apply to them and ask them to do so."

I quite feel the force of this argument, but it does not strike me as conclusive. It is often impossible to draw the line and yet possible to be perfectly certain that particular acts are on one side of it or the other. It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, among the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them, to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the goodwill, and an endeavour to destroy it. If a person who has previously been partner in a firm sets up in business on his own account and appeals generally for custom, he only does that which any member of the public may do, and that which those carrying on the same trade are already doing. It is true that those who were former customers of the firm to which he belonged may, of their own accord, transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the persons to whom it has been sold, and to restore it to himself.

It is said, indeed, that he may not represent himself as a successor of the old firm, or as carrying on a continuation of their business; but this, in many cases, appears

to me of little importance, and of small practical advantage if canvassing the customers of the old firm were allowed without restraint. I do not think that in cases where an injunction was granted in terms employed in *Labouchere* v. *Dawson* (3) there would be any real difficulty in drawing the line and determining whether there had been a breach of it or not. In several cases such injunctions were granted, and there is nothing to show that any practical difficulty arose in enforcing them. It is not material to consider whether, on the sale of a goodwill, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity.

I have dealt with the case as if the goodwill had been sold, but I think that the rights and obligations must be precisely the same, for present purposes, when, on the creation of a partnership, it has been agreed that the goodwill shall belong exclusively to one of the partners. For these reasons I think the judgment must be reversed, and that an injunction should be granted in the form adopted in *Labouchere* v. *Dawson* (3), with the modification rendered necessary by the circumstances that here the partnership has not yet expired. The respondent must repay to the appellants the costs which the Court of Appeal ordered them to pay to him. Lord Ashbourne, who is unable to be present today, concurs in the opinion which I propose to your Lordships.

LORD MACNAGHTEN.—The question for the House to determine is this. Is a person who has sold the goodwill of his business, or one in the position of the respondent, who has been taken into partnership upon the terms that, on the expiration of the partnership, the goodwill shall belong solely to his partner, at liberty to solicit the old customers of the business to give their custom in preference to him? In 1872 Lord Romilly, M.R., decided the question in the negative in *Labouchere* v. *Dawson* (3). In 1884 the question was determined the other way by the Court of Appeal in *Pearson* v. *Pearson* (2); and *Labouchere* v. *Dawson* (3) was overruled by Bagallay and Cotton, L.JJ., differing from Lindley, L.J., who thought Lord Romilly's decision right.

In *Labouchere* v. *Dawson* (3) the question arose out of a sale of goodwill. In the present case there is a subsisting partnership between the appellants and the respondents in the business of varnish manufacturers. One of the terms of the partnership is that the goodwill "shall be and remain the sole property" of the appellant Anna Trego. The partnership will expire on Jan. 1, 1896. The business is extremely lucrative, the connection very large. The respondent is, or was when this action was commenced, employing one of the clerks in copying out the names and addresses of the customers of the firm, with the avowed intention of soliciting their custom as soon as the partnership expires. The object of the action was to obtain an injunction to restrain this proceeding on the part of the respondent. It is not necessary to consider whether the action at the outset was or was not open to objection on technical or other grounds. For this much, at least, is to be said in favour of the respondent—that he met the case fairly and frankly from the very first, without any attempt to embarrass the plaintiff or to conceal his own object. His case was: "The law allows it." There was, indeed, or there seemed to be at the last moment, if I am not doing an injustice to the respondent, an attempt on his part to recede from the position which up to that time he had maintained, and to suggest difficulties in the way of any judgment in favour of the appellants. But I am quite sure that your Lordships will not for a moment listen to such a suggestion after the case has been fought out in all the courts on the real issue between the parties.

After the observations of my noble and learned friend on the woolsack I do not

think it necessary to deal with the question at any length. The arguments on the one side and on the other are summed-up in *Labouchere* v. *Dawson* (3) and *Pearson* v. *Pearson* (2), and little remains but to choose between the conflicting views of very eminent lawyers. Nor do I think it necessary to do more than allude to the case in which SIR GEORGE JESSEL, M.R., held that a person who had sold the goodwill of his business could not even deal with his former customers: *Leggott* v. *Barrett* (5). There I think the Master of the Rolls went too far. The decision touched on the rights of the public. On the other hand, the Master of the Rolls was, I think, clearly right in refusing to extend the principle of *Labouchere* v. *Dawson* (3) to a sale in bankruptcy: *Walker* v. *Mottram* (6). There is, I think, all the difference in the world between the case of a man who sells what belongs to himself and receives the consideration and a man whose property is sold without his consent by his trustee in bankruptcy, and who comes under no obligation, express or implied, to the purchaser from the trustee.

PLUMER, V.-C., in *Harrison* v. *Gardner* (11), in 1817, said (2 Madd. at p. 219):

> "A person not a lawyer could not imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and honest understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might the next day deprive the vendee. The authorities, however, are strong to show that the sale of a goodwill does not import restraint, and that a person selling the goodwill of a business for however large a consideration is not prevented setting up the trade."

I agree, in substance, with the Vice-Chancellor's observations.

What "goodwill" means must depend on the character and nature of the business to which it is attached. Generally speaking it means much more than what LORD ELDON took it to mean in the particular case before him, in *Crutwell* v. *Lye* (1), where he says (17 Ves. at p. 346):

> "The goodwill, which has been the subject of sale, is nothing more than the probability that the old customers will resort to the old place."

Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work, or gained by lavish expenditure of money. I do not think that "a person not a lawyer," to use the Vice-Chancellor's phrase, would suppose that a man might sell the goodwill of his business and then set to work to withdraw from the purchaser the benefit of his purchase. However, authorities, which it is now too late to question, do undoubtedly show that a man who has sold the goodwill of his business may do much to regain his former position, and yet keep on the windy side of the law. The common law has always been jealous of any interference with trade. It was a lighter matter to interfere with freedom of contract and avoid covenants under seal. And so, the common law being the final arbiter on these questions, too little attention perhaps was paid to what was fair and just between man and man. A person who has sold the goodwill of his business is under no obligation to retire altogether from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is common to all cases, he is free to set up in business wherever he chooses.

But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must

not make his approaches from the vantage ground of his former position He may not sell the custom and steal away the customers. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality. Is it conceivable that the respondent would ever have been taken into partnership if he had hinted at such a manœuvre while negotiations for a partnership were pending? It was said that you cannot draw the line; but I think the line may be drawn at this point. It is quite true that you cannot protect the purchaser completely. With LINDLEY, L.J., I regret it. It is quite true that it would be better that he should protect himself by taking apt covenants from the person with whom he is dealing. But this, I think, is rather a counsel of perfection than a reason for leaving the purchaser entirely at the mercy of the vendor.

The principle on which *Labouchere* v. *Dawson* (3) rests has been presented in various ways. A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant on the sale of goodwill that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. These, as it seems to me, are only different turns and glimpses of a proposition which I take to be elementary. It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price, and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own. I am of opinion that the appellants are entitled to judgment.

LORD DAVEY.—This appeal comes before your Lordships in a somewhat unsatisfactory form. The plaintiffs and the defendant are partners together for a term which will expire on Jan. 1, 1896. On the expiration of the partnership the goodwill of the trade or business will be the sole property of the plaintiff, Anna Trego. The notice of motion asked that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion, the relief asked was misconceived. As well under the general law as under the express provision of the articles of partnership the defendant was entitled during the partnership to have access to the books and to make copies thereof or extracts therefrom. It is conceivable that, if the defendant proposed to use such extracts for purposes injurious or hostile to the interests of his firm, he might be restrained from so doing. But in such case it would not be the obtaining of the information, but the use the partner proposed to make of it when obtained, which would be restrained. In my opinion, the plaintiffs have no right to prevent the defendant from making any extracts from the books he thinks fit. Indeed, in the present case, as was observed at the Bar, the list of the creditors of the firm would be of service to the defendant if the law as laid down in *Labouchere* v. *Dawson* (3) be maintained, in order to enable him to know whom he may not solicit, and to keep himself within the law. It was, however, admitted that the defendant intends after the expiration of the partnership to set up a business on his own account similar to that carried on by his firm, and he claims the right, if he thinks fit to do so, to solicit custom for his own business from the customers of his present firm. The question which has been argued before your Lordships is whether he has any such right.

Upon this question there has been a remarkable difference of judicial opinion. The defendant has contracted for valuable consideration that, at the expiration of the partnership, the goodwill shall belong to the plaintiff, Anna Trego. To the lay mind it would undoubtedly seem a remarkable state of the law that a person who has entered into such a contract should be at liberty to go to the customers of the old firm and solicit them not to deal with the plaintiff, but to deal with him, and thus endeavour to secure for himself the business connection which he has contracted shall belong to the plaintiff. But it would probably seem to the lay mind equally remarkable that a man who has sold a business and goodwill to another

A should be at liberty to set up a similar business on his own account in the same street next door, or opposite to the premises on which the business he has sold was and is carried on—nay, more, that he may advertise himself as having been a partner in or the founder or the manager of the business which he has sold, provided that he does not represent that the business which he is carrying on is the same identical business with that which he has sold. Yet it is well settled that he may do B all this.

It has been established by a series of cases that in the sale of a goodwill or business no covenant is implied that the vendor will not start a new business in opposition to the purchaser of the old business. It is enough to refer to *Crutwell* v. *Lye* (1), *Churton* v. *Douglas* (7), *Johnson* v. *Hellely* (9), and the dicta in *Hookham* v. *Pottage* (12). An express covenant not to carry on business would be incapable of C being enforced as a restraint of trade if it was larger than the necessity of the case, having regard to the particular character of the business, demanded, or perhaps unless it was restricted in some way either in time or space. It seems to follow that a general covenant not to carry on business in competition with the purchaser, which would be invalid if expressed, cannot be implied. I think it is to be gathered from dicta and expressions used by learned judges in the Court of Chancery that D the idea of goodwill and of what is comprised in the sale of a business has silently been developed and grown since the days of Lord Eldon, who, in one passage of his judgment in *Crutwell* v. *Lye* (1), seemed to regard goodwill as only the habit of customers to resort to the old premises. In *Labouchere* v. *Dawson* (3), Lord Romilly, M.R., granted an injunction against the vendor of the goodwill of a brewery from applying to any person who was a customer of the old firm prior to the date of E the sale

> "privately by letter, personally, or by a traveller, asking such customer to continue to deal with the vendor, or not to deal with the purchasers."

The judgment was based on the principle that a man cannot derogate from his own F grant; that he cannot sell a thing and destroy the value of it. It was admitted in the judgment that a man may solicit customers in any public manner he pleased.

It is agreed on all hands that the decision in *Labouchere* v. *Dawson* (3) went considerably beyond the cases relating to goodwill decided before that time. In *Ginesi* v. *Cooper & Co.* (4), Sir George Jessel, M.R., expressed himself as prepared to extend the injunction so as to prohibit the vendor from dealing with the customers; G and in *Leggott* v. *Barrett* (5) he granted an injunction to that effect, but that part of the order was reversed in the Court of Appeal, and I understand that no such order is now asked for at the Bar. I may remark, in passing, that the injunction in *Ginesi* v. *Cooper* (4) went far beyond the order in *Labouchere* v. *Dawson* (3) and to an extent which, in my opinion, cannot in any event be supported. It restrained the defendant

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> "from in any way endeavouring to obtain the custom of such of the customers of the petitioner as were customers of the old firm, or from attempting to take away any portion of the business bought by the petitioner."

This form of order would prevent the defendant from issuing public advertisements or carrying on business in competition with the petitioner, as it is admitted he I may do.

In *Leggott* v. *Barrett* (5) there was no appeal against that part of the order, which simply followed *Labouchere* v. *Dawson* (3). It was, therefore, unnecessary for the court to express any opinion upon it. The present Master of the Rolls [Lord Esher], however, expressed his approval of the doctrine. James and Cotton, L.JJ., did not express any approval of it, and I think it may be inferred from the judgments that Cotton, L.J., certainly, and James, L.J., possibly, were not prepared to do so. In *Pearson* v. *Pearson* (2) Baggallay and Cotton, L.JJ., expressed

their dissent from *Labouchere* v. *Dawson* (3), and overruled it, while LINDLEY, L.J., expressed his approval of it. A

The present case is in substance an appeal from *Pearson* v. *Pearson* (2). On the argument of this case at your Lordships' Bar it certainly appeared to me that the logical result of the principle upon which I understand *Labouchere* v. *Dawson* (3) to be founded would be to restrain the vendor of the goodwill of a business from carrying on business in competition with the purchaser at all. Your Lordships were not asked to take that course. And, having regard to the well-established doctrine against restraint of trade, it would be impossible, as I have already said, to imply such a general covenant. I doubted whether it was right, if you allowed the vendor to trade in competition, to impose fetters upon him which might prevent his doing so effectually or successfully. I was also struck with the vagueness and difficulty of applying the injunction as granted in *Labouchere* v. *Dawson* (3). Questions may arise as to the persons to be comprised under the designation of customers. The injunction also may operate most unequally. In a business of a special character it might practically prevent the defendant from carrying on business at all, whereas, in a business of a different character, it might have very little effect. B C

Further consideration, however, has satisfied me that the decision in *Labouchere* v. *Dawson* (3), although it does not go so far as I think would be abstractedly just, is founded on a right principle, and the difficulty of doing complete justice should not prevent us from meting out such scanty measure of protection to the purchaser of a goodwill as the circumstances permit of, and although the difficulties I have pointed out exist they are not insuperable or (probably) formidable in practice. The question whether any person is a customer within the meaning of the injunction is one of fact to be ascertained when it arises. I have had the opportunity of reading the opinion which has been delivered by LORD HERSCHELL, and I desire to express my concurrence in the reasoning upon which it is founded. In particular, I think that the principle on which the injunction asked for may be supported is that the defendant is availing himself of the knowledge of the connection formed by his old firm to take away or to depreciate the value of the goodwill and connection which he has contracted shall belong to the plaintiff. I agree as to the form of the injunction, and also as to the costs. D E F

Appeal allowed.

Solicitors: *Miller, Wiggins & Naylor; H. J. Mannings.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re DAVID AND MATTHEWS

[CHANCERY DIVISION (Romer, J.), December 15, 1898, January 24, 1899]

[Reported [1899] 1 Ch. 378; 68 L.J.Ch. 185; 80 L.T. 75; 47 W.R. 313]

Partnership—Dissolution—Death of partner—Valuation of assets—Goodwill—Basis of valuation.

Partnership articles provided, in effect, that on the death of one or two partners all the assets should be valued and purchased by the surviving partner.

Held: the goodwill formed part of the partnership assets and ought to be valued on the footing that, if the business were sold, the surviving partner would be at liberty to carry on a rival business, but could not use the name of the partnership firm nor solicit the customers of the old firm.

Notes. Distinguished: *Burchell* v. *Wilde* (1900), 48 W.R. 491. Referred to: *Gillingham* v. *Beddow*, [1900] 2 Ch. 242; *Re Leas Hotel Co., Salter* v. *Leas Hotel Co.*, [1902] 1 Ch. 332; *Hill* v. *Fearis*, [1905] 1 Ch. 466; *Pomeroy* v. *Scalé* (1906), 22 T.L.R. 795.

As to goodwill of partnership, see 28 HALSBURY'S LAWS (3rd Edn.) 580; and for cases see 36 DIGEST (Repl.) 602 et seq.

Cases referred to:

(1) *Jennings* v. *Jennings* [1898] 1 Ch. 378; 67 L.J.Ch. 190; 77 L.T. 786; 46 W.R. 344; 14 T.L.R. 198; 42 Sol. Jo. 234; 36 Digest (Repl.) 602, *1639*.

(2) *Hammond* v. *Douglas* (1800), 5 Ves. 539; 31 E.R. 726, L.C.; 36 Digest (Repl.) 624, *1863*.

(3) *Turner* v. *Major* (1862), 3 Giff. 442; 5 L.T. 600; 8 Jur.N.S. 909; 10 W.R. 243; 66 E.R. 483; 36 Digest (Repl.) 605, *1664*.

(4) *Taylor* v. *Neate* (1888), 39 Ch.D. 538; 57 L.J.Ch. 1044; 60 L.T. 179; 37 W.R. 190; 4 T.L.R. 748; 36 Digest (Repl.) 594, *1518*.

(5) *Lewis* v. *Langdon* (1835), 7 Sim. 421; 4 L.J.Ch. 258; 58 E.R. 899; 36 Digest (Repl.) 603, *1643*.

(6) *Robertson* v. *Quiddington* (1860), 28 Beav. 529; 54 E.R. 469; 43 Digest 87, *920*.

(7) *Webster* v. *Webster* (1791), 3 Swan. 490, n.; 36 E.R. 949, L.C.; 36 Digest (Repl.) 492, *602*.

(8) *Banks* v. *Gibson* (1865), 34 Beav. 566; 6 New Rep. 373; 34 L.J.Ch. 591; 29 J.P. 629; 11 Jur.N.S. 680; 13 W.R. 1012; 55 E.R. 753; 36 Digest (Repl.) 603, *1644*.

(9) *Trego* v. *Hunt*, ante p. 804; [1896] A.C. 7; 56 L.J.Ch. 1; 73 L.T. 514; 44 W.R. 225; 12 T.L.R. 80, H.L.; 36 Digest (Repl.) 564, *1231*.

(10) *Levy* v. *Walker* (1879), 10 Ch.D. 436; 48 L.J.Ch. 273; 39 L.T. 654; 27 W.R. 370, C.A.; 36 Digest (Repl.) 603, *1648*.

(11) *Johnson* v. *Helleley* (1864), 2 De G.J. & Sm. 446; 5 New Rep. 211; 34 L.J.Ch. 179; 11 L.T. 581; 13 W.R. 220; 46 E.R. 447, L.JJ.; 43 Digest 82, *865*.

(12) *Pearson* v. *Pearson* (1884), 27 Ch.D. 145; 54 L.J.Ch. 32; 51 L.T. 311; 32 W.R. 1006, C.A.; 43 Digest 85, *898*.

Case Stated pursuant to s. 19 of the Arbitration Act, 1889 [see now s. 21 of the Arbitration Act, 1950].

M. Letricheux and Edmond David carried on business in Swansea as coal merchants, coal brokers, and commission agents, under the style or firm of "Letricheux and David" up to the death of M. Letricheux, on Dec. 25, 1876. After M. Letricheux's death Edmond David and Richard John Matthews entered into partnership under articles of partnership dated Mar. 23, 1877, which provided that the style of the firm should be "Letricheux and David", and further provided:

"8. In case of the death of one of the partners a general account of the position shall be made, including all effects and securities of whatsoever nature

that they possess, and the value of such effects and securities be estimated as at the date of such decease. Two appraisers shall be appointed to fix the value of the effects and securities, one by the surviving partner, the other by the lawful heirs of the deceased; and if these two do not agree, they must appoint a third person whose decision shall be final. 9. The portion decided upon as belonging to the heirs of the deceased partner cannot be withdrawn from the business before three years from the date of the said decease, but during this time the heirs shall have a right to half of the share of the profits which would have belonged to the deceased partner."

In addition to the business formerly carried on by the original firm of Letricheux and David, Edmond David and R. J. Matthews engaged in the business of ship managers and ship brokers. The partnership between Edmond David and R. J. Matthews continued until the death of Edmond David intestate on Mar. 11, 1896. After his death it was agreed between Louise David, his administratrix, and R. J. Matthews that, in lieu of having two appraisers as provided by art. 8 of the articles of partnership, one person should act as sole appraiser and arbitrator, and they appointed R. G. Cawker to make a general account of the position of the partnership business at the date of the death of Edmond David.

It was contended before the arbitrator by Louise David that the business had a goodwill, and that in estimating the value of the effects and securities belonging to the partnership he ought to set a value on such goodwill; and it was contended by R. J. Matthews that there was not any goodwill attached to the business, and that, even if there was any such goodwill, it was not a subject which ought to be valued by the arbitrator. The following questions were submitted for the opinion of the court: (i) Whether under art. 8 of the articles of partnership the arbitrator ought to consider the question of goodwill, and set a value upon the goodwill (if any) which he might consider to have been attached to the business at the death of Edmond David; (ii) whether or not, in considering the question of goodwill, the arbitrator should appraise the value (if any) on the footing that if it were sold, R. J. Matthews would be at liberty to carry on a rival business, but without any right to solicit any person who was a customer of the old firm prior to the death of Edmond David to continue to deal with R. G. Matthews or not to deal with the purchaser, and whether or not he should appraise such value (if any) on the footing that, if it were sold, R. J. Matthews would not be entitled to carry on business under the name of Letricheux and David, or on what other footing he should appraise such value, if any.

Farwell, Q.C., and *T. Bateman Napier* for Louise David.
Christopher James for R. J. Matthews.

ROMER, J.—With regard to the first question submitted for my opinion, I do not think there is any real difficulty. Articles 8 and 9 of the partnership agreement constituted in substance a contract for sale of the partnership assets to the surviving partner. This being so, then on principle and on the authorities cited I am of opinion that, as the goodwill formed part of the effects of the partnership at the death of Edmond David, it ought to be valued. The authorities were so fully cited and discussed in the recent case of *Jennings* v. *Jennings* (1), before STIRLING, J., that I need not again review them; and, indeed, I do not suppose that the surviving partner in the case before me would admit that the share or interest of the deceased partner in the goodwill had not passed to him, bearing in mind what the effect of such an admission might be. I ought perhaps to add, with reference to an argument addressed to me based on the special provisions of art. 9 of the partnership agreement, that I cannot gather from that article that the share of profits payable to the representatives of the deceased partner was given in lieu of payment of that partner's share of goodwill. The more natural inference is that the share of profits was given in lieu of interest on the deceased partner's portion allowed to remain in the business.

With regard to the second question, I feel more difficulty. I think that the goodwill ought to be valued on the footing of the consideration of what its value would have been to the partnership if there had been no contract between the partners that the surviving partner should purchase the share of the deceased partner in the partnership effects and securities, and therefore, on the footing that if it were sold the surviving partner would be at liberty to carry on a rival business, but also, I think, on the footing that he could not use the name of the partnership firm of Letricheux and David, and would not have the right to solicit the old customers of the firm.

I will take the case of a partnership of the ordinary kind determined by the death of one partner, and will consider what the rights of the deceased partner would be. The goodwill of the business would be an asset, and might well be the most valuable asset, of the partnership. The executors would, therefore, in the absence of special provision in the partnership contract, be entitled to require that the goodwill should be sold, together with the other assets, for the purposes of division between the executors and the surviving partner, and, if the surviving partner refused to carry out this implied contract, then the executors could, by an action in the Chancery Division obtain an order for the sale of the goodwill under the direction of the court. This is now well settled, though at one time it was considered and had been decided (see *Hammond* v. *Douglas* (2)) that the goodwill survived for the benefit of the living partner. And in the meantime, pending the sale, I think the surviving partner would not be allowed to appropriate to himself the goodwill which belonged to the partnership: see *Turner* v. *Major* (3). In that case, which was one of dissolution by agreement between living partners, there was a special agreement that the goodwill should be sold. But I can see no difference in principle, so far as concerns the point I am now dealing with, between a special contract that the goodwill should be sold and the contract implied by the court in ordinary cases of partnership; see also *Taylor* v. *Neate* (4). In *Lewis* v. *Langdon* (5) (7 Sim. at p. 425) there are some observations of SHADWELL, V.-C., which would seem to imply that he regarded a surviving partner as being under no obligation to the legal personal representatives of a deceased partner to preserve the goodwill, but those observations must, I think, be regarded as based on the above-mentioned case of *Hammond* v. *Douglas* (2), which at that time was probably regarded as representing the law on the subject of goodwill.

If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the partnership business, it follows that he ought not to do—and in case of necessity would be restrained by the court pending a sale of the goodwill for the benefit of the partnership from doing—any act in excess of his rights which, if not stopped, would enable him to obtain the goodwill or any part of it. For example, though a surviving partner is within his rights in carrying on a similar or rival business, he could in my opinion be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business. In saying this, I am not considering special cases of difficulty which might arise if the name of the surviving partner was exactly the same as that of the partnership firm, and he was doing nothing else which might injure the goodwill beyond carrying on a similar business in his own name, but am only dealing with ordinary cases. In those cases which at first sight might appear to conflict with the view I have expressed, it will be found on examination that, so far as not overruled, they do not really conflict.

I need not again refer to the cases of *Hammond* v. *Douglas* (2) and *Lewis* v. *Langdon* (5), or refer in detail to cases or observations in cases—as in *Robertson* v. *Quiddington* (6) (28 Beav. at p. 536)—based on the erroneous supposition that *Hammond* v. *Douglas* (2) was a binding authority. As to *Webster* v. *Webster* (7), that was not a case where the executors of the deceased partner were seeking to protect the goodwill, but was an application by them to restrain the

surviving partner from using the name of the firm, based merely on the ground (obviously untenable) that thereby the estate of the deceased partner might be made liable. With regard to *Banks* v. *Gibson* (8), it was a case, according to the view of the judge who decided it, where co-partners had agreed on dissolution to divide the assets, including the goodwill, so as to allow either partner to use the name of the partnership firm.

I know of no other case bearing on the point which calls for special comment. It is true I cannot find any case directly establishing the right of the executors of a deceased partner, in order to protect the goodwill, to an injunction to restrain the surviving partner from carrying on business in the name of the partnership firm. But that is not extraordinary when it is considered that up to comparatively recent times it was considered that the right to the goodwill belonged to the surviving partner, and that it is only recently that the importance of goodwill and the necessity of preventing its improper appropriation has been fully recognised, and I may refer, as illustrating this, to the very recent important decision of the House of Lords in *Trego* v. *Hunt* (9). And, bearing in mind that in ordinary cases of dissolution of partnership by death of one partner there is implied a right to have the goodwill sold, which would have to be carried out by an assignment of the goodwill to the purchaser, it is pertinent to refer to what JAMES, L.J., said in *Levy* v. *Walker* (10) (10 Ch.D. at p. 448), that without any doubt on his part the assignment of the goodwill of a business conveyed the right to use the name of the business sold, and the exclusive right to use the name as between vendor and purchaser. It further appears to me to follow that, in considering the value of the goodwill, it should be appraised on the footing that the surviving partner would not be at liberty to solicit customers of the old firm, for, if the goodwill had been sold in the ordinary way on the death and had been assured to the purchaser, it is clear since *Trego* v. *Hunt* (9) that the surviving partner, who would have been one of the vendors, could not injure the goodwill sold by soliciting the customers of the old firm. And see *Jennings* v. *Jennings* (1), and, while referring to that case, I desire to add a few observations on the point mentioned by STIRLING, J. ([1898] 1 Ch. at pp. 389, 390), and which occasioned him some doubt. In cases of sale of a business by the court for the purpose of winding-up a partnership it has been the practice to provide by the particulars of sale that the sale would not prevent other persons previously interested in the business, or their representatives, from carrying on a like business. But that provision is inserted whether the dissolution of partnership occurs by death of a partner or in the lifetime of all the partners; and the reason of its insertion is to prevent a purchaser being misled into supposing that he is buying, or that the vendors are going to sell to him, anything beyond what would be implied by the law by an assignment of the goodwill of the business: see the observations of TURNER, L.J., and KNIGHT-BRUCE, L.J., in *Johnson* v. *Helleley* (11) (2 De G.J. & S. at pp. 448, 449). The provision is not intended to give any right to the partners or their representatives to appropriate to themselves the benefit of the goodwill which has to be sold. It merely points out, so as to prevent any mistake or misunderstanding, that the sale of the goodwill of a business does not in itself prevent vendors from carrying on a like business, but the provision does not provide, and is not intended to provide, that the like business may be carried on by the vendors in a manner incompatible with their position as vendors. For example, in case of a sale on dissolution between two living partners whose names differ from the name under which the partnership business had been carried on, the provision in question would not entitle any partner to carry on a like business in the partnership name, so as to lead to the belief that his business was the same as or a continuation of the partnership business. And in the same way, in my opinion, the provision would not entitle one of the partner vendors to injure the goodwill sold by soliciting the customers of the partnership firm.

With regard to *Pearson* v. *Pearson* (12), also referred to by STIRLING, J., in *Jennings* v. *Jennings* (1), if the whole of the agreement in question in that action

be looked at, and the circumstances under which it was entered into be considered, I think it is clear that the parties must have intended that the defendant should be authorised to carry on business in the same way as any stranger might do, and certainly that was the view which was taken by the Court of Appeal, and upon which its decision was based.

Before parting with the case which I have now to decide, it appears to me that there is another and a shorter way of dealing with it which leads to the same conclusions as those above pointed out. By the partnership agreement, Mr. David and Mr. Matthews contracted that the partnership assets, which would include the goodwill, should on the death of one be sold to the survivor. For the purpose of valuing the goodwill, no difference can properly be drawn between a contract to sell to one of the partners and a contract to sell to a stranger. If the partners had contracted that on the death of one the goodwill should be sold to a stranger, the stranger buying and taking an assignment of the goodwill would have been entitled to prevent the survivor of the partners from carrying on a like business in the name of the firm "Letricheux and David," and from soliciting the customers of the firm.

Solicitors: *Paul E. Vanderpump & Eve*, for *Ingledew, Sons & Vanderpump*, Swansea; *Riddell, Vaizey & Co., for W. Robinson Smith, Son & Lewis*, Swansea.

[*Reported by* G. WELBY KING, ESQ., *Barrister-at-Law.*]

HELBY *v.* MATTHEWS AND OTHERS

[HOUSE OF LORDS (Lord Herschell, L.C., Lord Watson, Lord Macnaghten, Lord Morris and Lord Shand), April 30, May 30, 1895]

[Reported [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232]

Hire-Purchase—Nature of transaction—Contract to hire with option to buy—Not contract of sale and purchase—Factors Act, 1889 (52 & 53 *Vict.*, *c.* 45), *s.* 9.

By an agreement made between the appellant, therein called the "owner," and B., therein called the "hirer," the hirer agreed to pay a monthly rent or "hire instalment" to the owner in respect of the hire of a piano on the terms that, if the hirer should pay a certain sum by a series of such monthly instalments, the piano should become his property, but that until the full amount was paid it should remain the property of the owner. It was further agreed that the hirer should not let the piano go out of his possession, and that he might terminate the hiring by delivering up the piano to the owner. B. obtained possession of the piano, and paid some of the instalments, but, before the full amount agreed upon was paid, he pledged the piano with the respondents without notice of the appellant's claim. In an action by the appellant to recover the piano from the respondents,

Held: an agreement to buy imported an obligation to buy; on the true construction of the present contract B. was not under any obligation to pay the stipulated number of instalments and become the purchaser of the piano; he

had a mere option to buy, and, by returning the piano, he could put an end to the contract whenever he wished; therefore, he had not "bought or agreed to buy" the piano within s. 9 of the Factors Act, 1889, and so he was unable to give the respondents a good title under that section, and the appellant was entitled to succeed.

Lee v. *Butler* (1), [1893] 2 Q.B. 318, distinguished.

Notes. Distinguished: *Hull Ropes Co.* v. *Adams* (1895), 65 L.J.Q.B. 114; *Thompson and Shackell* v. *Veale* (1896), 74 L.T. 130; *Horton* v. *Gibbins* (1897), 13 T.L.R. 408; *Wylde* v. *Legge* (1901), 84 L.T. 121. Followed: *Brooks* v. *Bernstein*, [1909] 1 K.B. 98. Applied: *Grande Maison d'Automobiles* v. *Beresford* (1909), 25 T.L.R. 522; *Belsize Motor Supply Co.* v. *Cox*, [1911-13] All E.R. Rep. 1084. Considered: *Lewis* v. *Thomas*, [1918-19] All E.R. Rep. 497. Distinguished: *Taylor* v. *Thompson* (1929), 69 L.Jo. 116. Considered: *Blakey* v. *Pendlebury* (*A Bankrupt*) *Property Trustees*, [1931] All E.R. Rep. 270; *Re George Inglefield, Ltd.*, [1932] All E.R. Rep. 244; *Modern Light Cars, Ltd.* v. *Seals*, [1933] All E.R. Rep. 539; *Karflex* v. *Poole*, [1933] All E.R. Rep. 46. Referred to: *Hepple* v. *Brumby* (1896), 60 J.P. 792; *Marten* v. *Whale*, [1917] 1 K.B. 544; *South Bedford Electrical Finance, Ltd.* v. *Bryant*, [1938] 3 All E.R. 580; *Menzies* v. *United Motor Finance Corpn., Ltd.*, [1940] 1 All E.R. 549; *Scammell* v. *Ouston*, [1941] 1 All E.R. 14.

As to the nature of a hire-purchase transaction, see 19 Halsbury's Laws (3rd Edn.) 510-513; and for cases see 26 Digest (Repl.) 658-663. For the Factors Act, 1889, see 1 Halsbury's Statutes (2nd Edn.) 29.

Case referred to:

(1) *Lee* v. *Butler*, [1893] 2 Q.B. 318; 62 L.J.Q.B. 591; 69 L.T. 370; 42 W.R. 88; 9 T.L.R. 631; 4 R. 563, C.A.; 26 Digest (Repl.) 659, *5*.

Also referred to in argument:

Weston v. *Collins* (1865), 5 New Rep. 345; 34 L.J.Ch. 353; 12 L.T. 4; 29 J.P. 409; 11 Jur.N.S. 190; 13 W.R. 510, L.C.; 40 Digest (Repl.) 315, *2601*.

Re Florence, Ex parte Wingfield (1879), 10 Ch.D. 591; 40 L.T. 15; 27 W.R. 246, C.A.; 39 Digest 510, *1268*.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., A. L. Smith and Davey L.JJ.), reported [1894] 2 Q.B. 262, reversing a decision of the Queen's Bench Division (Lord Coleridge, C.J., and Day, J.), affirming a decision of the judge of the Bloomsbury County Court in favour of the appellant, the plaintiff in the action.

By s. 9 of the Factors Act, 1889:

"Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods . . . the delivery or transfer, by that person . . . of the goods . . . under any . . . pledge . . . to any person receiving the same in good faith and without any notice of . . . right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . with the consent of the owner."

By s. 2 (1):

"Where a mercantile agent is, with the consent of the owner, in possession of goods . . . any . . . pledge . . . made by him when acting in the ordinary course of business of a mercantile agent shall . . . be as valid as if he were expressly authorised by the owner of the goods to make the same . . ."

Finlay, Q.C., *Walton, Q.C.*, and *Hextall* for the appellant.

Jelf, Q.C., *H. D. Greene, Q.C.*, and *C. L. Attenborough* for the respondents.

Their Lordships took time for consideration.

May 30, 1895. The following opinions were read.

LORD HERSCHELL, L.C.—The appellant was the owner of a piano, of which he had given possession to one Charles Brewster, under an agreement in writing of Dec. 23, 1892, to the terms of which I shall have occasion to refer immediately. On July 21, 1893, Brewster, improperly and without the consent of the appellant, pledged the piano with the respondents, who are pawnbrokers, as security for an advance. The appellant, upon discovering this, demanded the piano from the respondents, and, on their refusing to deliver it, brought an action of trover. The defence set up by the respondents was that they had received the piano from Brewster in good faith and without notice of any claim on the part of the appellant, and that Brewster having "bought or agreed to buy" it from him, they were protected by s. 9 of the Factors Act, 1889. The county court judge held that the defence was not proved, and his judgment was upheld by the Divisional Court of the Queen's Bench. The Court of Appeal, however, came to the conclusion that the defence had been established, and reversed the judgment of the Divisional Court.

The only question is whether the respondents have made out that Brewster had bought or agreed to buy the piano. This depends upon the true effect of the agreement under which he obtained it. By that agreement Brewster, called therein the hirer, agreed to pay the "owner" on Dec. 23, 1892, a rent or hire instalment of 10s. 6d., and 10s. 6d. on the 23rd of each succeeding month, and to keep the instrument in the hirer's own custody at the address named in the agreement, and not to remove the same without the owner's previous consent in writing. He further agreed that if the hiring should be terminated by him under a subsequent clause of the agreement, and the instrument returned to the owner, the hirer should remain liable to the owner for arrears of hire up to the date of the return, and should not be entitled to any allowance, credit, return, or set-off for payments previously made. The owner, on the other hand, agreed that the hirer might terminate the hiring by delivering up the instrument to the owner, and, further, that if the hirer should punctually pay the full sum of eighteen guineas, by 10s. 6d. at the date of signing and by thirty-five monthly instalments of 10s. 6d. in advance as aforesaid, the instrument should become the sole and absolute property of the hirer. It was also agreed that unless and until the full sum of eighteen guineas was paid the instrument should be and continue the sole property of the owner.

It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10s. 6d. a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

I cannot, with all respect, concur in the view of the Court of Appeal that, upon the true construction of the agreement, Brewster had "agreed to buy" the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment

of 10s. 6d. so long as he kept the piano. He had an option, no doubt, to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see, under these circumstances, how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not, upon its execution, bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation. The Master of the Rolls said:

> "It is a contract by the seller to sell, and a contract by the purchaser, if he does not change his mind, to buy; and, if this agreement goes on to its end, it ends in a purchase. Therefore, it seems to me that the true and proper construction of this instrument, after all, is this—it is an agreement by the one to sell, and an agreement by the other to buy, but with an option on the part of the buyer if he changes his mind to put an end to the contract."

I cannot think that an agreement to buy, "if he does not change his mind," is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it.

It appears to me that the contract in question was in reality a contract of hiring, and not in name or pretence only. But for the provision that if the hirer punctually paid the 10s. 6d. a month for thirty-six months, the piano should be his property, it could not be doubted that it was a mere agreement for its hire, and I cannot see how the fact that this provision was added made it any the less a contract of hiring until that condition had been fulfilled. I think it very likely that both parties thought it would probably end in a purchase, but this is far from showing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision. One can well conceive cases, however, in which a person who had not made up his mind to continue the payment for three years, would nevertheless enter into such an agreement. It might be worth his while to make somewhat larger monthly payments for the use of the piano in order that he might enjoy that option if he chose to exercise it. In such a case how could it be said that he had agreed to buy when he had not only come under no obligation to buy, but had not even made up his mind to do so? The agreement is, in its terms, just as applicable to such a case as to one where the hirer had resolved to continue the payments for the three years, and it must be construed upon a consideration of the obligations which its terms create, and not upon a mere speculation as to what was contemplated, or what would probably be done under it.

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It was argued for the respondents that the case came within the mischief intended to be provided against by s. 9 of the Factors Act, 1889, and that the enactment ought, therefore, to be so construed as to cover it. I can see no reason for thus straining the language of the enactment. A person who is in possession of a piano under such an agreement as that which existed in the present case is no more its apparent owner than if he had merely hired it, and in the latter case any one taking it as security would have no claim to hold it as against the owner. Reliance was placed on the decision in *Lee* v. *Butler* (1), and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the

broadest distinction between the two cases. There was there an agreement to buy. The purchase money was to be paid in two instalments; but as soon as the agreement was entered into, there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there was a breach of contract by the party who engaged to make the payments the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question. It was further urged for the respondents that when Brewster pledged the piano with them it became impossible for him to return it to the appellant, and he became, therefore from that time bound to make the stipulated payment and to become the purchaser. I cannot accede to this argument. In my opinion, it is impossible to hold that Brewster, having only a right under the contract to buy, provided he complied with the prescribed conditions, could convert himself into a purchaser as against the owner by violating the conditions of the contract. I think the judgment appealed from must be reversed.

LORD WATSON.—This case depends upon the construction of an agreement made on Dec. 23, 1892, between the appellant and one Charles Brewster, in terms of which a piano belonging to the appellant was on that date delivered to Brewster. On July 21, 1893, while the instrument was admittedly the property of the appellant, Brewster gave it in pawn to the respondents for the sum of £4 10s. The present action was then brought by the appellant against the respondents in the county court of Middlesex for recovery of the piano or its value. The defence set up by the respondents, which has occasioned this litigation, is, that at the date of pawning Brewster was in possession of the piano under an agreement for its purchase, and was, therefore, in a position to make an effectual pledge to them under s. 9 of the Factors Act, 1889, is not being disputed that they received the pledge in good faith, and without notice of the appellant's right. In these circumstances the case is narrowed to the single question whether the possession of Brewster was attributable to a contract of purchase, as the respondents maintain, or to a contract of hiring, as contended for by the appellant. The county court judge held Brewster's possession to have been that of a hirer, and, in the Divisional Court, the same view was taken by LORD COLERIDGE, C.J., and DAY, J. In the Court of Appeal, LORD ESHER, M.R., A. L. SMITH and DAVEY, L.JJ., were all of opinion that the agreement constituted a contract of sale and purchase, and they, accordingly, reversed the decisions of the courts below, and gave judgment for the respondents.

The terms of the agreement are exceedingly simple; and had it not been for the conflict of judicial opinion which they have provoked it would not have occurred to me that their true character and substance admitted of much doubt. The only stipulations which are of materiality to the present question are these. Brewster undertakes to pay a monthly rent or hire instalment of 10s. 6d., commencing on Dec. 23, 1892, subject to the condition that he may terminate the hiring at any time by delivering up the piano to the appellant. In the event of the hiring being so terminated he is to remain liable to the owner for arrears of hire up to the date when the piano is returned. Then follows a stipulation to the effect that:

> "If the hirer shall punctually pay the full sum of £18 18s., by 10s. 6d. at date of signing and by thirty-five monthly instalments of 10s. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer."

These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour—that if he shall elect to retain it until he has made thirty-six monthly

payments as they fall due the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing or to pay a price for it. There is no purchase and no agreement for purchase until the hirer actually exercises the option given him.

The respondents' counsel endeavoured to assimilate this case to *Lee* v. *Butler* (1), but in reality the two cases differ essentially. In *Lee* v. *Butler* (1) the so-called hirer was bound absolutely to make payment of £1 on May 6 and of £96 4s. on Aug. 1, 1892, which sums were described as "rent for the hire or use" of certain furniture, which was the subject-matter of the agreement, it being declared that upon due payment of these rents, amounting to £97 4s., the furniture was to be the sole and absolute property of the hirer. It appears to me to have been rightly held that Mrs. Lloyd, the hirer, had truly agreed to purchase the furniture, and could, therefore, give a good title to a bona fide purchaser. Her legal obligation to pay the price attached as soon as the agreement was executed. Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that, while he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract it if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was in no sense an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement for sale and purchase there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered, there could, in this case, be no contract to purchase by Brewster until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano. The distinction between a pre-contract of that kind and a proper agreement for the sale and purchase of goods does not appear to me to have been sufficiently regarded by the learned judges of the Court of Appeal. Their Lordships seemed to have assumed that, because the appellant had bound himself to sell if Brewster chose to buy upon the terms prescribed, he was in reality a seller; and that the existence of a seller necessarily implied the existence of a buyer. In my opinion, that reasoning is inconclusive. While, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement.

Another argument was urged for the respondents, which I find thus succinctly stated in their fifth reason of appeal: "That upon Brewster pledging the pianoforte with the respondents he put it out of his power to exercise his right to determine the agreement by returning the pianoforte, and thereby the agreement to purchase became absolute and unconditional." The argument is, in my opinion, untenable. In a question with the appellant, Brewster could not become purchaser of the instrument, except upon the condition of his observing the stipulations of the agreement, and making regular payment of each monthly instalment until Nov. 23, 1895, which he was under no obligation to do. By the act of pawning he violated these stipulations, and that dishonest act, which was committed after he had paid only seven out of thirty-six instalments, is not calculated to suggest that he entertained any intention of becoming purchaser of the piano. It is quite true that Brewster thereby put it out of his power (at least until he could raise the amount

for which it was pawned) to return the piano to the appellant; but he, at the same time, broke his contract, and forfeited his right to exercise the option of purchase given him by the agreement. For these reasons I am of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored.

LORD MACNAGHTEN.—In this case I think that his Honour Judge Bacon took the right view. It seems to me that the agreement under consideration means what it says, and can mean nothing more. It is an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable. I rather doubt whether the meaning of the parties can be better elucidated, or their relative position more clearly defined, by speaking of an "option," or of a "defeasance," or by translating their contract into other and more formal language. At least I am unable to express the obvious intention of the parties in simpler or plainer words than those which they have used.

The musical instrument dealer let out a piano by the month, and undertook to sell it to the customer who hired it conditionally on his making a certain number of monthly payments. But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano, or any interest in the nature of a lien, or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come. The customer was under no obligation to fulfil the conditions on which—and on which alone—the dealer undertook to sell. He was not bound to keep the piano for a single day, or a single hour. He was no more bound to purchase it after he had signed the agreement than he was before. The contract as it seems to me on the part of the dealer, was a contract of hiring, coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that, at the inception of the transaction, both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well-founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want, and for which at the time they cannot pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano, or a carriage, or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burden and an encumbrance, it is something surely to know that the transaction may be closed at once without further liability, and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for Parliament to interfere. It is not for the courts to put a forced or strained construction on a written document, or to import a meaning which the parties never dreamed of, because it may not wholly approve of transactions of this sort.

Lee v. *Butler* (1), on which the Court of Appeal relied, was a very different case. There a person, who got some furniture under an agreement which was called "a hire-purchase agreement," was bound by the terms of the agreement to pay for and purchase the furniture. I do not see how *Lee* v. *Butler* (1) can be an authority for the respondent's contention. Nor can I understand why the customer in the present case should be taken to have agreed to purchase the piano which he hired

because he fraudulently pledged it, and so put it out of his power to return it without redeeming the pledge. I agree that the judgment under appeal should be reversed.

LORD MORRIS.—I concur.

LORD SHAND.—I am also of the same opinion. The right of the defendant to refuse delivery of the piano in question under s. 9 of the Factors Act depends on his being able to show that Brewster, in whose possession it was, had either bought it or agreed to buy it from Mr. Helby, the plaintiff and appellant, and the decision of this question depends entirely on the true construction of the agreement between the plaintiff and Brewster, under which the latter got possession of the instrument. It is true that, by that agreement Brewster undertook to pay to the appellant not only the first instalment of 10s. 6d. described as a "rent or hire instalment," but to pay the same amount on the 23rd of each succeeding month, and that it was provided that on the payment of thirty-six monthly instalments the piano should become his property.

If these stipulations had been unqualified there would have been an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instalments were described as for rent or hire, and *Lee* v. *Butler* (1) would have directly applied. But the whole obligations by Brewster were qualified by the stipulation "that the hirer may terminate the hiring by delivering up to the owner the said instrument." This provision appears to me to make it clear that there was no purchase and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired; and he need not allow the transaction to become one of purchase unless he desired to do so. An agreement to purchase would infer an obligation to pay a price the payment of which could be enforced by action, while here it is plain that no action for any balance of the alleged price could be maintained if Brewster thought fit at any time to return the instrument to its owner. The substance of the transaction was a hiring of the piano, for the use of which monthly instalments were to be paid, with a provision that the arrangement might ultimately result in a purchase, but that this should be entirely at the option of the hirer and should depend entirely on his thinking fit to make payment of thirty-six monthly instalments. The contract of hiring only was to cease at his option on the instrument being returned to the owner.

It was maintained that under the general words of the undertaking to pay future instalments there was an agreement to purchase within the meaning of the Factors Act, although there was power to resolve the agreement or to bring it to an end by returning the instrument. It seems to me to be very difficult to hold that, even if in form the agreement could be correctly thus described, this would satisfy the provision of the Factors Act, which it has been forcibly maintained requires an absolute obligation to purchase and pay a price—or, at least, an obligation which is not merely dependent on the will or wish of the alleged purchaser. In this case, however, I think there was an agreement of hiring only with an option to the hirer to become the purchaser; and that although there was an obligation to sell if the hirer should avail himself of the right of option to purchase, there was no obligation or agreement to purchase. I cannot hold that there is such an agreement on the part of one who having the beneficial use of the property of another agrees to pay instalments described as rent or hire instalments, and which he is entitled to treat as payments for hire only—because it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property—he having at the same time the power at any moment and at his own will by returning the property to the owner, to put an end to any obligation to pay any further instalments.

Solicitors: *H. E. Tudor; J. Attenborough.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

McENTIRE AND ANOTHER *v.* CROSSLEY BROS., LTD.

[House of Lords (Lord Herschell, L.C., Lord Watson, Lord Ashbourne and Lord Shand), May 10, 13, 1895]

B

[Reported [1895] A.C. 457; 64 L.J.P.C. 129; 72 L.T. 731; 2 Mans. 334; 11 R. 207]

Hire-Purchase—Sale of goods—Passing of property—Payment by instalments—Bankruptcy of hirer—Provision in agreement that goods should remain property of sellers until all instalments paid.

C By an agreement between the respondents and one P. the respondents supplied an engine to P. upon the terms that P. was to pay a certain sum down, and the balance of the purchase money by eight quarterly instalments. The agreement provided that until all the instalments were paid P. should not sell, assign, or remove the engine without the consent of the respondents; that, if the D instalments fell into arrear, the respondents might sue for the whole amount, or might resume possession of the engine and sell it, paying over to P. the amount of the price received by them, if any, beyond what was due to them; and that until all the instalments were paid the engine should remain the property of the respondents. P. allowed the instalments to fall into arrear, and became bankrupt, and the official assignees of the Court of Bankruptcy claimed pos- E session of the engine.

Held: on its true construction the agreement was one of sale and purchase, but the property in the subject-matter of the agreement remained throughout in the vendor, and, therefore, the claim of the official assignees failed.

Per Lord Watson: Although the words "lessors" and "hirer" are used, and the word "rent" also occurs, it is plain that the agreement is one of sale F and purchase, and nothing else. But it does not in the least follow that the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends on the intention of the parties. The law permits them to settle the point for themselves by any expression of their intention upon the point.

G **Notes.** Considered: *Modern Light Cars, Ltd.* v. *Seals*, [1933] All E.R. Rep. 539. Referred to: *Hobson* v. *Gorringe*, post; *Scammell* v. *Ouston*, [1941] 1 All E.R. 14.

As to the seizure of goods the subject of a hire-purchase agreement and the effect of bankruptcy on the agreement, see 19 Halsbury's Laws (3rd Edn.) 546, 564, 565; and for cases see 26 Digest (Repl.) 658-663.

H Case referred to:

(1) *Coburn* v. *Collins* (1887), 35 Ch.D. 373; 56 L.J.Ch. 504; 56 L.T. 431; 35 W.R. 610; 3 T.L.R. 419; 7 Digest (Repl.) 13, *57*.

Also referred to in argument:

Helby v. *Matthews*, [1894] 2 Q.B. 262; 63 L.J.Q.B. 577; 70 L.T. 837; 58 J.P. 785; 42 W.R. 514; 10 T.L.R. 468, C.A.; reversed, ante p. 821; [1895] I A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 26 Digest (Repl.) 660, *14*.

Re Love, Ex parte Watson (1877), 5 Ch.D. 35; 46 L.J. Bcy. 97; 36 L.T. 75; 25 W.R. 489; 3 Asp.M.L.C. 396, C.A.; 39 Digest 617, *2163*.

Cropper & Co. v. *Donaldson* (1880), 7 R. (Ct. of Sess.) 1108.

Appeal from a decision of the Court of Appeal in Ireland (Lord Chancellor Walker, Fitzgibbon and Barry, L.JJ.), reversing a decision of the judge of the Bankruptcy Court (Boyd, J.).

The appellants were the official assignees of the Court of Bankruptcy in Ireland, and assignees of the estate and effects of Thomas Frederick Peel, who was adjudicated a bankrupt in the Irish Bankruptcy Court in 1893.

At the commencement of the bankruptcy the bankrupt had in his possession an "Otto" gas-engine, which had been supplied to him by the respondents, Crossley Bros., Ltd., who carried on business in Manchester as engineers, and part of whose business consisted in supplying gas-engines to persons on the hire-purchase system. In June, 1892, they supplied the engine in question to the bankrupt under an agreement by the terms of which the engine was to become the property of the bankrupt on his paying the sum of £240 by instalments, but was in the meantime to remain the property of the respondents, who were empowered, on a failure to pay any of the instalments, either to sue for the unpaid balance or to demand the return of the engine. The bankrupt paid one instalment of £60, but failed to pay the remaining instalments. After the bankruptcy of the hirer the respondents demanded back the engine, but their right to do so was disputed by the appellants. In the Bankruptcy Court it was contended, on behalf of the respondents, that under the agreement the property in the gas-engine remained in them, and that the bankrupt had no more than the use of the engine, and that the custom of hiring with option of purchase was sufficiently notorious to exclude the application of the law of reputed ownership. On behalf of the assignees it was contended, among other things, that the real relation between the parties was not that of owner and hirer of the engine, but that of seller and buyer, with a prescribed mode of payment by instalments. At the conclusion of the case the learned judge gave judgment refusing the motion with costs, on the ground that the agreement between Crossley Bros. and the bankrupt was in its true character a sale and purchase, and not a hire of the gas-engine. The Irish Court of Appeal set aside that judgment on the ground that the contention of the present respondents was correct. The assignees appealed.

Fletcher Moulton, *Q.C.*, *Muir Mackenzie*, and *Doyle* (the last-named of the Irish Bar) for the appellants.

Sir Richard Webster, *Q.C.*, and *C. A. Russell* for the respondents, were not called on to argue.

LORD HERSCHELL, L.C.—I confess that this appears to me to be a very plain case indeed. An agreement was entered into on June 23, 1892, between the respondents and Mr. Thomas Frederick Peel, under which Mr. Peel obtained possession of an "Otto" gas-engine, the property of the respondents. Mr. Peel afterwards became bankrupt, and the appellants are his assignees. I shall have to call your Lordships' attention in detail to the terms of that agreement, but put shortly it was to this effect, that Peel should pay Messrs. Crossley £60 before delivery and the balance, making in all £240, in eight quarterly payments. At the time when he became bankrupt several of the payments then due had not been paid, and the question is whether the assignees can claim this gas-engine as against Messrs. Crossley, or whether they are entitled to resume possession of it as owners.

The agreement between the parties must be construed in precisely the same way as if there had been no bankruptcy at all, and, apart from any statutory provision, the assignees in bankruptcy only succeed to the rights of the bankrupt, and have no higher or greater rights. The assignees, of course, could not successfully contend that under this agreement Mr. Peel could have insisted, as against Messrs. Crossley, on retaining possession of this engine without paying the sum, or what was necessary to make up the sum, of £240, and, therefore, at common law the assignees would be in no better position. There are, so far as I know, only two statutory provisions which, in such a case as this, could give the assignees a better right than the bankrupt. One of them is the provision of the Bankruptcy Act known as the "reputed ownership clause" [now s. 38 (c) of the Bankruptcy Act,

A 1914], that is to say, that, if the goods, although the goods of Messrs. Crossley, were in the reputed ownership of the bankrupt, though the bankrupt could not have claimed a right to retain them as against Messrs. Crossley, the assignees can. That was the question argued in the courts below. The present appellants there insisted upon their right to the engine under the reputed ownership clause of the Bankruptcy Act. That was decided against them. They have abandoned any B claim to it on this appeal, and, therefore, the provisions of the Bankruptcy Act are out of the case.

The only other statute which could give the assignees a better right under the bankruptcy is the Bills of Sale Act; and, under the Bills of Sale Act, if a bankrupt has in his possession goods which are the property of any other person, there is no doubt that, although the bankrupt has transferred the property to that other person, C or given that other person rights in the nature of rights of property over it, if the goods remain in his possession, and he becomes bankrupt, his assignees in the bankruptcy can claim the property, disregarding all the rights which he has given, unless the instrument carrying out the transaction (if it has been carried out by an instrument) has been registered as a bill of sale. But, of course, in order to make out that the assignees have a title to this engine under the Bills of Sale Act, it is D absolutely essential to prove that the property in the engine, at some time or other, passed to the bankrupt. If the property never passed to the bankrupt, he can never have conveyed it or assigned it, or given the right to seize, or have given any of the rights over it within the meaning of the Bills of Sale Act. The Bills of Sale Act relates to assurances, or assignments, or rights to seize, given or conferred by the person who owns the property. Here, if the true view is that the property E in this gas-engine has never been out of Messrs Crossley, then the bankruptcy of Peel cannot affect their title in any manner or shape, and the property must still remain in them, and all the rights under the agreement must remain.

That necessitates an examination of the agreement. It seems to me that the only question in this case is: "Did the property in this gas-engine pass at any time from Messrs. Crossley to Mr. Peel?" Coming, then, to the examination of F the agreement, I quite concede that the agreement must be regarded as a whole; its substance must be looked at. The parties cannot by the insertion of any mere words defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction, and the words in another part in another direction, we must look at the agreement as a whole and see what its substantial effect is. But there is no G such thing as seems to have been argued here, as looking at the substance apart from looking at all the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained. The agreement begins with a provision that "the lessee will pay to the owners and lessors as and for rent . . . £60 cash before delivery, and the balance in eight H equal and consecutive quarterly payments," amounting in the aggregate to £240. The lessee agrees to take all proper care of the gas-engine, and to pay the rent of the premises on which it is, and that he

> "will not in any way sell, assign, or sublet, or otherwise part with the possession of the 'Otto' gas-engine, or assume the ownership, or remove the same from one building to another, without first informing the owners and lessors of such I intended removal, and receiving their consent in writing so to do, so long as any of the said sums shall remain unpaid, and will not make any alteration or addition to the said 'Otto' gas-engine, or allow the same to be made, without the consent in writing of the owners and lessors, and that upon payment by the lessee of the several sums aforesaid, then this agreement shall be at an end, and the said 'Otto' gas-engine shall become the property of the lessee as purchaser thereof for the sum of £240 so to be paid as aforesaid, but until the several sums shall have been fully paid, together with insurance, repairs (if any), and other costs and expenses, legal or otherwise, connected therewith,

the said 'Otto' gas-engine shall remain the sole and absolute property of the owners and lessors, it being hereby expressly agreed and declared that the said 'Otto' gas-engine is only let on hire to the lessee until all sums of money due under this agreement are paid."

I stop there to observe that the parties have in terms expressed the intention that the property in this gas-engine should not pass until all the instalments have been paid.

Upon an agreement to sell, it depends upon the intention of the parties whether the property passes or does not pass. Here the parties have in terms expressed their intention, and said that the property shall not pass until the full purchase money is paid. I know no reason to prevent that being a perfectly lawful agreement. If that was really the intention of the parties, I know of no rule or principle of law which prevents it from being given effect to. I quite agree that if, although the parties have inserted a provision to that effect, they have shown in other parts of the agreement, by the language which they have used, or the provisions which they have made, that they intended the property to pass, one must look at the transaction as a whole, and it might be necessary to hold that the property has passed, although the parties have said that their intention was that it should not, because they have provided that it shall. No doubt any provisions which were inconsistent with the intention that the property should not pass would be given effect to in preference to a mere expression of intention in words. That is a proposition which I shall not dispute for a moment, and if the appellants could have pointed here to any provision in this deed inconsistent with the intention that the property should remain in the vendors, I think that they might very likely have succeeded, notwithstanding that the parties had in terms said what their intention was. If the matter of intention were even doubtful, great weight would be given to what the parties have stated their intention to be. But, in the present case, I confess that I am unable to find any provision in this deed inconsistent with the intention which the parties have said was theirs. If the instalments are not paid as provided for, or if the hirer, or intended purchaser, or whatever he may be called, becomes bankrupt, then there is a provision in the agreement as to what shall happen. Messrs. Crossley may in that case elect to sue for the remainder of the instalments, to treat them all as at once payable and sue for them. No doubt, if they take that course, they then elect to have the purchase completed. They could not sue for the purchase money while they insisted that the property in the goods, the price of which they were suing for, had not passed.

But that is only one of certain alternative courses which are open to Messrs. Crossley. They may, instead of suing for the balance of the price and treating it then and there as a sale at that price then due, resume possession. I would observe that in all the subsequent clauses, which clearly contemplate the property being in them, the only word used with reference to their action is "resuming possession"; nothing is said about any transfer of the property. It is assumed that on the resumption of possession there will be in them both possession and property. On the resumption of possession they may pursue one of two alternative courses. They may, if they like, sell; and if they sell, and if on the sale the engine produces more than enough to pay everything that would be due in any event to Messrs. Crossley, and leaves a surplus, then Messrs. Crossley undertake by the agreement to pay that surplus to Mr. Peel, the bankrupt. But that is not the only course which they may pursue. It is absolutely at their option whether they do that or not. They may simply resume possession of the engine, and having resumed possession they may sue the bankrupt for the damages which they have sustained by the non-performance of the provisions of this agreement, or they may prove for them as liquidated damages.

The distinction is as well settled as it possibly can be between a debt for the price of goods the property in which has passed, and an action of damages for breach of a contract to buy and pay for the goods. In the former case, the debt

due is the balance of the price, the purchaser keeping the goods. In the other case the vendor retains possession of the goods, but he sues for the damages that he has sustained by the purchaser not carrying out his agreement to buy as stipulated. This agreement provides that he may either sue for them, if there has not been a bankruptcy, or prove for them if there has been a bankruptcy. But suing or proving for those damages implies of course that the property as well as the possession is still in the vendor. So far from finding in this agreement anything that was counter to the expressed intention of the parties that the property should throughout remain in the vendor, everything, to my mind, seems to point in that direction. Great reliance was placed upon the provision with reference to the sale of the engine. Counsel for appellants said that that was putting the vendors in the position of mortgagees. It seems to me not to be a position inconsistent with the provision which the parties stated was their intention. There seems to me nothing inconsistent with that in an agreement by the vendor that, if he does resume possession, and if he does sell, and if he does on the sale get more than the stipulated price, he will not keep it, but will pay the balance to the intending purchaser. That is a perfectly lawful agreement for the parties to come to.

But it is to be observed that, if he sells, and the engine produces on the sale less than what would be due from Mr. Peel, there is no provision that he can recover the balance. His only course, if he contemplated such a result, would be to determine not to sell, but to keep possession and to sue for damages for breach of contract, or to prove for such damages. Therefore, when the agreement is looked at as a whole, I can find nothing to prevent effect being given to the expressed intention of the parties that the property in this engine should not pass. I know of nothing to prevent such a contract as that being made, or having full effect given to it. If a contract of that description is within the mischief of the Bills of Sale Act, then the Bills of Sale Act needs amendment. It seems to me impossible to bring this case within the Bills of Sale Act because the transaction may bear a resemblance to a transaction which would be within it on the ground that it is within its mischief, when the initial step to bringing the Bills of Sale Act into operation at all seems to me to fail, namely, that there should have been an assurance, or an assignment, or a licence to seize, or any of the other matters referred to in the Bills of Sale Act, given by the bankrupt to some other person.

With regard to *Coburn* v. *Collins* (1), upon which reliance was placed, that seems to me to be a very different case from the present one. That was an agreement for the sale of a business, the price of which no doubt was to be paid at a future time. There was no agreement between the parties in that case that the property should not pass at once. There were none of the stipulations one finds here as to the use of that which was the subject of the agreement to sell. In this case the intending purchaser cannot sell, assign, sub-let, or even remove from one building to another, this gas-engine, the property in which is supposed to be in him; in *Coburn* v. *Collins* (1) it was the sale of a business where the purchaser was intending to continue the business and to sell the stock-in-trade—two contracts of a very different nature. In the next place there, in terms, the vendors were to have a lien or charge, implying that the property had passed to others, for a man does not have a lien on his own property or a charge either. Therefore, in that case, there were provisions in the agreement which pointed to the intention being that the substance of the transaction was a sale in which the property passed, with a security, eo instanti, given by the purchaser to the vendor. That decision does not seem to me to be in the slightest degree inconsistent with the conclusion at which your Lordships have arrived in the present case. I move your Lordships that this appeal be dismissed with costs.

LORD WATSON.—I agree with your Lordships that in this appeal no cause has been shown for disturbing the judgment of the Court of Appeal in Ireland. As is usual in cases of this kind, we have heard a great deal in the course of the

appellants' argument of the necessity of attending to the substance of the agreement which we have to construe. That is a canon of construction applicable to all agreements; but in its application to an agreement it must always be borne in mind that the substance of the agreement must ultimately be found in the language of the contract itself. The duty of a court is to consider every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other; but it is entirely beyond the function of a court to discard the plain meaning of a term in the agreement unless there can be found within its four corners other language and other stipulations which necessarily rob the stipulation of its primary meaning.

In this case the substance of the agreement, to my mind, does not admit of much doubt, although the words "lessors" and "hirer" are used, and the word "rent" also occurs, it is plain that the agreement is one of sale and purchase, and nothing else. To that extent my opinion entirely coincides with that expressed by the learned judge of first instance. But a finding that the contract in this case is one of sale and purchase is not sufficient for the argument of the appellants; because it does not in the least follow that, because there is an agreement of sale and purchase, the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends upon the intention of the parties. The law permits them to settle the point for themselves by any expression of their intention upon the point. In this case the matter is not left to implication; because, if there be one point on the face of this contract clearer than another, it is that the intention of the parties was that the seller should not part with his dominium over the thing which he was selling, and that the property should not become vested in the purchaser until the last farthing of the price was paid. If there had been in the deed language to be found which showed that the parties were using those expressions inadvertently, or that they had entered into other stipulations which were in substance contrary to the expressed intention, the case would have been otherwise. They might, for instance, have given power to the purchaser to exercise a right which implied dominium before the contractual term of the passing of the property arrived. But there is no case of that kind here. There are no such stipulations to be found in the agreement. The whole of the stipulations of the agreement appear to me to be in entire conformity with the expressed intention of the parties.

Moreover, I may add that, in my opinion, the remedies given to the unpaid vendor are far more appropriate to the case of an undivested seller than to the case of a mortgagee which was said to be his true position. I need not, after the criticism of the Lord Chancellor, enter any further into the terms of this contract. I shall only say in conclusion that I find it impossible to attach the construction to it which was contended for by the appellants, without taking out of the contract plain words which are to be found in it, and inserting in lieu of them words to a different effect, which are not to be found in it.

LORD ASHBOURNE.—I entirely concur. Notwithstanding the ingenious arguments addressed to your Lordships in this case on behalf of the appellants, and notwithstanding the respect which I entertain for the ability and experience of BOYD, J., I am clearly and strongly of opinion that the decision of the Court of Appeal in Ireland in this case was absolutely correct on all points. The question turns upon the construction of this agreement, not upon a suggestion that may be drawn from the construction of other agreements; and I can see no considerations of public policy, and no considerations of inconvenience in the administration of bankruptcy law in Ireland or elsewhere, that should induce us specially to favour the arguments addressed to us on behalf of the appellants. On the construction of this agreement I can see no room for any reasonable doubt. The parties expressed what they desired to be their contract in language of reasonable clearness, and, in my opinion, their intentions are expressed in a way that leaves no room for

doubt. I have read with attention the judgment in the Court of Appeal, and I think that the words that appear at the end of the judgment of the Lord Chancellor of Ireland express the position here accurately, and I myself am willing entirely to adopt them:

> "I cannot come to the conclusion that the property passed where, upon the whole agreement—and I am bound to construe it as a whole—that result would be contrary to the express intention of the parties."

I entirely agree with the opinion of the Lord Chancellor, and I am clearly of opinion that the appeal should be dismissed with costs.

LORD SHAND.—I entertain the same opinion as your Lordships in reference to this appeal. In the court below there seems to have been a full argument upon another ground, which has not been argued here—I mean the ground of the reputed ownership of this engine. That has been abandoned in the argument before your Lordships. But it was maintained, apparently I think, repeating an argument which is mentioned by the Lord Chancellor of Ireland, as the second branch of the grounds upon which the official assignees maintain their right to this gas-engine, in these words:

> "The assignees however mainly rested their case upon the other ground, that on which BOYD, J., founded his order, viz., that the agreement of June 23, 1892, was in reality an agreement for purchase, vesting the property in the bankrupt at once, or at all events when the first instalment became overdue."

His Lordship adds: "And that it was unreasonable and contrary to the policy of the bankruptcy laws." In the argument at your Lordships' Bar, the point that has been maintained is that it was a violation of the Bills of Sale Act, which is in precisely the same terms in Ireland as in this country. The point, as I understand it, that was made was this. By the agreement it was alleged that the bankrupt having become the owner of the gas-engine in dispute, while retaining possession of it attempted to create a charge on it in favour of the vendors, and the agreement was thus in substance a bill of sale by the bankrupt, which was invalid because it was never registered. Having heard all the criticisms that have been offered upon the terms of that agreement, I am entirely of opinion, with your Lordships, that in substance it cannot be regarded as a bill of sale. It is conceded that, in order to succeed in the argument, the appellant must show that the bankrupt became the owner, and, therefore, was in a position to grant a bill of sale; but the whole terms of the agreement seem to me to exclude the notion that he was to be the owner. The engine was to be held by him with plates affixed to it, stating that Messrs. Crossley Bros. were the owners; the price was to be paid by instalments extending over a period of two years; and this very reasonable and natural stipulation was part of the agreement, that until that price should be paid the ownership should not change, and that Messrs. Crossley Bros. should continue to be the owners. If they were the owners, there is an end to this argument. I can only further say that I entirely concur in the view that in none of the other stipulations of this agreement which have formed the subject of comment is there anything to contradict or render inoperative that clause which says that the property in this engine is to remain with the vendors until the price is fully paid. I am, therefore, of opinion, with your Lordships, that the appeal fails.

Appeal dismissed.

Solicitors: *Hasties*, for *J. Rose Byrne*, Dublin; *Grundy, Kershaw, Saxon, Samson & Co.*, for *Grundy, Kershaw & Co.*, Manchester.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

LE MESURIER *v.* LE MESURIER

[PRIVY COUNCIL (Lord Herschell, L.C., Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Morris and Sir Richard Couch), March 28, 29, April 2, June 29, 1895]

B

[Reported [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 T.L.R. 481; 11 R. 527]

Domicil—Marriage—Dissolution—Jurisdiction—Court of the domicil—Insufficiency of "matrimonial domicil"

C

According to international law the domicil for the time being of married persons affords the only true jurisdiction to dissolve their marriage. Such jurisdiction is not conferred by a "matrimonial domicil" based on a residence which, though not "casual or that of a traveller," is not of sufficient permanence to enable the parties to acquire a true domicil.

Wilson v. *Wilson* (7) (1872), L.R. 2 P. & D. 435, applied.

Niboyet v. *Niboyet* (8) (1878), 4 P.D. 1, criticised.

D

Notes. Considered: *Bater* v. *Bater*, [1906] P. 209; *R.* v. *Hammersmith Superintendent Registrar, Ex parte Mir-Anwaruddin*, [1917] 1 K.B. 634; *Lord Advocate* v. *Jaffrey*, [1920] All E.R. Rep. 242; *Keyes* v. *Keyes and Gray*, [1921] P. 204; *A.-G. for Alberta* v. *Cook*, [1926] All E.R. Rep. 525; *Salvesen (or von Lorang)* v. *Austrian Property Administrator*, [1927] All E.R. Rep. 78; *Inverclyde* v. *Inverclyde*, E [1931] P. 29; *Re Luck, Walker* v. *Luck*, [1940] 3 All E.R. 307; *Wall* v. *Wall*, [1949] 2 All E.R. 927; *Matalon* v. *Matalon*, [1952] 1 All E.R. 1052; *Sealey (otherwise Callan)* v. *Callan*, [1953] 1 All E.R. 942; *Arnold* v. *Arnold*, [1957] 1 All E.R. 570; *Manning* v. *Manning*, [1958] 1 All E.R. 291. Referred to: *Christian* v. *Christian* (1897), 78 L.T. 86; *Sinclair's Divorce Bill*, [1897] A.C. 469; *Armytage* v. *Armytage*, ante p. 377; *Lowenfeld* v. *Lowenfeld, Corbett Intervening* (1903), 72 L.J.P. 57; F *Re Stirling, Stirling* v. *Stirling*, [1908] 2 Ch. 344; *Rayment* v. *Rayment and Stuart, Chapman* v. *Chapman and Buist*, [1910] P. 271; *Anghinelli* v. *Anghinelli*, [1918-19] All E.R. Rep. 255; *Casdagli* v. *Casdagli*, [1918] P. 89; *Graham* v. *Graham* (1923), 128 L.T. 639; *Eustace* v. *Eustace*, [1923] All E.R. Rep. 281; *Rudd* v. *Rudd*, [1924] P. 72; *Sasson* v. *Sasson*, [1924] A.C. 1007; *Herd* v. *Herd*, [1936] 2 All E.R. 1516; *Hutter* v. *Hutter*, [1944] 2 All E.R. Rep. 368; *De Reneville* v. *De Reneville*, [1947] G 2 All E.R. 112; *Travers* v. *Holley and Holley*, [1953] 2 All E.R. 794; *Dunne* v. *Saban*, [1954] 3 All E.R. 586; *Ramsay-Fairfax* v. *Ramsay-Fairfax*, [1955] 3 All E.R. 695; *Robinson-Scott* v. *Robinson-Scott*, [1957] 3 All E.R. 473; *Mountbatten* v. *Mountbatten*, [1959] 1 All E.R. 99.

As to domicil and dissolution of marriage, see 7 HALSBURY'S LAWS (3rd Edn.) 14 et seq., 102 et seq.; and for cases see 11 DIGEST (Repl.) 326 et seq., 466 et seq. H

Cases referred to:

(1) *R.* v. *Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden* v. *Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 11 Digest (Repl.) 486, *1108*.

(2) *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833, H.L.; 11 Digest (Repl.) 481, *1081*. I

(3) *Tollemache* v. *Tollemache* (1859), 1 Sw. & Tr. 557; Sea. & Sm. 149; 30 L.J.P.M. & A. 113; 2 L.T. 87; 23 J.P. 679; 164 E.R. 858; 11 Digest (Repl.) 482, *1089*.

(4) *Yelverton* v. *Yelverton* (1859), 1 Sw. & Tr. 574; Sea. & Sm. 49; 29 L.J.P. & M. 34; 1 L.T. 194; 6 Jur.N.S. 24; 8 W.R. 134; 164 E.R. 866; 11 Digest (Repl.) 471, *1025*.

(5) *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259; 30 L.J.P.M. & A. 185; 4 L.T. 307; 9 W.R. 815; 164 E.R. 995; 11 Digest (Repl.) 472, *1026*.

(6) *Manning* v. *Manning* (1871), L.R. 2 P. & D. 223; 40 L.J.P. & M. 18; 24 L.T. 196; 19 W.R. 479; 11 Digest (Repl.) 475, *1051*.

(7) *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435; 41 L.J.P. & M. 74; 27 L.T. 351; 20 W.R. 891; 11 Digest (Repl.) 468, *1010*.

(8) *Niboyet* v. *Niboyet* (1878), 3 P.D. 52; 47 L.J.P. 49; 39 L.T. 172; on appeal, 4 P.D. 1; 48 L.J.P. 1; 39 L.T. 486; 43 J.P. 140; 27 W.R. 203, C.A.; 11 Digest (Repl.) 469, *1021*.

(9) *Pitt* v. *Pitt* (1864), 10 L.T. 626; 10 Jur.N.S. 735; 12 W.R. 1089; 4 Macq. 627, H.L.; 11 Digest (Repl.) 348, *167*.

(10) *Shields* v. *Shields*, 15 Dunl. (Ct. of Sess.) 142.

(11) *Jack* v. *Jack* (1862), 24 Dunl. (Ct. of Sess.) 467.

(12) *Hume* v. *Hume*, 24 Dunl. (Ct. of Sess.) 1342.

(13) *Wilson* v. *Wilson* (1872), 10 Macph. (Ct. of Sess.) 573; 44 J. 295; 9 S.L.R. 364.

(14) *Stavert* v. *Stavert* (1882), 9 R. (Ct. of Sess.) 519; 19 S.L.R. 381.

(15) *Dolphin* v. *Robins* (1859), 7 H.L.Cas. 390; 29 L.J.P. & M. 11; 34 L.T.O.S. 48; 23 J.P. 725; 5 Jur.N.S. 1271; 7 W.R. 674; 3 Macq. 563; 11 E.R. 156, H.L.; 11 Digest (Repl.) 356, *252*.

Appeal by the husband, a member of the Ceylon Civil Service, against a decision of the Supreme Court of the Island (LAWRIE, Acting C.J., and BROWNE, J.), who had reversed a decision of the judge of the District Court of Matara (SAUNDERS, J.), who granted a decree nisi for a divorce in a suit brought by the husband against his wife, on the ground of her adultery with the other respondents. The decree nisi was afterwards made absolute.

J. D. Mayne for the appellant.

R. M. Bray and *Cassel* for Mrs. Le Mesurier.

A. J. Walter for the co-respondent.

June 29, 1895. **LORD WATSON.**—In February, 1883, the appellant, who is a member of the Ceylon Civil Service, was married in England to a French lady, the leading respondent in this appeal, who will hereinafter be referred to as "the respondent." From the date of their marriage, until the commencement of this suit, the spouses had their principal residence in Ceylon, where the appellant was necessarily detained by his official duties. In July, 1892, he was assistant government agent of the district of Matara; and on July 12 he brought the present action before the District Court of Matara, against his wife and three other defendants, praying for a divorce a vinculo matrimonii, and other remedies, upon the allegation that she had committed adultery with one of these defendants in the year 1887, with another of them in the year 1889, and with the third of them at various times between May, 1891, and April, 1892. Except on the last of these occasions, when the adultery was alleged to have taken place at Kandy, none of these matrimonial offences was said to have been committed within the jurisdiction of the Courts of Ceylon. The loci assigned for these acts on the two other occasions were, on the first, the steamship *Ghoorka* during a voyage from England to Colombo; and, on the second, the steamship *Ravenna*, during a voyage from Colombo to Marseilles, an hotel at Marseilles, and in Paris. In her defence, the respondent pleaded that the District Court had not jurisdiction to entertain the suit. Upon the merits, she denied all three charges of adultery, and, with respect to the first charge, pleaded alternatively that it had been condoned by the appellant. Two of the other defendants, who were alleged to have been participant in her adulterous acts on the first and third occasions, also lodged defences, denying the charges made against them, and pleaded that they were not subject to the jurisdiction of the court. The defendant in the first charge also set up the plea of condonation.

The appellant is an Englishman by birth; and at the time when this action was instituted, although officially resident within the district of Matara, he admittedly retained, and still continues to retain, his English domicil of origin. He had pre-

viously brought a divorce suit, founded on the same charges of adultery, and directed against the same parties, before the Divorce Court in England, and these proceedings appear to be still in dependence. At the time when they were cited to appear in the District Court of Matara, not one of the three persons who are co-defendants with the respondent was resident in, or was alleged by the appellant to have any connection with, the island. They are described in his plaint, as "of Calcutta, India," and "of London, England."

The district judge ruled that jurisdiction to proceed in the suit was conferred upon him by s. 597 of the Civil Procedure Code, No. 2, of 1889, an enactment which their Lordships will have occasion to notice more fully. The case accordingly went to trial before him; and, on considering the evidence, he found that the first charge of adultery had been proved, but that it had been condoned by the appellant, and that the second and third charges had also been established. In respect of the latter findings, he granted a decree nisi, to become absolute in four months unless good cause were shown against it. On appeal to the Supreme Court, that order was reversed, and the appellant's suit dismissed with costs. Acting Chief Justice LAWRIE, and Acting Puisne Justice BROWN, who constituted the Court of Appeal, based their judgment upon two independent grounds. They held, in the first place, that the courts of Ceylon had no jurisdiction to dissolve a marriage between British or European spouses resident in the island. Such jurisdiction appeared to them to be expressly excluded by s. 53 of the Royal Charter of April 18, 1801, which enacted that the jurisdiction of the Supreme Court of the island—at that time the only court competent to try matrimonial causes—should be exercised

> "towards and upon all the Dutch inhabitants of the said town, fort, and district, according to the laws and usages in that behalf in force at the time the said settlements, territories, and dependencies came into our possession; and, towards and upon the said British and Europeans, and licensed persons hereinbefore described, resident in any of the said settlements, territories, and dependencies, according to the ecclesiastical law, as the same is now used and exercised in the diocese of London, in Great Britain."

That enactment applied to British residents in Ceylon the matrimonial law of England, as it existed in the year 1801; and if it had stood unaltered, the conclusion of the learned judges would have been irresistible. They held, in the second place, that the second and third charges of adultery, which were subsequent to condonation, had not been established by the evidence.

Their Lordships, in deciding this appeal, must observe the limits which the law of Ceylon imposes upon the matrimonial jurisdiction exercisable by the tribunal before which the action was originally brought. It, therefore, becomes necessary to consider whether the District Court of Matara was competent to entertain the action and to pronounce a decree of divorce a vinculo. To that point, which is one of some importance to British and other European residents in the island, the arguments of counsel on both sides of the Bar were exclusively directed. Jurisdiction in matrimonial causes, which, by the Royal Charter of 1801, was vested in the Supreme Court of Judicature, has by subsequent legislation been extended to the district courts of the island. The last of a series of enactments to the same effect is to be found in s. 597 of the Procedure Code of 1889, which provides that

> "any husband or wife may present a plaint to the district court within the limits of which he or she, as the case may be, resides, praying that his or her marriage may, by the law applicable in this colony to his or her case, be dissolved."

This enactment, like those which preceded it, refers to procedure only, and distributes the matrimonial jurisdiction which may be competently exercised by its tribunals among the various courts of the colony. The judge of the district court assumed that it gave him jurisdiction to try the present case, but it is clear that

neither s. 597 of the Code, nor previous enactments to a similar effect, empowered him to entertain any divorce suit which was not previously cognisable by the courts of Ceylon. If s. 53 of the charter of 1801, upon which the learned judges of the Supreme Court relied, had continued in force, it would have been beyond the competency of the District Court of Matara to give the appellant a more stringent remedy than separation a mensa et thoro. But it does not appear to have been brought under the notice of the appellate judges that the whole clauses of the charter of 1801, including s. 53, were revoked and annulled by the Ceylon Charter of Justice, of Feb. 18, 1833. Since that date there has been no legislation regulating the jurisdiction of the courts of Ceylon in matrimonial causes arising between British or European spouses.

In these circumstances, it becomes necessary to consider, in the first place, what is the present law of the island by which such jurisdiction is regulated; and, in the second place, whether according to that law, the present suit is maintainable. The first of these questions appears to their Lordships to admit only of one answer. After the annexation of the Dutch settlements in the island of Ceylon to the British Crown, a commission was granted on April 19, 1798, to Frederick North, appointing him to be governor and commander-in-chief, and containing instructions to him with respect to the administration of justice and other matters. In pursuance of these instructions, the governor issued a Royal Proclamation, promulgated at Colombo, on Sept. 23, 1799, which declared that the administration of justice and police thenceforth and during His Majesty's pleasure, to be exercised by all courts of judicature, civil and criminal,

> "according to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations and alterations by any of the respective powers and authorities hereinbefore mentioned, and to such deviations and alterations as we shall by these presents, or by any future proclamation, and in pursuance of the authorities confided to us, deem it proper and beneficial for the purposes of justice to ordain and publish, or which shall or may hereafter be by lawful authority ordained and published."

The matrimonial law of the colony established by the proclamation of 1799 was superseded, or at least modified, in so far as it related to British and European residents, by the enactments of the Royal Charter of 1801. But it does not appear to their Lordships to admit of doubt, that, as soon as these enactments were swept away by the legislation of 1833, the proclamation was restored to its original force, and the matrimonial law applicable to British or European residents in Ceylon again became the Roman-Dutch law which had prevailed in the colony before its annexation.

Accordingly the prejudicial question which their Lordships have to decide is, whether the Roman Dutch law, or any modification of it introduced into the colony before the year 1798, gives the courts of the island jurisdiction to dissolve a marriage contracted in England by British subjects, who, though resident within the forum, still retain their English domicil. No authority can have a material bearing upon that point which does not relate to the dissolution of marriage, because there are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the jus gentium, may be administered by the courts of the country in which spouses domiciled elsewhere are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties. But the considerations which justify the courts of the residence in administering remedies for

the protection of mutual rights incidental to marriage, which do not involve disruption of the marriage bond, have little or no application to proceedings taken for the purpose of putting an end to the marriage, and remanding the spouses to the condition of single persons.

In order to sustain the competency of the present suit, it is necessary for the appellant to show that the jurisdiction assumed by the district judge of Matara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman-Dutch law. If either of these points were established, the jurisdiction of the district court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicil within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilised country. The opinions expressed by the English common law judges in *R.* v. *Lolley* (1) gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships' opinion, correctly stated by Lord Westbury in *Shaw* v. *Gould* (2) in these terms (L.R. 3 H.L. at p. 85):

> "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a bona fide suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case* (1)."

On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.

Counsel for the appellant, did not assert the existence of any special rule in the Roman-Dutch law giving jurisdiction to entertain a divorce suit in such circumstances as occur in the present case. He maintained that, in addition to jurisdiction arising from the fact of the spouses having their domicil of succession within the territory, which he admitted to be universally acknowledged, the general law of nations recognises that a concurrent and equally effective jurisdiction to divorce is created by the spouses' residence within the territory of such permanence as to constitute what has been termed a "matrimonial domicil," although not of sufficient permanence to fix their true domicil there. In support of the theory of a matrimonial domicil, as distinguished from the domicil of succession, the learned counsel relied mainly, if not exclusively, upon certan decisions by the courts of England and Scotland, which he represented as conclusive in his favour.

Their Lordships will at once proceed to examine these authorities, beginning with the English cases, which do not appear to them to be either consistent or satisfactory. The Scottish cases are not, in their Lordships' opinion, more satisfactory than the English; but, so far as they go, they have the merit of consistency. The first in date of the English cases is *Tollemache* v. *Tollemache* (3) which was decided by Williams, J., Martin, B., and the Judge Ordinary. The suit was for divorce at the instance of the husband, who was throughout a domiciled Englishman. The parties were first married at Gretna Green, and thereafter entered into a regular marriage in London in August, 1837. From that date, with the exception of occasional visits to England and Wales, they resided continuously in Scotland; and, on July 3, 1841, the husband obtained a decree of divorce from the Scottish courts for the adultery of the wife committed in Scotland. In her answer to the English suit, which was

instituted eighteen years afterwards, the wife also prayed the court for a decree, declaring her marriage with the petitioner to be dissolved. The court granted decree of dissolution, with the observation (1 Sw. & Tr. at p. 561):

> "Sitting here as an English Matrimonial court, we cannot recognise [the Scottish] divorce as putting an end to the marriage bond of a domiciled Englishman."

The next case in order, *Yelverton* v. *Yelverton* (4), was a suit at an alleged wife's instance for restitution of conjugal rights, which was dismissed by the judge ordinary. The husband who was called as respondent was not resident and had never been domiciled in England. Their Lordships have noticed these cases because they were founded upon in the argument addressed to them. They need hardly observe that in neither of them was any question raised in regard to matrimonial domicil. In *Tollemache* v. *Tollemache* (3) it might very well have been contended that four years' residence there had given the spouses a matrimonial domicil in Scotland; but that view of the law does not seem to have occurred either to the parties or to the Bench.

In the next case, *Brodie* v. *Brodie* (5), the petitioner, being the husband, was resident, but had not his domicil, in England. He had been married to the respondent in Tasmania, and left her behind him in Melbourne, when he came to Great Britain. His wife never came to England, and the acts of adultery charged in his petition were committed in the colony. In giving decree, the court, consisting of the judge ordinary, with WIGHTMAN and VAUGHAN WILLIAMS, JJ., observed (2 Sw. & Tr. at p. 263):

> "We think that the petitioner was bona fide resident here, not casually, or as a traveller; after he became resident here, his wife was carrying on an adulterous intercourse in Australia. He is, therefore, entitled to a decree nisi for a dissolution of his marriage."

These observations go the whole length of affirming that the residence of the husband in a country where he has not a domicil, if such residence be not casual, or that of a traveller, gives the courts of that country divorce jurisdiction over him, and also over his wife, although she should continue to reside in the country where they both have their domicil of succession. In *Manning* v. *Manning* (6) the judge ordinary dismissed a petition for divorce at the instance of an Irish husband, upon the ground that he was not a bona fide resident in England.

The next authority adduced for the appellant was *Wilson* v. *Wilson* (7), which their Lordships notice because of its connection with a Scottish case between the same parties to which they will have occasion to refer. At the time of their marriage in 1861, both the spouses had their domicil of origin in Scotland, and they continued to reside there until November, 1866, when the husband discovered that the lady had been guilty of adultery. He then went to England, and lived there with his mother until April, 1871, when he presented his petition to the judge ordinary. During its dependence, he brought an action in the Court of Session, and obtained a decree of divorce, after it had been found that he was still domiciled in Scotland. LORD PENZANCE, upon the evidence before him, held that the petitioner had, in April, 1871, acquired an English domicil, and he accordingly pronounced a similar decree, upon the ground that the Scottish courts had no jurisdiction. No question as to what is called matrimonial as distinguished from true domicil was raised in the case. The petitioner was admittedly resident in England, and was found to have his domicil there; but LORD PENZANCE, in delivering judgment, expressed his opinion to the effect that actual domicil afforded the only true test of jurisdiction in such cases.

The last, and not the least important of the English authorities requiring to be considered is *Niboyet* v. *Niboyet* (8). Shortly stated, the facts were these. A Frenchman and an Englishwoman were married at Gibraltar, in the year 1856. In 1875 the husband went to Newcastle-on-Tyne, and continued to reside there until October, 1876, when his wife filed a petition in the Divorce Division of the High

Court of Justice, alleging adultery coupled with desertion for two years and upwards. It was admitted that the respondent, being in the consular service of France, had never lost his domicil of origin. The judge ordinary (Sir R. Phillimore) held that he had no jurisdiction to dissolve the marriage. On appeal, his judgment was reversed by James and Cotton, L.JJ., the present Master of the Rolls (then Brett, L.J.), dissenting. The main reason assigned for their decision by the learned judges of the majority was, that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce a mensa et thoro, and in either case for proper alimony; and, consequently, that, after the Act of 1857 was passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicil sufficient to sustain a suit for restitution of conjugal rights, for separation, or for aliment; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe s. 27 of the Act of 1857 as giving the English court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

The only Scottish authority cited by counsel for the appellant was *Pitt* v. *Pitt* (9). But, in order to ascertain whether, and if so to what extent, the doctrine of matrimonial domicil is regarded in Scotland as a good foundation for the exercise of divorce jurisdiction, their Lordships find it necessary to refer to the other cases in which the doctrine has been applied or discussed by a Scottish court. Although the matrimonial courts of Scotland had previously exhibited no lack of ingenuity in discovering grounds for exercising divorce jurisdiction in cases where the parties had their domicil elsewhere, it was not until the year 1862 that the idea of a matrimonial domicil, other than true domicil, and resting upon a somewhat indefinite permanency of residence, which had been foreshadowed in *Shields* v. *Shields* (10), was first formulated and applied in *Jack* v. *Jack* (11).

In that case both spouses were Scottish, and after their marriage they continued to live together in Scotland until the year 1855, when the husband went to America, and became a minister of the Gospel at Newburgh, in the State of New York, the wife continuing to reside in Scotland. Four and a half years afterwards, the husband, who was still in America, brought his action founded on adultery committed by his wife in Scotland. It was met by the plea of no jurisdiction, and was heard before twelve judges of the Court of Session, who upheld the jurisdiction of the court by a majority of eleven to one. The late Lord President Inglis (at that time Lord Justice Clerk), went upon the ground of matrimonial domicil, which he thus defined:

> "The true inquiry, I apprehend, in every such case is, where is the home or seat of the marriage for the time; where are the spouses actually resident if they be together; or if from any cause they are separate, what is the place in which they are under obligation to come, and renew, or commence, their cohabitation as man and wife?"

Five other judges took substantially the same view expressed in different languages. Lord President M'Neill, with two of their Lordships, concurred in the judgment, holding that the domicil of the married pair had never been transferred to any other country. Lord Kinloch and Lord Jerviswoode, intimated their opinion that the true domicil of the husband was the only test of jurisdiction, but held that the husband was not shown to have lost his Scottish domicil. Lord Deas held that there was no jurisdiction, because the pursuer had acquired a new domicil in the United States. With regard to the matrimonial domicil which found favour with some members of the Court, his Lordship observed:

> "Neither can I solve this case by what has been sometimes called the domicil of the marriage. The phraseology appears to me to be calculated to mislead.

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> It is figurative, and wants judicial precision. There is no third domicil involved apart from the domicil of the husband and the domicil of the wife. Domicil belongs exclusively to persons. Having ascertained the domicil of the husband and the domicil of the wife, the inquiry into domicil is exhausted."

The doctrine of matrimonial domicil, as explained by the Lord Justice Clerk in *Jack* v.
B *Jack* (11) was subsequently applied by his Lordship and other judges of the Second Division, in *Hume* v. *Hume* (12), where they granted a decree of divorce for adultery to a wife whose husband had been in America for seventeen years, and was living with a woman whom he had married there.

The next case, which is also the last case in which the so-called matrimonial domicil has been made the ground of divorce jurisdiction in Scotland, is *Pitt* v. *Pitt*
C (9) already mentioned. In that case, Colonel Pitt, a domiciled Englishman and married there, went to Scotland, chiefly for the purpose of avoiding his creditors, leaving his wife in London. With the exception of occasional visits, in disguise, to relatives in England, he continued to reside in the Hebrides for six years, and then brought an action for divorce on the ground of adultery. His wife, who had never been in Scotland, appeared to defend, and pleaded that, her husband being domiciled
D in England, the Court of Session had no jurisdiction. After proof, the Lord Ordinary (LORD KINLOCH) found that the pursuer had acquired a domicil in Scotland, and gave him decree of divorce. His decision was affirmed by the Second Division of the court, who, differing from him on that point, came to the conclusion that the pursuer still retained his English domicil, but held that his residence in Scotland had been of such a character as to make that country the domicil of the marriage.
E On appeal to the House of Lords, these judgments were reversed, and the defender assoilzied from the conclusions of the action. At the Bar of the House the pursuer's counsel (SIR R. PHILLIMORE, then Queen's Advocate, and SIR HUGH CAIRNS) intimated that

> "they had come to the resolution of abandoning as untenable the ground on
F which the Second Division of the Court of Session had rested their decision, namely, that divorce a vinculo might be validly granted to strangers not domiciled, though temporarily resident, within the jurisdiction."

They, accordingly, confined their argument in support of the judgments appealed from to an endeavour to show that Colonel Pitt had acquired a Scottish domicil. The Lord Chancellor (LORD WESTBURY), in delivering judgment, referred to the
G course taken by counsel in these terms (10 L.T. at pp. 627, 628):

> "If he was not domiciled in Scotland to all intents and purposes, having relinquished his original domicil and acquired a domicil in Scotland, then by the concession of the counsel at the Bar, a concession which is, I trust, in the opinion of your Lordships, quite in accordance with the law of the case, it will be
H impossible to maintain the order which has been pronounced in the court below."

Neither LORD CHELMSFORD nor LORD KINGSDOWN, who sat with the Lord Chancellor, took any exception to that statement.

After the observations made by LORD WESTBURY in *Pitt* v. *Pitt* (9), from which the other noble and learned Lords present did not express dissent, it would be very rash to affirm that, according to the law of Scotland, mere matrimonial domicil affords
I any ground for jurisdiction to divorce. There is no trace of the doctrine to be found in the Institutes of Scottish Law, or in the earlier decisions of the court; and, during the thirty-one years which have elapsed since *Pitt* v. *Pitt* (9) was decided by the House of Lords, the divorce jurisdiction of the Court of Session has never been exercised on that ground. It has, however, been twice referred to since that date, first in the year 1872, in *Wilson* v. *Wilson* (13), and again, ten years afterwards, in *Stavert* v. *Stavert* (14).

In *Wilson* v. *Wilson* (13) the parties were the same as in the English case already noticed. On his finding that his English suit was met by the plea that he retained

his Scottish domicil, the husband brought an action of divorce in the Court of Session, and was there met by the plea that he had acquired an English domicil. The Lord Ordinary, whose judgment was affirmed by the First Division, found that he was domiciled in Scotland, and, notwithstanding the dependence of the English suit, granted decree of divorce. In the note appended to his judgment, the Lord Ordinary (LORD ORMIDALE) observed that

> "having regard to the judgment in the House of Lords in *Pitt* v. *Pitt* (9) in April, 1864, any such thing as a consistorial or matrimonial domicil must be held to be unknown to the law."

In delivering the judgment of the Inner House, Lord President INGLIS said:

> "In cases of divorce, jurisdiction depends upon domicil, and the domicil in this case is here. And if the domicil, and consequently the jurisdiction, is here, they can be nowhere else. I have always been of opinion, as I expressed myself in the case of *Pitt* v. *Pitt* (9), and I have never seen any reason to change that opinion, that for the purposes of divorce there may be a matrimonial domicil, differing from the absolute domicil which will rule succession."

Their Lordships find it difficult to reconcile these statements. If there really were such a thing as a matrimonial domicil recognised by general law, it is not easy to comprehend why the jurisdiction could be nowhere else than in Scotland. On that assumption, the pursuer had certainly acquired a matrimonial domicil in England by five years' continuous residence there; and, in deference to international rules, the Scottish court ought not to have entertained the same lis which was already pending in the proper court of the matrimonial domicil.

In *Stavert* v. *Stavert* (14) the Lord Ordinary refused to grant a divorce to a foreigner who had come to Scotland with his paramour, and had lived there for five months, with the sole object of obtaining a divorce from his wife. The pursuer maintained, alternatively, that he had acquired either a real domicil or a matrimonial domicil in Scotland. The Lord President (LORD INGLIS) held that he was possessed of neither; and with reference to matrimonial domicil his Lordship said:

> "There has been a good deal of speculation on this point, but fortunately it is not necessary to deal with the question here. It has not yet been decided in the court of last resort."

LORD DEAS reiterated the views which he had expressed in *Pitt* v. *Pitt* (9), and LORD SHAND, dealing with the same subject, said:

> "I have great difficulty in finding any sound principle of general application which would induce foreign courts to give weight to a decree in this country based on such jurisdiction; and I have, further, great difficulty in finding any rule or standard as to the nature and extent of the residence which would be necessary or sufficient to found such a jurisdiction."

When carefully examined, neither the English nor the Scottish decisions are, in their Lordships' opinion, sufficient to establish the proposition that, in either of these countries, there exists a recognised rule of general law, to the effect that a so-called matrimonial domicil gives jurisdiction to dissolve marriage. *Tollemache* v. *Tollemache* (3), which was decided by three judges in 1859, shortly after the passing of the Divorce Act, appears to be an authority to the contrary. The learned judges sustained the jurisdiction of the English court, which was the forum of the husband's domicil, and disregarded as incompetent a decree of the Court of Session dissolving his marriage, although he had a matrimonial domicil in Scotland, where he had bona fide resided for four years with his wife, neither casually, nor as a traveller. Then in *Brodie* v. *Brodie* (5), in the year 1861, three learned judges decided the opposite, holding that residence of that kind, which had been found in *Tollemache* v. *Tollemache* (3), to be insufficient to give jurisdiction to a Scottish Court where the

domicil was English, was nevertheless sufficient to give jurisdiction to themselves where the domicil was Australian. In *Wilson* v. *Wilson* (7) jurisdiction was sustained by LORD PENZANCE upon the ground that the petitioner had acquired an English domicil, with an expression of opinion by his Lordship, that such domicil ought to be the sole ground of jurisdiction to dissolve marriage. In *Niboyet* v. *Niboyet* (8) SIR ROBERT PHILLIMORE expressed a similar opinion, and dismissed the suit of the petitioner, who had a matrimonial domicil in England, which fully answered the definition of such domicil given either in *Brodie* v. *Brodie* (5) or in *Pitt* v. *Pitt* (9). His decision was, no doubt, reversed in the Court of Appeal: but it had the support of the present Master of the Rolls, and their Lordships have already pointed out that the judgment of the majority was mainly, if not altogether, based upon a reason which will not bear scrutiny.

The Scottish decisions appear to their Lordships to be equally inefficient to show that a matrimonial domicil is a recognised ground of divorce jurisdiction. So far as they go, they are consistent enough, but the doctrine appears to have had a very brief existence, because the three cases in which it was applied all occurred between Feb. 7 and Dec. 14 in the year 1862. Although, owing to the course taken by the appellant's counsel in *Pitt* v. *Pitt* (9) the House of Lords had not an opportunity of expressly deciding the point, there can be little doubt that the approval of the course adopted by counsel, which was openly expressed by LORD WESTBURY, has had the effect of discrediting the doctrine in Scotland, and it is impossible to affirm that the Court of Session would now give effect to it. The eminent judge, who, in 1862, was the first to give a full and clear exposition of the doctrine of matrimonial domicil, spoke of it, in the year 1882, not as a doctrine accepted in the law of Scotland, but as matter of speculation. It is a circumstance not undeserving of notice that the learned judges, whether English or Scottish, who have expressed judicial opinions in favour of a matrimonial domicil, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any municipal law to the contrary. The reason for their abstinence is probably to be found in the circumstance that nothing could be extracted from these sources favourable to the view which they took.

Their Lordships are of opinion that in deciding the present case, on appeal from a colony which is governed by the principles of the Roman-Dutch law, these authorities ought not to be overlooked. HUBER (lib. 1, tit. 3, s. 2, DE CONFL. LEG.) states the rule of international law in these terms:

> "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut jura alterius imperantis ejusque civium præjudicetur."

That passage was cited with approbation by LORD CRANWORTH, and LORD WESTBURY, in *Shaw* v. *Gould* (2) (L.R. 3 H.L. at pp. 72 and 81). To the same effect, but in language more pointed, is the text of RODENBURG (DE STAT. DIVERS. tit. 1, c. 3, s. 4) cited in the same case by LORD WESTBURY:

> "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solum modo judici, et quidem dimicilii, universum in illa jus sit attributum."

The same rule is laid down by BAR, the latest continental writer on the theory and practice of international private law. He says (s. 173 GILLESPIE'S TRANSLATION, p. 382)

> "that in actions of divorce—unless there is some express enactment to the contrary—the judge of the domicil or nationality is the only competent judge. . . . A decree of divorce, therefore, pronounced by any other judge than a judge of the domicil or nationality, is to be regarded in all other countries as inoperative."

There can, in their Lordships' opinion, be no satisfactory canon of international law, regulating jurisdiction in divorce cases, which is not capable of being enunciated with sufficient precision to ensure practical uniformity in its application. But any judicial definition of matrimonial domicil which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. The definitions given in *Brodie* v. *Brodie* (5) and in *Pitt* v. *Pitt* (9), appear to their Lordships to be equally open to that objection. Bona fide residence is an intelligible expression, if, as their Lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil. Residence which is "not that of a traveller" is not very definite; but nothing can be more vague than the description of residence which, not being that of a traveller, is not to be regarded as "casual." So also, the place where it is the duty of the wife to rejoin her husband, if they happen to be living in different countries, is very indefinite. It may be her conjugal duty to return to his society although he is living as a traveller, or casually, in a country where he has no domicil. Neither the English nor the Scottish definitions, which are to be found in the decisions already referred to, give the least indication of the degree of permanence, if any, which is required in order to constitute matrimonial domicil, or afford any test by which that degree of permanence is to be ascertained. The introduction of so loose a rule into the jus gentium would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent. Their Lordships attach great weight to the consideration that the theory of matrimonial domicil for which the appellant contends has never been accepted in the court of last resort for England and Scotland.

The matter does not rest there, because the theory is not only in direct opposition to the clear opinion expressed by LORD WESTBURY in *Pitt* v. *Pitt* (9), but appears to their Lordships to be at variance with the principles recognised by noble and learned lords, in *Dolphin* v. *Robins* (15), and in *Shaw* v. *Gould* (2). It is true that in these cases, and especially in *Dolphin* v. *Robins* (15), there was ground for holding that the spouses had resorted to a foreign country and a foreign tribunal in order to escape from the law and the courts of their English domicil. But in both, the international principle, upon which jurisdiction to dissolve a marriage depends, was considered and discussed; and the arguments addressed to their Lordships in favour of matrimonial domicil appear to them to run counter to the whole tenor of the observations which were made by noble and learned Lords in these cases.

In *Dolphin* v. *Robins* (15), LORD CRANWORTH stated (7 H.L.Cas. at p. 414) that

> "it must be taken now as clearly established that the Scotch court has no power to dissolve an English marriage, where, as in this case, the parties are not really domiciled in Scotland, but have only gone there for such a time as, according to the doctrine of the Scotch courts, gives them jurisdiction in the matter."

In *Shaw* v. *Gould* (2), the dicta of noble and learned lords upon the point raised in this appeal was even more emphatic. LORDS CRANWORTH and WESTBURY expressed their entire approval of the doctrine laid down by HUBER and RODENBURG in those passages which have already been cited. Their Lordships did not go the length of saying that the courts of no other country could divorce spouses who were domiciled in England; but they held that the courts of England were not bound, by any principle of international law, to recognise as effectual the decree of a foreign court divorcing spouses, who, at its date, had their domicil in England. The other noble and learned Lords who took part in the decision of *Shaw* v. *Gould* (2) were LORDS CHELMSFORD and COLONSAY. LORD CHELMSFORD did not express any opinion upon the subject of matrimonial domicil. LORD COLONSAY rested his judgment upon the fact that the spouses had resorted to Scotland for the very purpose of committing a fraud upon the law of their English domicil; but he indicated an opinion that, in the absence of such fraudulent purpose, they might have obtained a valid

A divorce in Scotland, after a residence in that country which was insufficient to change their domicil of succession.

Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by LORD PENZANCE in B *Wilson* v. *Wilson* (7), which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce (see L.R. 2 P. & D. at p. 442):

> "It is the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all C cases referring their matrimonial differences to the courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which D alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be a man and wife in one country, and strangers in another."

Their Lordships will, therefore, humbly advise Her Majesty to affirm the order appealed from. The appellant must pay to the first and fourth respondents their E costs of this appeal.

Solicitors: *J. J. Freeman; Lewis & Lewis; Maynard & Son.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

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COUNTY OF GLOUCESTER BANK *v.* RUDRY MERTHYR STEAM AND HOUSE COAL COLLIERY CO. AND OTHERS

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), March 5, 1895]

[Reported [1895] 1 Ch. 629; 64 L.J.Ch. 451; 72 L.T. 375; H 43 W.R. 486; 39 Sol. Jo. 331; 2 Mans. 223; 12 R. 183]

Company—Management—Presumption that directors have acted regularly—Deed signed by two directors—Power in articles to directors to prescribe quorum—Resolution prescribing quorum of three directors—Validity of deed.

I Where there is nothing in the public documents of a company to put on enquiry a person who is dealing with the company that person is entitled to accept as regular a document on the face of which there does not appear anything irregular, e.g., a mortgage deed signed by two directors of the company, whereas the directors, exercising a power given to them by the articles of association, had in fact, as a matter of internal management, passed a resolution constituting three directors a quorum to perform such an act.

Rule in *Royal British Bank* v. *Turquand* (1) (1856), 6 E. & B. 327, applied.

D'Arcy v. *Tamar, Kit Hill, and Callington Rail. Co.* (2) (1867), L.R. 2 Exch. 158, distinguished.

Mortgage—Business—Colliery—Receiver and manager—Appointment after mortgagors had entered into possession.

Leases of colliery property which had been granted to the mortgagors were sub-demised by them to the mortgagees as security for a loan. The mortgagors became insolvent, the mortgagees appointed a receiver of rents and profits under s. 19 (1) (iii) of the Conveyancing Act, 1881 [now the Law of Property Act, 1925, s. 101 (1) (iii)] and then, finding it necessary that they should be empowered to work the mines, applied to the court for an order for the appointment of a receiver and manager.

Held: a "colliery" meant a business and the sub-demise of the leases included and implied in its terms the business of getting and selling coal which was carried on by the company; it was essential for the preservation of their security that the mortgagees should be at liberty to carry on the business; and the order which they sought would be made although they had already entered into possession.

Notes. Applied: *Re Bank of Syria, Owen and Ashworth's Claim, Whitworth's Claim*, [1900] 2 Ch. 272. Followed: *Duck* v. *Tower Galvanizing Co.*, [1901] 2 K.B. 314. Considered: *Ruben* v. *Great Fingall Consolidated*, [1904] 1 K.B. 650; *Premier Industrial Bank* v. *Carlton Manufacturing Co. and Crabtree*, [1909] 1 K.B. 106. Applied: *Re Fireproof Doors, Ltd., Umney* v. *Fireproof Doors, Ltd.*, [1916-17] All E.R. Rep. 931. Considered: *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins*, [1924] All E.R. Rep. 230. Distinguished: *Houghton* v. *Northard, Low and Wills*, [1927] 1 K.B. 246. Referred to: *Poole* v. *Downes* (1897) 76 L.T. 110; *Stamford, Spalding and Boston Banking Co.* v. *Keeble* (1913), 82 L.J.Ch. 388; *Dey* v. *Pullinger Engineering Co.*, [1920] All E.R. Rep. 591; *B. Liggett (Liverpool), Ltd.* v. *Barclays Bank, Ltd.*, [1927] All E.R. Rep. 451; *Rama Corpn. v. Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554.

As to persons dealing with a company not being concerned to inquire into the regularity of acts of internal management, see 6 HALSBURY'S LAWS (3rd Edn.) 430. For cases see 9 Digest (Repl.) 660. As to the appointment of a receiver and manager of mortgaged property, see 27 HALSBURY'S LAWS (3rd Edn.) 366-369, and for cases see 35 DIGEST 531 et seq.

Cases referred to:

(1) *Royal British Bank* v. *Turquand* (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur.N.S. 663; 119 E.R. 886, Ex. Ch.; 9 Digest (Repl.) 660, *4374*.

(2) *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (1867), L.R. 2 Exch. 158; 4 H. & C. 463; 36 L.J.Ex. 37; 14 L.T. 626; 30 J.P. 792; 12 Jur.N.S. 548; 14 W.R. 968; 10 Digest (Repl.) 1243, *8750*.

(3) *Mahoney* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 9 Digest (Repl.) 687, *4529*.

(4) *Campbell* v. *Lloyd's, Barnett's and Bosanquet's Bank, Ltd.* (1889), [1891] 1 Ch. 136, n.; 58 L.J.Ch. 424; 35 Digest 532, *2630*.

(5) *Jefferys* v. *Smith* (1820), 1 Jac. & W. 298; 37 E.R. 389, L.C.; 34 Digest 623, *198*.

(6) *Whitley* v. *Challis*, [1892] 1 Ch. 64; 61 L.J.Ch. 307; 65 L.T. 838; 40 W.R. 291; 36 Sol. Jo. 109, C.A.; 35 Digest 532, *2629*.

Also referred to in argument:

Re Prytherch, Prytherch v. *Williams* (1889), 42 Ch.D. 590; 59 L.J.Ch. 79; 61 L.T. 799; 38 W.R. 61; 35 Digest 522, *2508*.

Appeal by the plaintiffs from a decision of NORTH, J., on a motion by mortgagees for an order appointing a receiver and manager.

By two indentures of lease, dated respectively April 14, 1877, and June 1, 1878, and made between the lessors and lessees therein respectively named, certain mines, beds, veins, and seams of coal, iron ore, ironstone, and fireclay, situate

in the parish of Rudry, in the county of Glamorgan, were demised to the lessees for the respective terms of thirty-nine years from Feb. 2, 1876, and forty years from Feb. 2, 1875, at and subject to the several rents and royalties and covenants on the part of the lessees and conditions thereby and therein reserved and contained. By an indenture of lease, dated Sept. 27, 1883, and made between the lessor and lessees therein named, a railway or tramway wayleave and right of way and certain hereditaments, all situate in the parish of Rudry, were demised to the lessees for the term of thirty-two years from Feb. 2, 1883, at and subject to the several rents and royalties and covenants on the part of the lessees and conditions thereby and therein reserved and contained. By an indenture of lease, dated Dec. 26, 1883, and made between the lessor and lessees therein named, a certain level situate and being in and under a certain farm and lands in the parish of Rudry (except as therein mentioned) was demised to the lessees for the term of thirty-two years from Feb. 2, 1883, at and subject to the several rents and royalties and covenants on the part of the lessees and conditions thereby and therein reserved and contained. By an indenture, dated Sept. 1, 1888, and made between the lessees under the several before-mentioned indentures of lease, of the one part, and the defendant company, of the other part, all the premises comprised in and demised by those indentures of lease were assigned to the defendant company for all the residue then unexpired of the several terms for which the same were granted as aforesaid, subject to the several rents and royalties and other moneys reserved by the indentures and the covenants, conditions, and declarations in the same indentures respectively contained.

By an indenture dated Mar. 14, 1893, and made between the defendant company, of the one part, and the above-named plaintiffs, of the other part, all and singular the several pieces and parcels of land, mines, beds, veins, and seams of coal and other the premises comprised in and demised by the several before-mentioned indentures of lease, and also all buildings and erections, fixed motive powers, and fixed powers of machinery erected and being on the premises (excepting such machinery as would be deemed personal chattels within the Bills of Sale Acts, 1878 and 1882), were demised to the plaintiffs for all the residue of the several terms of thirty-nine years, forty years, thirty-two years, and thirty-two years, granted respectively by the indentures of lease, except the last three days of each of the terms, by way of mortgage to secure payment of the sum of £6,000 and interest thereon at the rate of £5 per cent. per annum at the times and in manner therein mentioned. On Nov. 21, 1894, an order was made for the winding-up of the defendant company. Some time prior to the making of that order the defendant company had ceased to carry on its business or to work the colliery and other property comprised in the before-mentioned indentures of lease. Large sums were claimed by the lessors to be due for arrears of rent and royalties, and the defendant company was hopelessly insolvent. The defendant company had granted a second mortgage of the property comprised in the several before-mentioned indentures of lease, and had executed a bill of sale of their chattels and effects, in favour of the defendants Joseph Heald and Samuel Gething Lewis, trading as the Bute Works Supply Co. There was also a third mortgage in favour of the defendant Edwin Starbuck Williams.

On Dec. 27, 1894, the plaintiffs, by virtue of the power conferred on them by the Conveyancing Act, 1881, appointed a receiver of the rents, profits, and income of all the property comprised in or subject to the indenture of mortgage of Mar. 14, 1893, with all the powers conferred on a receiver by that Act, and to the intent that he should apply all moneys received by him in manner directed by s. 24 (8) of that Act [Law of Property Act, 1925, s. 109 (8)]. It being considered that it would be exceedingly difficult, if not impossible, for the plaintiffs to sell the mortgaged property unless they were empowered to keep open the colliery and to work the same so that the same might be sold and disposed of as a going concern, and being also apprehensive that the lessors would forfeit the leases on account of the breaches

of covenant to work the mines, the plaintiffs brought the present action for foreclosure, and then moved before NORTH, J., for an order appointing a receiver and manager. On Feb. 1, 1895, the motion came on to be heard before NORTH, J., who refused to make any order on it. The plaintiffs appealed. Upon the hearing of the appeal the question was raised, which had not been argued before NORTH, J., whether the mortgage to the plaintiffs was validly executed by the defendant company. It appeared that the articles of association of the defendant company empowered its directors to determine how many of their number should form a quorum at meetings of the board, and a resolution was passed that three directors were required to form a quorum. At meetings which authorised the execution of the mortgage of the company's property in favour of the plaintiffs there were only two directors present, and they sanctioned the mortgage and empowered the secretary to affix the seal of the company to it.

Swinfen Eady, Q.C. (with him *A. à Beckett Terrell*) for the plaintiffs, the mortgagors.

Romer for the third mortgagee.

J. G. Wood for the second mortgagees.

LORD HALSBURY.—Upon the point whether the mortgage in question was a valid mortgage or not, I am of opinion that nothing has been urged before us which would induce us to say that the authority of the company was not given to the making of this mortgage. When a company is dealing with an outside person who has no other means of knowledge, he is entitled to regard the company as having performed its functions in the transaction by whatever means it can lawfully do so. *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (2) was a case in which a bond given by a company was held not to be the bond of the company among other reasons, because by a section of a special Act, the business of the company was to be conducted by a particular quorum of directors, and it was held that all persons dealing with the company were bound, therefore, to know what was in the provisions of the special Act in respect to that matter. If that case were identical in its facts with the case now before us, one would be bound by that decision, but I think the facts are not the same at all. Looking at the decisions in *Royal British Bank* v. *Turquand* (1) and in the case in the House of Lords of *Mahony* v. *East Holyford Mining Co.* (3), they affirm a proposition of a very different character. Persons dealing with joint-stock companies are bound to look at what one may call the outside position of the company; that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company. If those public documents, which everyone has a right to refer to, disclose an infirmity in the action of the company persons take the consequences of dealing with a joint-stock company which has apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would only show that by some regulations of their own—what LORD HATHERLEY, in *Mahony* v. *East Holyford Mining Co.* (3), described as their "indoor management"—they were capable if they had thought right of making any quorum they pleased. An outside person knowing that, and not knowing the internal regulations, when he found a document, sealed with the common seal of the company, and attested and signed by two of the directors and the secretary, was, I think, entitled to assume that that was the mode by which authority was conferred on the company to make an instrument of that description. It turns out that by their internal regulations the number of directors should have exceeded two, and that there ought to have been three. But then that is a matter which, as LORD HATHERLEY says in *Mahony's Case* (3), was known to them and them alone. The only external management of the company of which an outside person would be cognisant would be that they had power to make any quorum they pleased. Having

these documents before us, I think we should be entitled to assume that the proper quorum had been properly summoned and attended to effect the completion of the instrument.

That disposes of the first point as to the validity of the mortgage. As to the second, which I may call the substantial part of this case, it altogether depends upon what is involved in a mortgage of colliery leases. Subject to a question which I will deal with in a moment, whether the plaintiffs have put themselves in a worse position by taking possession under their mortgage, it does not appear to be denied that, if the business is sought to be conveyed by the mortgage, and intended by the parties to be conveyed, this application for a receiver and manager is a proper and usual application, and one which would as a matter of course be granted. The management of the colliery business is one which essentially required the appointment of a manager, and it would be proper and usual to come to the court to aid the persons who were invoking its assistance for the purpose of carrying on the business.

There are two objections made. It is said first, that the business is not intended to be conveyed, that this is only a mortgage of a certain quantity of land and seams of coal. That appears to me to rest entirely on a false foundation. It may be that the words of the mortgage do not contain "the colliery and the colliery business," and I assume that they do not. But it is impossible to disregard the nature of the thing itself. What is a colliery? What are the seams of coal, what is the motive power—what does all that phraseology mean but that industrial occupation which we compendiously call a "colliery"? What is the meaning of the transfer of these rights of taking away the coal and of working the coal which are involved in the leases? More than that, there is the right of the lessors to terminate all interest in these things if the coal is not properly, continuously, and uninterruptedly worked, and worked according to the best manner of working in the district in which the mining goes on. It appears to me that, when one looks at the nature of the thing itself, it is impossible to doubt that it was intended by the instruments and by the parties executing them, that what we, as I say, compendiously call "the colliery" was to be transferred, and with it the right of managing the business. If I am right in my construction of what the transfer of a colliery means, then this case is covered distinctly by authority which counsel for the second mortgagees does not seem to contest, viz., *Campbell* v. *Lloyd's, Barnett's and Bosanquet's Bank, Ltd.* (4). That therefore, to my mind, disposes of that question, for I am very clearly of opinion that a colliery means a business, and the conveying of colliery leases under these circumstances includes and implies in its terms the business which is carried on by a colliery.

There is this further question. It is said that the parties cannot now make this application, because they have put themselves in the wrong by taking possession. It is urged that, if they have got possession themselves and have exercised the power to take possession which a mortgagee has, they are in the difficulty that they cannot apply to the court to appoint a manager, because, if they chose to manage, they could themselves do so. I do not deny the difficulty, and it is possible that they have done what was ill-advised, and that they ought to have made this application before they had themselves taken possession. But that is not an objection at law, it is an objection only as to the discretion of the court, and if we see that they have got into a difficulty by doing that which was ill-advised perhaps, but that it is for the advantage of all the parties that we should appoint a manager and a receiver, there is no case which could stop us from doing it. We should not interfere under ordinary circumstances, if the parties themselves had taken possession. I agree to that. But it appears to me, from what I have already said, that the circumstances of this case are extremely peculiar, and that we ought to cure the mistake that the parties have made, if we can, and put them in a position which will be to the advantage of all the parties and will prevent the subject-matter of this security being forfeited, as it probably would if we were

to hold our hands. I am, therefore, of opinion that this appeal ought to succeed, and that NORTH, J., ought to have made the order that was requested.

LINDLEY, L. J.—I am of the same opinion. As to the question of the validity of the mortgage, I have not the slightest doubt that the mortgage is perfectly good upon the evidence as it stands. Counsel for the second mortgagees has relied upon *D'Arcy* v. *Tamar, Kit Hill, and Callington Rail. Co.* (2), which is always referred to when there has been any irregularity in affixing the seal of a company. But that case does not reach the present case by a very long way. The Court of Exchequer there held that, in an action on a bond, and a plea of non est factum, they could not say that a bond executed under the seal of the company was good, because there were two Acts of Parliament. One was a special Act, which rendered it essential that in the case of any bond issued by the company there should be a quorum of directors present at that particular meeting, there was no such quorum and no such meeting, and the court came to the conclusion that, upon the true construction of those Acts, non est factum was a good defence. That case has never been applied, so far as I know, to registered companies where the quorum and so on depend entirely upon the regulations which the directors may choose to make themselves.

The present case is governed, not by *D'Arcy* v. *Tamar, Kit Hill and Callington Rail. Co.* (2), but by *Royal British Bank* v. *Turquand* (1), followed as it has been by a string of cases too numerous to refer to, the principal one of which is the Irish case in the House of Lords of *Mahony* v. *East Holyford Mining Co.* (4). Here the directors may make any quorum they like—it may be two or it may be more. They did apparently appoint three. The document in question is under the seal of the company signed by two directors and countersigned by the secretary. What could anybody think of that? What is there to put him upon inquiry? What is there to give him notice of anything irregular, if there was anything irregular? If a person looked at that deed and at the articles of association of the company, there does not seem to be anything irregular at all. He would be at liberty to infer, and probably anyone in the ordinary course of business would infer, that if the directors had appointed a quorum they would have appointed the two who signed that deed. But supposing that three were wanted, he is not bound to go and look at the directors' minutes. He has no right to look at them except as a matter of bargain. What is in the minutes does not affect him at all. There is nothing irregular on the face of the deed—there is nothing illegal in it. As to a plea of non est factum, that could not be raised for a moment, and I have not the slightest doubt myself that that deed is as good as any other deed that ever was sealed. So much for that point.

As to the other point, that is an important matter. NORTH, J., has declined to appoint a receiver and manager because, he says, the first mortgagees who ask for a receiver and manager are not mortgagees of the business of the colliery. In one sense that is right, they are not mortgagees of the business in so many words. But what is a colliery? What does it mean? The leases on which this colliery was held were sub-demised to the mortgagees, and those leases contained powers to win and get the coal. The leases were of a colliery to be worked; that is to say, the lessees were to dig out the coal and sell it—take so much of the ground away, and get rid of it for money. There were royalties to be paid, and there were clauses for re-entry, as to the ordinary dead rent, and so on. That property was sublet. What does that mean? What are the sub-lessees to do with such property as that? It is familiar to everybody in this court, I suppose, that for years colliery property has not been property of so much land. Ever since the days of LORD ELDON, and probably long before, there was a distinction drawn between colliery property and ordinary landed property. In *Jefferys* v. *Smith* (5), which is one of the leading cases on this point, the Lord Chancellor makes this observation about collieries. It was there a question with regard to a receiver. There were some

tenants in common of a colliery. One tenant in common wanted a receiver of the colliery appointed, and it was familiar law in those days that, if one tenant in common wanted a receiver of the property in common, he could not get it. He must go and enter, and the law allowed all tenants in common to enter into possession. LORD ELDON said (1 Jac. & W. at p. 302):

> "The question is, whether mines have not been always considered, not altogether, but in some sort, as a species of trade. How it may be in Wales I do not know; but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied, that it was to be carried on in a practical and feasible way? I believe I have a note of a case before LORD HARDWICKE, which confirms me in the idea that, where there are part owners of a mine, and they cannot by contract agree to appoint a manager, this court will manage it for them."

That doctrine never applied to tenants in common of ordinary land, and the reason of it is obvious when you come to think of it.

Let us see what in effect is the mortgage of this colliery. It is intended of course as a security: that is the object of the whole transaction. What are the mortgagees to do? Are they to prevent anybody from going into it? Are they to leave the mortgagors alone whether they pay the interest or not, or whether they make default or not? If they go into possession what are they to do with the property? Bear in mind that, if they do nothing, the mine will be swamped with water, and the property will not be to them what it was intended to be, namely, a security for their repayment. It is absolutely essential that a sub-lessee of a going concern like this is to be at liberty to dig and work the coal, and sell it, and reduce what is due to him on his mortgage. That is a necessary part of the transaction. It has been so treated in, I should think, almost every case of this kind which has come before the courts. It was so treated in the case before CHITTY, J., of *Campbell v. Lloyd's, Barnett's, and Bosanquet's Bank, Ltd.* (4). That case was substantially like this. I may say that it was exactly like this, except that there the sublease included the loose plant and materials, which this sublease does not. That does not alter the substantial character of the transaction, and it would be a mere mockery to a mortgagee of a colliery, whether by assignment or sub-demise, to tell him he is not to touch the minerals. It is ridiculous. It appears to me that this is a matter in which I will not say that there is a goodwill, but in which it is absolutely essential to the mortgagees' security that the mine should be worked. If not, it may be forfeited at any moment.

If the mortgagees had not embarrassed themselves by taking possession, I should have thought that, under s. 25 of the Supreme Court of Judicature Act, 1873 [see now the Supreme Court of Judicature (Consolidation) Act, 1925, s. 45], it would be almost a matter of course to appoint a receiver and manager. I say under that section, because, before that, I rather think the first mortgagee was told to go and enter. That practice has been altered, it may be beneficially, by s. 25 of the Supreme Court of Judicature Act, 1873. The mortgagees have entered, and they find themselves in a difficulty. They find that they have made a false move. They have got themselves into a state of embarrassment by entering into possession because the second mortgagees attack, and say: "If you are going to be mortgagees in possession you have no right to work this colliery; you must do it at your own peril; you must lay out a lot of money in keeping the mine going, and then be disallowed it in your accounts." That is very awkward, and the plaintiffs want to know where they are, to say the least of it. It appears to me that, there being ample jurisdiction to appoint a receiver and manager, we ought not to abstain from doing it simply because the mortgagees have made what now appears to be a false step, and have taken possession. Their mortgagors are being wound-up, and

will not have anything to do with the matter, but the third mortgagees support them. The second mortgagees, finding that the first mortgagees, through taking possession, have got into a difficulty, want to keep them there. I do not think that that is fair. I think that the case for a receiver and manager is amply made out, and that the order of NORTH, J., ought to be discharged, and the receiver and manager appointed.

A. L. SMITH, L.J.—The first question that appears to me to arise in this case is: What was the security which was given by the defendant company to the plaintiffs? Was it a mere security of bare land, was it a mere security of a seam of coal, or was it a security which the defendants had to dispose of, namely, the value of the leases and the leases themselves, which they held from the lessors?

Apart from the phraseology of this mortgage deed, I cannot have any doubt myself that the intention of the parties was that one should convey to the other by way of security the security which they had to grant, namely, the leases. The leases were subject also to the covenants that unless the seams of coal were worked the lessors might enter into possession. It seems to me that the subject of the security in this case is not the bare seams, but that it is the coal and the rights which the mortgagors had of working those seams under their leases. If they were not granted under this mortgage deed I do not see what security the plaintiffs took. If they did not work the seams it might well be, and probably would be, that the landlords would re-enter for a forfeiture, and the whole of the security would be gone, because the leases would be put an end to by that re-entry. I think that that is the true meaning of a colliery lease. It is entirely unlike *Whitley* v. *Challis* (6), by which NORTH, J., thought himself bound. It is a different thing altogether to a mortgage of a house or an hotel. In *Whitley* v. *Challis* (6) this court held that the business of the hotel and the goodwill of the hotel was not comprised in the security; that being so, that the mortgagee, by asking for a receiver, could not enlarge the security which he had not got; and they refused to order a receiver or manager to be appointed. For the reasons which have been given by LORD HALSBURY and LINDLEY, L.J., I am of opinion that the subject-matter of the security in this case is the colliery, and the right to work it as contended for by the plaintiffs.

If the matter had rested there, and nothing had taken place except that on Jan. 25, 1895, this originating summons had been taken out by the plaintiffs for foreclosure of their mortgage and sale, I suppose that under s. 25 of the Supreme Court of Judicature Act, 1873, it would have been held by any court that it was just and convenient that a receiver and manager should be appointed. But it is said that something did occur between the granting of the mortgage in March, 1893, and January, 1895, namely, that the plaintiffs, in the interval, entered into possession, and that, therefore, they are not entitled to ask for a receiver. For the reasons which have been given by LORD HALSBURY (and LINDLEY, L.J., has pointed out the difficulty which the plaintiffs were in), in my judgment, the mere fact of their having entered into possession as they did does not render it unjust or not convenient in the present circumstances that a receiver and manager should be appointed. Accordingly, I think that the judgment appealed against should be reversed and the appeal allowed.

There is one other point about the mortgage not having been duly executed so as to be binding upon the defendant company. I have nothing to add except to say this, that the cases which were cited, viz., *Royal British Bank* v. *Turquand* (1) and *Mahony* v. *East Holyford Mining Co.* (3) are conclusive upon the point that this was a duly executed deed. I think, therefore, that the appeal should be allowed, with costs.

Appeal allowed.

Solicitors: *Riddell, Vaizey & Smith*, for *Vachell & Co.*, Cardiff; *Ince, Colt & Ince, for Ingledew, Ince & Colt*, Cardiff.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

HOWARD *v.* FANSHAWE

[CHANCERY DIVISION (Stirling, J.), May 7, 8, 28, June 26, 29, 1895]

[Reported [1895] 2 Ch. 581; 64 L.J.Ch. 666; 73 L.T. 77; 43 W.R. 645; 39 Sol. Jo. 623; 13 R. 663]

Landlord and Tenant—Lease—Forfeiture—Peaceable re-entry by landlord—Right of tenant to relief—Need for new lease where relief granted—Common Law Procedure Act, 1852 (15 & 16 *Vict.*, *c.* 76), *s.* 212.

The proviso for re-entry on demised premises on non-payment of rent is regarded in equity as merely a security for the rent, and, therefore, a tenant is entitled to be relieved against forfeiture on payment of the rent and any expenses to which the landlord has been put. This right to relief exists whether the landlord has obtained possession of the premises by peaceable re-entry or in an action for ejectment. Under the Common Law Procedure Act, 1852, a tenant who has been relieved shall hold the demised premises "according to the lease thereof made, without any new lease."

Bankruptcy—Tenant—Chose in action—Right to relief from forfeiture of lease—Right vesting in trustee—Assignment to purchaser.

The right of a tenant to be relieved from forfeiture of a lease for breach of covenant is a chose in action, which, on the bankruptcy of the tenant, vests in the trustee in bankruptcy, who is entitled to assign the right to a purchaser.

Notes. Followed: *Humphreys* v. *Morton*, [1905] 1 Ch. 739. Distinguished: *Standard Pattern Co., Ltd.* v. *Ivey*, [1962] 1 All E.R. 452. Referred to: *Durell* v. *Gread* (1914), 84 L.J.K.B. 130.

As to relief against forfeiture, see 23 HALSBURY'S LAWS (3rd Edn.) 674-683, and s. 146 of the Law of Property Act, 1925: 20 HALSBURY'S STATUTES (2nd Edn.) 427. For cases see 31 DIGEST (Repl.) 534 et seq. For Landlord and Tenant Act, 1730, and Common Law Procedure Act, 1852, see 13 HALSBURY'S STATUTES (2nd Edn.) 850, 407.

Cases referred to:

(1) *Wadman* v. *Calcraft* (1804), 10 Ves. 67; 32 E.R. 768; 31 Digest (Repl.) 535, *6595*.

(2) *Sanders* v. *Pope* (1806), 12 Ves. 282; 33 E.R. 108, L.C.; 20 Digest (Repl.) 549, *2572*.

(3) *Davis* v. *West* (1806), 12 Ves. 475.

(4) *Cage* v. *Russel* (1681), 2 Vent. 352; 86 E.R. 481, L.C.; 20 Digest (Repl.) 549, *2566*.

(5) *Northcote* v. *Duke* (1765), Amb. 511; 2 Eden, 319; 27 E.R. 330, L.C.; 31 Digest (Repl.) 419, *5477*.

(6) *Hack* v. *Leonard* (1724), 9 Mod. 91.

(7) *Wafer* v. *Mocato* (1724), 9 Mod. 112.

(8) *Eaton* v. *Lyon* (1798), 3 Ves. 690; 30 E.R. 1223; 31 Digest (Repl.) 76, *2307*.

(9) *Bowser* v. *Colby* (1841), 1 Hare, 109; 11 L.J.Ch. 132; 5 Jur. 1178; 66 E.R. 969; 31 Digest (Repl.) 535, *6592*.

(10) *Taylor* v. *Knight*, 4 Vin. Abr. Ch., Pl. 31, p. 406.

(11) *Hill* v. *Barclay* (1810), 16 Ves. 402; 33 E.R. 1037, L.C.; subsequent proceedings (1811), 18 Ves. 56; 34 E.R. 238, L.C.; 20 Digest (Repl.) 550, *2577*.

(12) *Hare* v. *Elms*, [1893] 1 Q.B. 604; 62 L.J.Q.B. 187; 68 L.T. 223; 57 J.P. 309; 41 W.R. 297; 37 Sol. Jo. 214; 5 R. 189, D.C.; 31 Digest (Repl.) 551, *6717*.

(13) *Seear* v. *Lawson* (1880), 15 Ch.D. 426; 49 L.J.Bcy. 69; 42 L.T. 893; 28 W.R. 929, C.A.; 5 Digest (Repl.) 1046, *8457*.

(14) *Guy* v. *Churchill* (1888), 40 Ch.D. 481; 58 L.J.Ch. 345; 60 L.T. 473; 37 W.R. 504; 5 T.L.R. 149; 5 Digest (Repl.) 1083, *8732*. A

Also referred to in argument:

Reynolds v. *Pitt* (1812), 19 Ves. 134; 2 Price, 212, n.; 34 E.R. 468, L.C.; 31 Digest (Repl.) 404, *5346*.

Elliott v. *Turner* (1843), 13 Sim. 477; 60 E.R. 185; 36 Digest (Repl.) 8, *14*. B

Grimston v. *Lord Bruce* (1707), 1 Salk. 156; 2 Vern. 594; 91 E.R. 144; 20 Digest (Repl.) 549, *2568*.

Action for possession.

Some time previously to December, 1892, the defendant entered into an agreement with Lewis Etheridge, a builder, for the erection of certain dwelling-houses C in Stanley Road, Dagenham, Essex, and for the granting to Etheridge of leases of the houses so to be erected. On Dec. 2, 1892, the defendant granted to Etheridge a lease of No. 5, Stanley Road, for ninety-nine years from Mar. 25, 1892, at a peppercorn rent for the first year, and thereafter at the rent of £5 paid quarterly. When this lease was granted No. 5, Stanley Road was not completed, but the lease was given to him by the defendant for the express purpose of raising money D thereon. On Dec. 14, 1892, Etheridge deposited the lease with the plaintiff by way of security for an advance of £200 and interest. In like manner a lease of No. 1, Stanley Road, was granted to Etheridge on Dec. 22, 1892, and was on April 14, 1893, deposited with the plaintiff to secure another sum of £200 and interest. The leases dealt with the houses as completed, and each contained a proviso enabling the lessor to re-enter on any part of the demised premises in the name of the whole E

> "if and when any part of the rent hereby reserved shall be in arrear for twenty-one days next after the same shall have become due, whether the same shall have been legally demanded or not, or if the lessee, his executors, administrators, or assigns, shall not truly observe and perform all and singular the covenants and provisions hereinbefore contained, and thereupon, the term hereby granted shall absolutely determine." F

On Feb. 6, 1894, Etheridge was adjudicated a bankrupt. At this date the houses Nos. 1 and 5, Stanley Road, were incomplete. They appeared to have had front doors, but neither back doors nor windows. On Feb. 20, 1894, the plaintiff's solicitor saw the defendant's solicitors, and negotiations took place with a view to the plaintiff's title being completed. On Feb. 21, without notice to the plaintiff, G a clerk to a land agent, acting under instructions given him by the defendant's solicitors, went to Nos. 1 and 5, Stanley Road, entered each of them by the back door, and affixed to the front door a notice to the effect that possession had been taken on behalf of the defendant. On Feb. 23, 1894, the defendant's solicitors, by letter, gave the plaintiff's solicitor notice that possession had been taken, "in consequence of breaches of covenant." It was further stated that possession was H taken on Feb. 21, at which date rent was in arrear under both leases. Thereupon, correspondence took place between the solicitors of the plaintiff and those of the defendant, in which the plaintiff's solicitor stated that his client would either take an assignment of the old leases from the trustee in bankruptcy, and complete the buildings, or else take a new lease. On April 25 the defendant's solicitors wrote, intimating that their client could not grant fresh leases without provision for I claims which he had against Etheridge in respect of bricks supplied to him and sand taken by him from the property, amounting to £81 8s. 6d. On May 4 the plaintiff's solicitor wrote, stating that his client declined to pay anything whatever beyond the costs of the new leases; but that, if the new leases were granted, he would at once proceed to complete the property. On May 28, 1894, the defendant's solicitors wrote, stating that the houses were to be sold. On June 28, 1894, the plaintiff tendered to the defendant the sum of £9 7s. 6d., the amount of the ground rent in arrear, but the tender was refused. By a deed, dated July 5, 1894, the

A trustee in bankruptcy of Etheridge, in consideration of £5, assigned to the plaintiff all his interest in Nos. 1 and 5, Stanley Road.

On July 6, 1894, the plaintiff brought this action, claiming possession of the properties comprised in the leases at the rents and under and subject to the lessee's covenants and conditions in such leases respectively reserved and contained, and relief from any forfeiture of the leases on payment of the rents B reserved by the leases, or on such terms as the court should think just. Apart from the nonpayment of the rent, it was not at the trial alleged that any breach of covenant had been committed which would justify the re-entry; and the question was whether, under these circumstances, the plaintiff was entitled to be relieved from the forfeiture.

By s. 212 of the Common Law Procedure Act, 1852:

C

> "If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord . . . or pay into court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or D assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease."

Stroud for the plaintiff.
R. G. Wood for the defendant. *Cur. adv. vult.*

E June 26, 1895.—**STIRLING, J.**, stated the facts and continued:—It was admitted in the argument by the learned counsel for the defendant that, if on Feb. 21, 1894, the defendant had recovered possession by means of legal proceedings taken against Etheridge, the latter or his trustee in bankruptcy would be entitled to be relieved, both under the general jurisdiction of the court, and under the Landlord and Tenant Act, 1730. It was, however, strongly urged that no relief could be given F where the lessor had recovered peaceable possession without the assistance of any court; and in support of this contention reliance was placed, first, on the circumstance that no case could be found in which such relief had been given, and secondly, on the preamble to s. 2 of the Act of 1730, which was said to amount to a recognition by the legislature that the right only existed where the demised property had been recovered by legal process. On behalf of the plaintiff it was G suggested that the property was not really in the possession of the defendant at all, and there was some evidence that workmen in the employment of Etheridge had been on the property since possession was said to have been resumed by the defendant. In the view which I take I do not think it necessary for me to decide whether or no the defendant's possession was good legal possession. If it were, I should probably come to the conclusion that it was good, because from and after H the date of Etheridge's bankruptcy the property vested in his trustee, and as against him the defendant was entitled, subject to any right of law, to re-enter and assume legal possession.

Are the arguments as to the effect of the peaceable possession well founded? I will first consider the grounds on which such relief was formerly given by the Court of Chancery. In *Wadman* v. *Calcraft* (1) SIR WILLIAM GRANT, M.R., says I (10 Ves. at pp. 68, 69):

> "The plaintiff seeks to be relieved against a forfeiture of this lease, which he states to have been incurred solely by nonpayment of rent, and if that is the ground of this ejectment, there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent, and that when the rent is paid the end is obtained; and therefore the landlord shall not be permitted to take advantage of the forfeiture."

In *Sanders* v. *Pope* (2) LORD ERSKINE, L.C., says (12 Ves. at p. 289):

"There is no branch of the jurisdiction of this court more delicate than that which goes to restrain the exercise of a legal right. That jurisdiction rests only upon this principle—that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other the party may have the full benefit of the contract, as originally framed, the court will interfere; where a clear mode of compensation can be discovered. Of this nature is the case, that constantly occurs, confirmed by statute [the Act of 1730], giving a more ready relief at law; a contract to pay rent, with a covenant and clause of re-entry for breach. The obvious intention is to secure the payment of the rent; that the landlord may not be put to his action of debt, coming from time to time against an insolvent estate; but may be enabled to recover possession of the premises. In that case equity is in the constant course of relieving the tenant, paying the rent and all expenses, and placing his landlord in exactly the same situation; and in that case it is not necessary that the failure in paying the rent should arise from accident, the miscarriage of a letter with a remittance, insolvency, or disease; but even against negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity interferes; and upon payment of the rent and all expenses will not permit the tenant to be turned out of possession; considering, that in the one case frequently great hardship might be the consequence; in the other, the party being placed in the same situation, there is in general no hardship."

In *Davis* v. *West* (3) LORD ERSKINE says (12 Ves. at p. 476):

"In the late case of *Sanders* v. *Pope* (2) I was very unwilling to give relief against breach of other covenants, but was compelled by a series of authorities —*Cage* v. *Russel* (4), *Northcote* v. *Duke* (5), *Hack* v. *Leonard* (6), *Wafer* v. *Mocato* (7), *Eaton* v. *Lyon* (8)—establishing that, where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere, and give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent; and the only distinction is, that in the latter case it is considered so clear, that the object of the clause for re-entry is only to secure the payment of the rent, that the legislature interposed, and made it unnecessary to come into equity; allowing the tenant, upon the terms and within the time specified by the Act [of 1730] to stop the ejectment; leaving the ancient jurisdiction of equity in every other case untouched."

The view there expressed as to other covenants has not been altogether approved, but as regards relief from forfeiture of a lease the principle seems to be well established.

In *Bowser* v. *Colby* (9) the question was raised as to the redemption of a lease which had become forfeited. WIGRAM, V.-C., there says (1 Hare, at p. 128):

"The next point taken was, that there are two different species of provisoes in leases; in some, a common clause of re-entry on nonpayment of rent, thereby determining the lease and nothing more; in others, a proviso declaring that, if the rent is not paid, the lease shall be void; and there being in this case a proviso 'that the lease shall become absolutely void,' it is said that there is now nothing for the court to act upon—no lease existing which it can restore to the tenant, and therefore that the court will not interfere. If it could have been shown that a court of equity gave relief only before the landlord had entered, the argument might have been well founded, but, inasmuch as in most of the cases relief has been given upon bills filed after the landlord has entered, the argument must be fallacious; for when the landlord has entered, the lease is

A equally at an end in a court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void on nonpayment of rent."

After some further observations, which it is not necessary for me to read, he continues (ibid. at p. 130):

"It appears from the case of *Taylor* v. *Knight* (10) and from LORD ELDON'S B observations in *Hill* v. *Barclay* (11), that the court formerly used to consider (the lease being gone at law by the re-entry) that the only way it could give relief was by creating a new lease, until the statute, recognising the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases C is to secure to the landlord the payment of his rent; and the principle of the court is—whether right or wrong is not the question—that if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid on the prescribed day."

The authorities appear to me to establish that the ground on which courts of D equity formerly gave relief was that the proviso for re-entry was, in the eye of the court, simply a security for the rent; and on principle I cannot see that it makes any difference whether the lessor avails himself of such security with or without the assistance of a court of law. It is, no doubt, remarkable that no reported case appears to have occurred in which relief was given where the landlord re-entered peaceably, and without bringing ejectment; but it is to be remembered that re-entry E in this way can be but seldom effected. As to the preamble to s. 2 of the Act of 1730, that is as follows:

"Whereas, great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for nonpayment of rent, by reason of the many niceties that attend re-entry at common law; and forasmuch as when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay, of F recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that, after such re-entry made, the lessee or his assignee, upon one or more bills filed in the court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall G or do afterwards incur."

It is to be observed that in terms the Act seems to contemplate the necessity of an ejectment in every case; but the existence of cases of peaceable re-entry on vacant premises may have been overlooked, or may have been considered of so infrequent occurrence that they were not considered to give rise to any grievance. The statute H fixes a period of six months only from recovery in ejectment within which an application for relief may be made, and it is said that the whole evil which the Act was passed to remove would be re-introduced if it were to be held that the jurisdiction to give relief were to be applied in a case where peaceable possession had been taken.

Upon that two observations may be made: first, that, if the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of I the processes established by statute for that; and secondly, that it does not follow that a court of equity would now grant relief at any distance of time from the happening of the event which gave rise to it. It appears to me that, inasmuch as the inconvenience of so doing has been recognised by the legislature, and a time has been fixed after which, in a case of ejectment, no proceedings for relief can be taken, a similar period might well be fixed, by analogy, within which an application for general relief in equity must be made. A court of equity would probably say that the action for relief must be brought within six months from the resumption of peaceable possession by the lessor.

I think, then, that if the lease had remained vested in Etheridge, or his trustee in bankruptcy, he or his trustee would have been entitled to relief. It was said, however, that the right was personal to the lessee, and that relief could not be given to his mortgagee. It is unnecessary to consider whether a mortgagee is, by virtue of his mortgage, entitled to be relieved from a forfeiture. It would appear from *Hare* v. *Elms* (12), that relief would not, as a rule, be given to an under-lessee or mortgagee in the absence of the original lessee; but in the present case the mortgagor has become bankrupt, and the mortgagee has obtained from the trustee in bankruptcy an assignment of the equity of redemption in consideration of a payment of £5. By s. 44 of the Bankruptcy Act, 1883, all property of the bankrupt vests in the trustee, and by s. 168 property includes things in action [see Bankruptcy Act, 1914, ss. 19, 38, 167]. The right of the bankrupt to be relieved of a forfeiture appears to me to be a thing in action, and to have become vested in the trustee in bankruptcy; and the trustee was entitled to sell the right and assign it to a purchaser: *Seear* v. *Lawson* (13); *Guy* v. *Churchill* (14). I think, therefore, that the plaintiff is entitled to bring the action.

Lastly, it was contended that the plaintiff had deprived himself of his right to relief by the position which he took up in the interval between Feb. 21 and the bringing of the action, and, in particular, by the letter of May 4, 1894, in which he declined to pay anything to the defendant except the costs of a new lease. I am unable to take this view of the plaintiff's conduct. I think that the correspondence does not show a refusal by the plaintiff to pay the arrears of rent, but merely a refusal to pay certain sums of money which the defendant had no right to claim. In my opinion, therefore, the plaintiff is entitled to the relief for which he asks.

At the conclusion of the judgment a question was raised whether the plaintiff was entitled to the relief given without a new lease, or whether a new lease should be granted. STIRLING, J., directed minutes to be prepared and the case to come into the paper on June 29 to be spoken to on the minutes.

June 29, 1895. Minutes having been prepared, the case again came on.

STIRLING, J.—The point which has now been raised is a difficult one. I do not think, on the whole, that s. 212 of the Common Law Procedure Act, 1852, should be read as limited to a case where proceedings in ejectment have been taken. It has already been decided by WIGRAM, V.-C., in *Bowser* v. *Colby* (9), that s. 211 does not apply where there has been no application for an injunction. Section 212 reverts to proceedings where there has been ejectment. The question is, whether the words "such lessee" and "such proceedings as aforsaid," relate merely to a lessee, and proceedings taken by him, when there have been proceedings in ejectment, or whether the section applies to any case where there is an application to a court consequent upon a forfeiture. The statute is a remedial one, and should, I think, be read as widely as possible. Probably what the legislature had in contemplation when the Act was passed was a case where there had been proceedings in ejectment, as that would be the most prominent case, but the latter part of the section is not, I think, so expressed as to compel me to hold that all proceedings are excluded where there has been no ejectment. I think, therefore, I may add to my judgment a declaration that the plaintiff shall have, hold, and enjoy the demised property, according to the leases thereof, mentioned in the statement of claim, without any new lease, following the words of s. 212 of the Act. He must, of course, pay the rent, and the defendant must thereupon deliver up possession to him. The plaintiff must bear the costs of the action, except so far as they have been increased by the defendant resisting his claim, and those costs must be borne by the defendant.

Solicitors: *H. C. Barker; Flower, Nussey & Fellowes.*

[*Reported by* W. IVIMEY COOK, ESQ., *Barrister-at-Law.*]

Re LORD COLERIDGE'S SETTLEMENT

[CHANCERY DIVISION (Chitty, J.), August 10, 1895]

[Reported [1895] 2 Ch. 704; 73 L.T. 206; 44 W.R. 59; 11 T.L.R. 596; 39 Sol. Jo. 725; 13 R. 767]

Settled Land—Tenant for life—Powers—Capital money—Power to direct investment—Settled Land Act, 1882 (45 & 46 *Vict.*, *c.* 38) *s.* 22 (2).

A tenant for life may, under s. 22 (2) of the Settled Land Act, 1882 [now s. 75 (2) of the Settled Land Act, 1925], direct the particular investment in which capital money in the hands of the trustees shall be invested, and cannot be controlled by the trustees or the court so long as he honestly exercises his discretion and the investment directed is one authorised by the settlement.

Notes. The Settled Land Act, 1882, ss. 21, 22, 53, have been repealed and replaced by the Settled Land Act. 1925, ss. 73, 75, 107 (1), respectively.

The purposes authorised for the application of capital moneys by the Settled Land Act, 1925, s. 73, have been extended by the Landlord and Tenant Act, 1954, s. 8 (5), Sched. II, para. 6 (34 HALSBURY'S STATUTES (2nd Edn.) 394, 449); the Town and Country Planning Act, 1954, s. 66 (2) (ibid. 987); the Coalmining (Subsidence) Act, 1957, s. 11 (7) (37 HALSBURY'S STATUTES (2nd Edn.) 776); and the Housing (Financial Provisions) Act, 1958, s. 35 (3) (38 HALSBURY'S STATUTES (2nd Edn.) 386).

Considered: *Re Hunt's Settled Estates*, *Bultcel* v. *Lawdeshayne*, [1904-7] All E.R. Rep. 736; *Re Gladwin's Trust*, [1919] 1 Ch. 232. Referred to: *Re Hotham*, *Hotham* v. *Doughty*, [1901] 2 Ch. 790; *Re Cleveland's Settled Estates*, [1902] 2 Ch. 350; *Re Theobald* (1903), 19 T.L.R. 536; *Re Keck's Settlement*, [1904] 2 Ch. 22.

As to the investment of capital money under a settlement, see 34 HALSBURY'S LAWS (3rd Edn.) 544-545; and for cases see 40 DIGEST (Repl.) 818. For the Settled Land Act, 1925, ss. 73, 75, 107, see 23 HALSBURY'S STATUTES (2nd Edn.) 161, 172, 229.

Summons taken out by the trustees of a settlement made by the late Lord Coleridge, in 1887, to obtain the decision of the court on the question whether the power of direction as to the investment of capital moneys arising under the Settled Land Act, 1882, given to the tenant for life under the settlement by sub-s. (2) of s. 22 of the Act was limited to giving a general direction for investment under sub-s. (1) of s. 21, or whether the tenant for life was entitled to direct the investment of such moneys in any particular securities authorised by the settlement.

The present Lord Coleridge, the tenant for life in possession under the settlement, had under the powers of the Act sold a leasehold house in Sussex Square, forming part of the settled property, and he had directed the trustees to invest the moneys arising from such sale in debenture stock principally of certain commercial joint-stock companies, which stocks were investments authorised by the settlement, but were not such as the trustees would have selected if the selection had been left to their discretion. The prices of many of the stocks were considerably above par, the price of one stock which was liable to be paid off in twenty-eight years at par being £120 per £100 of stock, but the net annual proceeds of the investments as a whole did not much exceed the rate at £3 per cent.

Mark Romer for the trustees.
Macnaghten for the tenant for life.

CHITTY, J.—This is an application by the trustees of the settlement executed by the late Lord Coleridge, in 1887, for the purpose of obtaining the decision of the court on the question whether they will be justified in investing certain capital money which has arisen from a sale of a leasehold house, part of the settled property,

according to the direction of the present Lord Coleridge, the tenant for life in possession. The sale was effected by him under his statutory power. The settlement contains a wide power of investment. It expressly refers to the Settled Land Act, 1882, and declares that capital money arising under that Act may be invested in the names of the trustees, or under their control in any investments in which trustees are by law authorised, or in other the various investments mentioned, including specifically the stocks, funds, debentures, mortgages, or securities of any corporation, company, or public body, municipal, commercial, or otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom. The investments which the tenant for life has directed are all within the scope of the settlement power, but they are not such as the trustees themselves would, if they have any discretion in the matter, themselves select.

The question turns on ss. 21, 22, and 53 of the Settled Land Act, 1882. Section 21 enacts that capital money under the Act shall be invested or otherwise applied wholly in one, or partly in one and partly in another or others, of the modes after mentioned, and these modes are specified in the ten following sub-sections. This division into ten sub-sections is merely for the sake of clearness and convenience. Sub-section (1) runs thus:

> "In investment on government securities [by sub-s. (10) (viii.) of s. 2 this term 'securities' includes stocks, funds, and shares] or on other securities on which the trustees of the settlement are by the settlement or by law authorised to invest trust money, or on"

other the securities mentioned in the sub-section. Section 22 enacts that the investment or other application of capital money by the trustees

> "shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees."

It was argued by counsel for the trustees that the only direction which the tenant for life could give to the trustees was to invest or apply the money according to some one or other of the ten sub-sections in s. 21, each sub-section being regarded as a whole, and that, in regard to the various modes of investment or application specified in each sub-section, the choice of the particular investment or application lay with the trustees. There is nothing in the Act to justify this construction; it would cut down the power of the tenant for life in a manner not contemplated by the legislature, and render it almost nugatory. The argument was abandoned, and rightly, by counsel, on my pointing out some of the results which would ensue from its adoption. The power thus conferred on a tenant for life of directing the mode of investment, and of selecting the particular investment, is no doubt extensive. The enactment is in accordance with the general policy of the Act. In cases falling within its provisions, the Act transfers, in regard to investment, a function ordinarily exercised by trustees from the trustees to the tenant for life. The only limitations imposed on him are those to be found in the Act itself—notably in s. 21 and s. 53. By s. 53 a tenant for life, in exercising any power under the Act, is bound to have regard to the interest of all parties entitled under the settlement, and in relation to the exercise thereof by him is deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

Supposing that this case had not fallen within the Act, and that the trustees had in exercise of their ordinary discretion selected these securities in good faith, their discretion could not have been questioned; they would have been acting within the scope of the authority conferred on them by the settlement. Similarly, the tenant for life, in the exercise of his statutory power, cannot be controlled by the trustees, or by the court, so long as he really and honestly exercises his discretion. This the present tenant for life has done; he has considered the question of the propriety of the investments, and has consulted a broker of good standing in the city of London,

who has advised him on the subject. He has offered to produce an affidavit verifying the paper on which the broker's advice is given. This should be done. I hold, then, that the trustees will be safe in complying with the direction given, and that they are bound to comply with it.

Solicitors: *C. & S. Harrison & Co.; Spencer Whitehead.*

[*Reported by* G. WELBY KING, ESQ., *Barrister-at-Law.*]

SMALLWOOD *v.* SHEPPARDS

[QUEEN'S BENCH DIVISION (Wright and Kennedy, JJ.), June 25, July 4, August 7, 1895]

[Reported [1895] 2 Q.B. 627; 64 L.J.Q.B. 727; 73 L.T. 219; 44 W.R. 44; 11 T.L.R. 586; 36 Sol. Jo. 735]

Landlord and Tenant—Use and occupation—Action after end of period for which sought to make defendant liable—Period of tenancy fixed—Entry by tenant—Possession given up before end of period—Liability for whole period.

The plaintiff orally agreed to grant the defendant the exclusive possession of a plot of land for three bank holidays for £45. This was found to be, not an agreement for three separate lettings with a separate rent or price for each of the bank holidays, but one agreement for the possession and use of the land on the three occasions for a single lump rent or price for the three. The defendant used the land on the first of the bank holidays and made a payment on account. He did not, however, use the land on the other two bank holidays, although he could have done so. In an action, in which the plaintiff claimed to be entitled to the balance of the sum of £45, and the defendant pleaded the absence of a written note or memorandum under the Statute of Frauds, 1677, s. 4,

Held: (i) the defence based on the Statute of Frauds failed as there was an entry for the purpose of occupation under a single letting (although the period of the agreed letting was not continuous) and a payment of rent on account of the entry; (ii) the defendant was liable for the use and occupation of the land on the last two bank holidays even though he was not in actual occupation, it being sufficient that he had once entered on the land and could have gone on occupying it had he chosen to do so.

Notes. That part of the Statute of Frauds, 1677, s. 4, which applied to "any contract or sale of lands, tenements or other hereditaments or any interest in or concerning them" has been replaced by the Law of Property Act, 1925, s. 40.

As to actions for use and occupation, see 23 HALSBURY'S LAWS (3rd Edn.) 559-561; and as to part performance, see 36 HALSBURY'S LAWS (3rd Edn.) 292 et seq. For cases see 31 DIGEST (Repl.) 311. For the Law of Property Act, 1925, s. 40, see 20 HALSBURY'S STATUTES (2nd Edn.) 500; and for the Distress for Rent Act, 1737, s. 14, see 6 HALSBURY'S STATUTES (2nd Edn.) 153.

Cases referred to in argument:

Maddison v. *Alderson* (1883), 8 App. Cas. 467; 52 L.J.Q.B. 737; 49 L.T. 303; 47 J.P. 821; 31 W.R. 820, H.L.; 12 Digest (Repl.) 182, *1245.*

Taylor v. *Caldwell* (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L.J.Q.B. 164; 8 L.T. 356; 27 J.P. 710; 11 W.R. 726; 122 E.R. 309; 12 Digest (Repl.) 418, *3242.*

Ryley v. *Hicks* (1725), 1 Stra. 651; Bull. N.P. 177; 93 E.R. 760; 30 Digest (Repl.) 458, *998*.

Wright v. *Stavert* (1860), 2 E. & E. 721; 29 L.J.Q.B. 161; 2 L.T. 175; 24 J.P. 405; 6 Jur.N.S. 867; 8 W.R. 413; 121 E.R. 270; 30 Digest (Repl.) 544, *1785*.

Appeal by the defendant from a decision of His Honour JUDGE CHALMERS, sitting at Birmingham County Court, giving judgment for the plaintiff for £26 13s. 4d., in an action brought to recover the sum of £26 13s. 4d., balance of rent alleged to be due from the defendant to the plaintiff.

The defendant, who was in the habit of attending fairs with "roundabouts," called upon the plaintiff in February, 1894, and said that he wished to have the use of some waste land belonging to the plaintiff, for the three bank holidays following, that is, Easter, Whitsuntide, and August, 1894, for the purpose of his performances. According to the evidence of the plaintiff—which the learned judge accepted—the defendant agreed to pay the plaintiff £45 for the piece of ground for the three bank holidays, and in consideration of his pulling down a shed which was on the land, the defendant was to receive £5, which was to be allowed and spread over the three payments of £15 in respect of each of the three holidays. The defendant paid a deposit of £5. The defendant entered upon the land and occupied the same on the Easter bank holiday, and paid the sum of £8 6s. 8d., in respect of such occupation (which, with the deposit of £5 and £1 13s. 4d., the proportionate part of the allowance for pulling down the shed, made £15, the amount of the first instalment) but he did not occupy or use the land on the other two holidays although he could have done so and refused to pay in respect of the same. The plaintiff then brought this action to recover the balance of the rent due. The learned judge accepted the plaintiff's account, and found for him for £26 13s. 4d., but reserved judgment on the question of law that was raised for the defendant, namely, that s. 4 of the Statute of Frauds applied, and that there was no writing and no part performance to take the case out of the section. The learned judge held that there was a single entire contract for £45; that there was an entry under the contract on to the land, and a user of the land and a payment on account, which could only be referable to one entire agreement, and not to three separate agreements; that whether the contract be regarded as a lease, or as an agreement under s. 4, the statute had been complied with, and that the plaintiff was entitled to recover. The defendant appealed.

By the Distress for Rent Act, 1737, s. 14, it is provided: "And to obviate some difficulties that many times occur in the recovery of rents where the demises are not by deed . . . it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements or hereditaments held or occupied by the defendant or defendants in an action on the case for the use and occupation of what was so held or enjoyed; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as an evidence of the quantum of the damages to be recovered."

Rawlinson and *G. Edwards Jones* for the defendant.

C. C. Scott for the plaintiff.

Cur. adv. vult.

Aug. 7, 1895. **WRIGHT, J.,** read the following judgment of the court.—In this case it is agreed that we are to draw any inference of fact from the evidence as stated in the judge's notes which the judge might have drawn. We draw the inference that the parties intended that the defendant should have exclusive possession of the land for the three bank holidays. The judge has found that the contract was a single entire contract for £45, by which we understand him to mean

that he finds that it was not an agreement for three lettings at a separate rent or price for each of the three bank holidays, but one agreement for the possession and use of the ground on the three occasions at a single lump rent or price of £45 for the three—in other words, for one letting. The defendant entered upon the land for the purpose of occupation under the agreement on one of the three days. After entry he made (as the county court judge finds) a payment of money on account, which can be referable only to one entire agreement. He might have occupied had he chosen to do so on the two later days which the letting covered.

In order to maintain an action for "use and occupation," after the close of the period for which it is sought to make the party sued liable, actual occupation is not necessary; it is sufficient if once there has been an entry, provided that the defendant might have gone on occupying had he chosen to do so. He has "held" within the Distress for Rent Act, 1737, s. 14, although he has not "enjoyed." On the facts the defence of the Statute of Frauds fails. There having been an entry for the purpose of occupation under an agreement for a single letting (although the period of the agreed letting was not continuous), at a single or lump rent or price, and a payment of rent on account of the entry, the plaintiff's right to recover the balance after the termination of the letting period is, in our judgment, not affected by the fact that the agreement was a parol agreement.

Appeal dismissed.

Solicitors: *Debenham & Walker*, for *J. P. Lambert*, Birmingham; *Morse & Simpson*, for *Whitelock*, Birmingham.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-law.*]

KERR *v.* KERR

QUEEN'S BENCH DIVISION (Hawkins, Vaughan Williams and Wright, JJ.), May 14, July 21, 1897]

[Reported [1897] 2 Q.B. 439; 66 L.J.Q.B. 838; 77 L.T. 29; 46 W.R. 46; 13 T.L.R. 534; 41 Sol. Jo. 679; 4 Mans. 207]

Bankruptcy—Proof—Debts provable—Arrears of alimony under order of Divorce Court.

Arrears of alimony under an order of the Divorce Court do not constitute a debt provable in bankruptcy, whether the arrears fall due before or after the making of the receiving order, and, consequently, a committal order may be made for the non-payment of such arrears.

So **held** by HAWKINS and VAUGHAN WILLIAMS, JJ., WRIGHT, J., dissenting.

Re Linton, Linton v. *Linton* (1) (1885), 15 Q.B.D. 239, applied.

Notes. The Debtors Act, 1869, s. 5 (which provides for committal for non-payment of judgment debts), was amended by the Bankruptcy Act, 1883, s. 169 (1), and Fifth Schedule, and also by the Administration of Justice Act, 1956, s. 40.

The provisions as to what debts are provable in bankruptcy were formerly contained in the Bankruptcy Act, 1883, s. 37, now replaced by the Bankruptcy Act, 1914, s. 30.

The provisions as to the effect of a receiving order were formerly contained in the Bankruptcy Act, 1883, s. 9, now replaced by the Bankruptcy Act, 1914, s. 7.

Referred to: *Re Hedderwick, Morton* v. *Brinsley*, [1933] All E.R. Rep. 73; *Re Pascoe, Trustee in Bankruptcy* v. *The Lords Commissioners of His Majesty's*

Treasury, [1944] 1 All E.R. 593; *Findlay* v. *Findlay*, [1947] 2 All E.R. 71; *Coles* v. *Coles*, [1956] 3 All E.R. 542. A

As to the effect of a receiving order on actions in respect of debts not provable, see 2 HALSBURY'S LAWS (3rd Edn.) 322; as to proof of debts, see ibid. 464 et seq.; as to committal for non-payment of judgment debts, see ibid. 639 et seq. For cases see 4 DIGEST (Repl.) 329. For the Debtors Act, 1869, s. 5 (as amended by the Bankruptcy Act, 1883), see 2 HALSBURY'S STATUTES (2nd Edn.) 294; for the Administration of Justice Act, 1956, s. 40, see 36 HALSBURY'S STATUTES (2nd Edn.) 479; and for the Bankruptcy Act, 1914, ss. 7, 30, see 2 HALSBURY'S STATUTES (2nd Edn.) 336, 364. B

Cases referred to:

(1) *Re Linton*, *Linton* v. *Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 33 W.R. 714; 49 J.P. 597; 2 Morr. 179, C.A.; 4 Digest (Repl.) 329, *2992*. C

(2) *Re Fryer*, *Ex parte Fryer* (1886), 17 Q.B.D. 718; 55 L.J.Q.B. 478; 55 L.T. 276; 34 W.R. 766; 2 T.L.R. 860; 3 Morr. 231, C.A.; 5 Digest (Repl.) 1110, *8966*.

(3) *Watkins* v. *Watkins*, [1896] P. 222; 65 L.J.P. 75; 74 L.T. 636; 44 W.R. 677; 12 T.L.R. 456, C.A.; 27 Digest (Repl.) 630, *5906*. D

(4) *De Blaquiere* v. *De Blaquiere* (1830), 3 Hag. Ecc. 322; 162 E.R. 1173; 27 Digest (Repl.) 607, *5690*.

(5) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 277, *2542*.

(6) *Re Hawkins*, *Ex parte Hawkins*, [1894] 1 Q.B. 25; 69 L.T. 769; 42 W.R. 202; 1 Mans. 6; 10 R. 29, D.C.; 4 Digest (Repl.) 329, *2987*. E

Also referred to in argument:

Wilson v. *Wilson* (1830), 3 Hag. Ecc. 329, n.; 162 E.R. 1175; 27 Digest (Repl.) 609, *5704*.

Bailey v. *Bailey* (1884), 13 Q.B.D. 855; 53 L.J.Q.B. 583, C.A.; 27 Digest (Repl.) 682, *6515*. F

Prescott v. *Prescott* (1868), 20 L.T. 331; 4 Digest (Repl.) 329, *2991*.

Re Robinson (1884), 27 Ch.D. 160; 53 L.J.Ch. 986; 51 L.T. 737; 33 W.R. 17, C.A.; 27 Digest (Repl.) 609, *5707*.

Appeal by the husband (the defendant) from an order of His Honour JUDGE LUMLEY SMITH at Westminster County Court by which he discharged a stay imposed by the registrar on a previous order committing the husband to prison at the suit of his wife for the non-payment of arrears of alimony. G

On May 2, 1893, an order for maintenance was made against the husband by the Probate, Divorce and Admiralty Division of the High Court of Justice, to be paid in certain instalments. The husband failed to keep up his payments, and on June 29, 1896, a judgment summons was issued from the Westminster County Court, under Ord. 25, r. 17, to enforce payment of the five instalments which were in arrear. This summons was not, however, served, and on Oct. 13, 1896, another summons was issued. On this the judge made an order for committal for fourteen days, but suspended it till Dec. 1, being of opinion that the debtor had had the means to pay a portion of the debt, and he did this on the authority of *Re Fryer*, *Ex parte Fryer* (2). On Dec. 5, 1896, the plaintiff (the wife), not having applied for the issue of the warrant, the defendant (the husband) made an affidavit under Ord. 25, r. 30, of the County Court Rules, and in accordance with Form 58. H I

That affidavit set out—(i) That under the Debtors Act, 1869, an order for committal had been made in default of payment under the order of May 2. (ii) That on Nov. 30 a receiving order had been made against the defendant. (iii) That the receiving order had been published in the LONDON GAZETTE. (iv) That the debt was provable in the bankruptcy. On that affidavit the registrar stayed the

order for commitment. The wife then applied to the judge to rescind the order of the Registrar, which he did, on the ground that, being for arrears of alimony which had accrued before the receiving order, it was not a debt provable in the bankruptcy. He gave leave to appeal, and stayed the order of commitment until the appeal was heard.

Powles for the husband.
Montague Lush for the wife.

Cur. adv. vult.

July 21, 1897. **VAUGHAN WILLIAMS, J.**, read the following judgment in which **HAWKINS, J.**, concurred.—This is an appeal against the order of His Honour JUDGE LUMLEY SMITH, discharging the order of the Registrar staying an order for commitment for non-payment of arrears of maintenance payable by a husband to a divorced wife. I think the order of the county court judge right. The order for maintenance made by the Divorce Court was an order made under s. 1 of the Matrimonial Causes Act, 1866. It was an order for the payment of £9 a month for maintenance.

It was decided by CAVE, J., in *Re Linton*, *Linton* v. *Linton* (1), that arrears of alimony accruing after the adjudication were not provable in bankruptcy, and that an order under the Debtors Act, 1869, might be made in a proper case to enforce payment of such arrears. As a fact, in that case the wife had proved for the arrears of alimony, due at the date of adjudication, but there was no judicial decision as to her right to do so. The decision purports to be one under the Matrimonial Causes Act, 1866, s. 1. I do not understand how that section applied to a case of judicial separation, but that is unimportant, as the judgment undoubtedly was one on the question of proof of debt for a sum payable under that section qua alimony, i.e., qua an allowance payable to a wife under a judicial separation, and *Watkins* v. *Watkins* (3) shows that it makes no difference if the sum is a periodical sum payable qua maintenance to a divorced wife.

It follows that the only question to be decided in the present case is whether the decision in *Re Linton*, *Linton* v. *Linton* (1) applies to arrears payable at the date of the receiving order. The considerations which led the Court of Appeal to hold that there could be no proof of arrears which had become due since the receiving order seem to have been that the sum payable was not a lump sum, but a payment to be made monthly or weekly, that the sum was payable out of personal earnings, that that which would go to his wife would take nothing from his creditors, that the payments could not be valued or have a capital value put upon them, because they might be at any time put an end to by a resumption of cohabitation. These considerations, except the last, all apply to permanent maintenance. The last consideration, viz., the impossibility of valuation, also, in my judgment, applies, although the impossibility is based on different facts in the case of permanent maintenance of a divorced woman, to those on which it is based in the case of permanent alimony for a judicially separated wife. Resumption of cohabitation between man and wife is no longer possible after divorce. The parties no longer stand in that relation, but the uncertainty as to the continuance of the obligation to make the payment exists, and exists not only as to future payments but also as to arrears, for the Divorce Court will wholly or partially relieve a husband from payment of arrears, if it is just to do so: *De Blaquiere* v. *De Blaquiere* (4). In fact, the practice of the Divorce Court so much treats the sums periodically payable under its order, as a fund for maintenance and not as property, and so much keeps its hand on the obligation to make these periodical payments for maintenance, that it is a standing rule that the court will not, in the absence of means, make an order enforcing more than one year's arrears. The very terms of s. 1 of the Matrimonial Causes Act, 1866, moreover show that the court has this power. Further than this, sub-s. (3) of s. 37 of the Bankruptcy Act, 1883, shows that a debt is equally provable whether the obligation arose before the receiving order or after it, at any time before discharge.

It follows that *Re Linton*, *Linton* v. *Linton* (1) is an authority for the proposition that, so far as regards permanent alimony, there can be no proof for arrears arising before the receiving order unless there is something in the nature of arrears arising before the receiving order which make it possible in such a case to form that estimate which the court held in *Re Linton*, *Linton* v. *Linton* (1) could not be formed in respect of the subsequent arrears; but it is to be observed that in *Re Linton*, *Linton* v. *Linton* (1) it is in respect of arrears, and not in respect of future liabilities, that it was said that an order could be made on a judgment summons on the ground that there could be no proof.

With regard to *Hardy* v. *Fothergill* (5), there is in the judgment a good deal to make me say that the liability of the husband to pay under the order of the Divorce Court permanent alimony or permanent maintenance by periodical payment, was a liability capable of being estimated, but the Court of Appeal in *Watkins* v. *Watkins* (3) do not suggest that anything in *Hardy* and *Fothergill* (5) has overruled anything in *Re Linton*, *Linton* v. *Linton* (1), or in *Re Hawkins*, *Ex parte Hawkins* (6), and I am of opinion that the value of the liability, the continuance and extent of enforcement of which, both as to the past and future, is as entirely under the court making the original order for payment, as this is, as these orders for alimony and permanent maintenance are, and ought to be held, incapable of being fairly estimated.

WRIGHT, J. (read by VAUGHAN WILLIAMS, J.).—If the liberty of the subject had not been in question, I should not have thought it necessary to express the doubt which I entertain. I only think it right to say that I think the case is governed by *Hardy* v. *Fothergill* (5), and that we ought to hold that arrears of alimony accrued due and payable before the receiving order are provable in bankruptcy, unless the court has declared them incapable of valuation.

Appeal dismissed.

Solicitors: *H. Westbury Preston; Official Solicitor.*

[*Reported by* W. DE B. HERBERT, ESQ., *Barrister-at-Law.*]

HUDDERSFIELD BANKING CO., LTD. *v.* HENRY LISTER & SON, LTD.

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), April 26, 27, 29, 1895]

[Reported [1895] 2 Ch. 273; 64 L.J.Ch. 523; 72 L.T. 703; 43 W.R. 567; 39 Sol. Jo. 448; 12 R. 331]

Order—Setting aside—Consent order—Mutual mistake.

A consent order made by the court to give effect to the compromise of a legal claim by the parties concerned can be set aside, not only on the ground of fraud, but for any reason which would afford a ground for setting aside the agreement on which the order was based, e.g., on the ground of a common mistake regarding a material fact.

Mortgage—Fixtures—Looms screwed to planks nailed to floor joists.

Looms owned by a company were screwed to planks which in turn were nailed to the joists of the floor of premises subject to a mortgage.

Held: the looms were fixtures to which, on a claim to enforce their security by debenture holders, the mortgagees were entitled.

Notes. Considered: *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Dsane* v. *Hagan*, [1961] 3 All E.R. 380. Referred to: *Hobson* v. *Gorringe*, post; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Ellis* v. *Glover and Hobson*, [1908] 1 K.B. 388.

As to setting aside a consent order, see 22 HALSBURY'S LAWS (3rd Edn.) 792; and for cases see DIGEST (Practice) 620 et seq. As to a mortgagee's right to fixtures, see 27 HALSBURY'S LAWS (3rd Edn.) 193, 194; and for cases see 35 DIGEST 320.

Cases referred to:

(1) *Davenport* v. *Stafford* (1845), 8 Beav. 503; 14 L.J.Ch. 414; 5 L.T.O.S. 428; 9 Jur. 801; 50 E.R. 198; Digest (Practice) 837, *3881.*

(2) *A.-G.* v. *Tomline* (1877), 7 Ch.D. 388; 47 L.J.Ch. 473; 38 L.T. 57; 26 W.R. 188; Digest (Practice) 622, *2582.*

(3) *Strickland* v. *Turner* (*Executrix of Lane*) (1852), 7 Exch. 208; 22 L.J.Ex. 115; 155 E.R. 919; 12 Digest (Repl.) 414, *3221.*

(4) *Bingham* v. *Bingham* (1748), 1 Ves. Sen. 126; 27 E.R. 934; 40 Digest (Repl.) 392, *3124.*

(5) *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149; 16 L.T. 678; 15 W.R. 1049, H.L.; 35 Digest 93, *27.*

(6) *Jones* v. *Clifford* (1876), 3 Ch.D. 779; 45 L.J.Ch. 809; 35 L.T. 937; 24 W.R. 979; 40 Digest (Repl.) 391, *3122.*

(7) *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.*, *Re Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; 61 L.J.Ch. 227; 66 L.T. 108; 40 W.R. 280; 31 Digest (Repl.) 223, *3599.*

(8) *Gough* v. *Wood & Co.*, [1894] 1 Q.B. 713; 63 L.J.Q.B. 564; 70 L.T. 297; 42 W.R. 469; 10 T.L.R. 318; 9 R. 509, C.A.; 31 Digest (Repl.) 231, *3670.*

Also referred to in argument:

Flower v. *Lloyd* (1879), 10 Ch.D. 327; 39 L.T. 613; 27 W.R. 496, C.A.; 36 Digest (Repl.) 994, *3399.*

Vadala v. *Lawes* (1890), 25 Q.B.D. 310; 63 L.T. 128; 38 W.R. 594, C.A.; 11 Digest (Repl.) 516, *1309.*

Abouloff v. *Oppenheimer* (1882), 10 Q.B.D. 295; 52 L.J.Q.B. 1; 47 L.T. 325; 31 W.R. 57, C.A.; 11 Digest (Repl.) 516, *1308.*

Re Liverpool Borough Bank, *Duranty's Case* (1858), 26 Beav. 268; 28 L.J.Ch. 37; 32 L.T.O.S. 114; 4 Jur.N.S. 1068; 7 W.R. 70; 53 E.R. 901; 9 Digest (Repl.) 261, *1649.*

Re South American and Mexican Co., *Ex parte Bank of England*, [1895] 1 Ch. 37; 64 L.J.Ch. 189; 71 L.T. 334, 594; 43 W.R. 107, 131; 11 T.L.R. 21; 39 Sol. Jo. 27; 12 R. 1, C.A.; Digest (Practice) 533, *2126.*

Bradish v. *Gee* (1754), Amb. 229; 1 Keny. 73; 27 E.R. 152; 20 Digest (Repl.) 413, *1341.*

Webb v. *Webb* (1676), 3 Swan. 658.

Clayton v. *Leech* (1889), 41 Ch.D. 103; 61 L.T. 69; 37 W.R. 663, C.A.; 35 Digest 110, *155.*

Bloomer v. *Spittle* (1872), L.R. 13 Eq. 427; 41 L.J.Ch. 369; 26 L.T. 272; 20 W.R. 435; 35 Digest 111, *165.*

Okill v. *Whittaker* (1847), 2 Ph. 338; 16 L.J.Ch. 454; 10 L.T.O.S. 1; 11 Jur. 681; 41 E.R. 73, L.C.; 40 Digest (Repl.) 391, *3116.*

Trigge v. *Lavallée* (1863), 15 Moo.P.C.C. 270; 1 New Rep. 454; 8 L.T. 154; 9 Jur.N.S. 261; 11 W.R. 404; 15 E.R. 497, P.C.; 35 Digest 112, *172.*

Furnival v. *Bogle* (1827), 4 Russ. 142; 6 L.J.O.S.Ch. 91; 38 E.R. 758; 3 Digest (Repl.) 383, *351.*

Brooke v. *Lord Mostyn* (1864), 2 De G.J. & Sm. 373; 5 New Rep. 206; 34 L.J.Ch. 65; 11 L.T. 392; 10 Jur.N.S. 1114; 13 W.R. 115; 46 E.R. 419, L.JJ.; on appeal sub nom. *Mostyn* v. *Brooke* (1866), L.R. 4 H.L. 304, H.L.; 35 Digest 23, *142.*

Cockrane v. *Willis* (1865), 1 Ch. App. 58; 35 L.J.Ch. 36; 13 L.T. 339; 11 Jur.N.S. 870; 14 W.R. 19, L.JJ.; 35 Digest 103, *97.*

Legge v. *Croker* (1811), 1 Ball & B. 506; 30 Digest (Repl.) 504, **472.*

Wilde v. *Gibson* (1843), 1 H.L.Cas. 605; 12 Jur. 527; 9 E.R. 897, H.L.; 35 Digest 68, *649.*

Brownlie v. *Campbell* (1880), 5 App. Cas. 925, H.L.; 35 Digest 123, *249.*

Garrard v. *Frankel* (1862), 30 Beav. 445; 31 L.J.Ch. 604; 26 J.P. 727; 8 Jur.N.S. 985; 54 E.R. 961; 35 Digest 130, *301.*

Harris v. *Pepperell* (1867), L.R. 5 Eq. 1; 17 L.T. 191; 32 J.P. 132; 16 W.R. 68; 35 Digest 111, *164.*

Paget v. *Marshall* (1884), 28 Ch.D. 255; 54 L.J.Ch. 575; 51 L.T. 351; 49 J.P. 85; 33 W.R. 608; 35 Digest 128, *291.*

D'Eyncourt v. *Gregory* (1866), L.R. 3 Eq. 382; 36 L.J.Ch. 107; 15 W.R. 186; 31 Digest (Repl.) 201, *3322.*

Appeal from a decision of VAUGHAN WILLIAMS, J.

In January, 1892, an action was commenced by debenture-holders against the defendant company in the present proceedings, Henry Lister & Son, Ltd., a manufacturing company, which was then in liquidation, to enforce their security, and the liquidator was appointed receiver. The plaintiffs in the present action, the Huddersfield Banking Co., Ltd., as mortgagees, claimed certain looms upon the premises of the company as being comprised in their securities. The premises were inspected on behalf of the parties to the action and the bank, and in view of the condition in which they were found the looms were considered to be loose chattels, not fixtures, and not included in the bank's securities, but belonging to the debenture-holders. On Oct. 17, 1892, an order by consent of all parties, including the bank, was made on a summons taken out in the action, directing that the looms should be sold and the proceeds paid to the receiver, which was done. The bank subsequently took out a summons, asking that the consent order might be set aside on the ground that the parties to the order had made a common mistake when they took the view that the looms were not included in the bank's securities. The court, by consent, made an order that the bank should be at liberty to bring such an action as they might be advised, and the bank thereupon brought an action against the company, the receiver, and the debenture-holders, alleging that the looms had recently been detached from the freehold, and asking for a declaration that the arrangements for the sale of the looms, and their assent to the order of Oct. 17, 1892, were agreed to and given under a mistake as to material facts which was caused by the wrongful acts of persons in the employment of the receiver. They also asked for an order that so much of the order of Oct. 17, 1892, as contained their consent to the compromise then effected should be set aside, and that the proceeds of sale belonged to them. VAUGHAN WILLIAMS, J., held that, although the consent order had been drawn up, completed, and acted upon, the court had power to set it aside on any ground which would justify the court in setting aside an agreement between the parties; that upon the evidence the looms were fixtures, and so were included in the bank's securities; and that the bank were, therefore, entitled to the relief claimed. The defendants appealed.

Farwell, Q.C., and *Sheldon* for the defendants.

Cooper Willis, Q.C., and *Kershaw, Q.C.*, for the bank, were not called on to argue.

LINDLEY, L.J.—We have had an opportunity of carefully considering this case, which is of considerable importance, and none of us requires to postpone delivering judgment.

An order was drawn up by consent, dated Oct. 17, 1892, it being made on the summons of the plaintiffs in a debenture-holders' action, which summons had been served on the plaintiff, the Huddersfield Banking Co. Let us consider what it was that the banking company were consenting to. They consented to the sale of

these looms which everybody at that time thought were Messrs. Lister's chattels, and not included in the mortgage to the banking company. The looms were sold, and the receiver has got the money. Since then it has been found out that these thirty-three looms had been originally screwed down and had thereby become the property of the mortgagees. That fact was not previously known, and never supposed by anybody, but, it having been discovered, the banking company say by their present action: "Set aside that consent order on the ground that it was made under a common mistake, and, instead of the receiver handing over the money to the debenture-holders, order it to be handed over to us."

VAUGHAN WILLIAMS, J., has made an order to that effect, and he has done it on the ground that the consent order was made by mistake, not of one side, but a common mistake of both sides, that there is jurisdiction to set it aside, and that it would be a failure of justice if he did not rectify that mistake. Messrs. Lister & Co., Ltd., appeal, and they contend that that order is wrong. They say, first of all, that there is no jurisdiction to set aside this consent order upon such materials as we have to deal with; and, as far as I understand it, they go so far as to say that a consent order can only be set aside on the ground of fraud. I dissent from that proposition entirely. A consent order I agree is an order, and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that point. But that a consent order can be impeached not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual, I also have not the slightest doubt. If authority for that be wanted, it will be found in two cases which were referred to in the course of the argument, and which I do not propose to examine at any length. I mean *Davenport* v. *Stafford* (1) and *A.-G.* v. *Tomline* (2).

The only thing, to my mind, to be done on this point of setting aside a consent order is to see whether the agreement upon which it was based can be invalidated or not. If the agreement cannot be invalidated, the consent order is good. If it can be, the consent order is bad. On the point of jurisdiction, let us see what there is against setting aside the agreement. It is an agreement carried out by payment to the receiver; that is to say, the receiver sold the things under that agreement and got the money. But I take it that an agreement which is founded upon a common mistake, which mistake is impliedly treated as a condition that must exist in order to bring the agreement into operation, can be set aside formally if necessary, or treated as set aside and as invalid without any process or proceeding to do so. The moment you have got rid of this consent order, I take it that it is quite plain that an action against the receiver would lie at law for money had and received at the instance of the bank upon the ground of the mutual mistake—or rather, as it would be put at law, a total failure of consideration.

If authority for that be wanted, the cases will be found collected in the ordinary books on contract, but I would cite in particular *Strickland* v. *Turner* (*Executrix of Lane*) (3). That case related to the sale of an annuity, the annuitant having died shortly before the sale was executed. It was a sale by trustees who were vendors, and the purchaser knew nothing about the death of the annuitant. The money was paid over, and the purchaser brought an action to recover it back, and succeeded as a matter of course. On the same principle there are cases in equity, among which *Bingham* v. *Bingham* (4) may be referred to as a leading example. There an agreement to purchase a property was set aside, and the money restored upon the ground that the property belonged to the man who had professed to buy it. It was a common mistake, and the transaction was set aside. I am aware that *Bingham* v. *Bingham* (4) has been occasionally criticised, and in some of the earlier editions of LORD ST. LEONARD'S book on VENDORS AND PURCHASERS he seemed to think that there was something wrong about it. In his later editions he changed his opinion. *Bingham* v. *Bingham* (4) was carefully examined in the House of Lords in *Cooper* v. *Phibbs* (5), and was distinctly affirmed. The principle of it

was assented to and laid down to be correct; and in a still later case of *Jones* v. *Clifford* (6) HALL, V.-C., again went through the whole of the cases relied on, and came to the conclusion that *Bingham* v. *Bingham* (4) was sound law. As I understand the case, I cannot conceive on what ground there should be any question of its soundness. It appears to me to be in perfect accordance with well-settled principles of law, both of this country and of all civilised countries so far as I know.

Therefore, there is no difficulty, so far as I can see, either in getting rid of the consent order, or in getting rid of the agreement on which it is founded, on the ground that it is based upon a mistake common to both parties. It was a mistake of this nature, that both parties believed that these thirty-three looms never had been fixed at all, whereas in fact they had. It was a common mistake of fact, on which mistake the agreement under which the receiver received the money was based.

I pass to another point. It was said that this was a compromise—that there were thirty-five of these looms, and the real arrangement was, not that the thirty-three should be sold upon the common mistake I have alluded to, but that something of this kind should be done. Lister & Co. claimed all the thirty-five looms, and the bank said, "Give us two; there are two screwed down." And Lister & Co. said: "You, the bank, may have two; but give us the balance." If that had been the true arrangement the aspect of the case would have been totally different. This part of the case was carefully considered by VAUGHAN WILLIAMS, J., and he finds upon the facts, I think, after seeing the evidence of Mr. Taylor, who said distinctly that there never was any such give-and-take arrangement, that it would be impossible to adopt that view of the transaction. There was no compromise at all. It was simply an oversight. Then it was said that, supposing that to be so, these looms were unfixed before the mortgagees took possession, and that, on the authority of *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (7) and *Gough* v. *Wood & Co.* (8) that is sufficient, and the mortgagees cannot claim. Those cases, however, turned on the view that the chattels were unfixed, and properly unfixed, on the implied authority given by the mortgagees. It is impossible to say that these looms were unfixed by the implied authority given by the mortgagees. They were not unfixed in the ordinary course of trade or anything of that kind; they were unfixed on purpose to prevent the mortgagees claiming them. The proposition as to inferring an authority on the part of the mortgagees, or an implied authority on the part of the mortgagees to unfix them, or to come to the conclusion that they were unfixed in the ordinary course of trade for the purpose of being replaced by others, is untenable. *Gough* v. *Wood & Co.* (8) does not apply to the case. It appears to me that the appeal breaks down in every direction, and that it must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. There are two questions that arise in this case. The first is: Can the court set aside a consent order which has been passed and drawn up?, and, secondly: Are these thirty-three looms fixtures?

I will deal with the question first with regard to whether they are fixtures, because, if the looms are not fixtures, the consent order would be right, and there would have been no mutual or common mistake. The learned judge found that the looms were so fixed to the freehold as to become part of it. I am of opinion that he was right. The conclusion I draw from the evidence is, that the machines were fixed to planks, and that the planks were fixed to the floor in such a way as to prevent the machines when in use moving either laterally or vertically. The worms of the screws raise, to my mind, the idea of adhesion, or intention on the part of those placing the machines where they were placed to so fix them in position as that they would adhere to the floor. That was the view that the learned judge took, and, in my opinion, it was the right view. But it was said during the course of the argument that, even assuming all that, what was done was done by the manufacturers—I mean the annexation without the knowledge of the defendants

A and without their authority—and, therefore, must be disregarded. I cannot adopt that contention. As I suggested during the course of the argument, suppose I order a carpenter to come into my room and fix a bookcase for me, and he fixes it in such a way that it becomes annexed to the freehold. It appears to me that I could not be heard to say that that was not done with my authority, that, therefore, annexation must be entirely disregarded, and that the chattel did not become part B of the freehold. That is very much this case, because, as appears from the evidence of Mr. Illingworth, who was the maker or manufacturer, he was told by Listers to place these machines in situ, and to make a good job of it, and, acting on that instruction, he placed the machinery in the way that I have endeavoured to describe. I think, therefore, that it cannot be contended that these thirty-three looms were not fixed to the soil in such a way as to pass to the mortgagees.

C Then it is said that there was a consent order which was drawn up and passed, and that the court has no jurisdiction to set it aside. It appears to me that the two cases which have been cited are sufficient authority to show that it can be set aside. One was *Davenport* v. *Stafford* (1), and the other *A.-G.* v. *Tomline* (2). The law seems to be that a consent order may be set aside for the same reasons as those on which you may set aside an agreement. It appears to me that, directly D a common mistake is established, you can set aside an agreement. It cannot be contended here, I think, that there was not a common mistake. I rather understood that it was admitted that both parties honestly believed that these thirty-three looms were loose chattels at the time the consent order was made. But then it is said that the true nature and character of this transaction is that it was a compromise. The order to my mind points in the other direction. I rather E conclude that the transaction was that the one party was satisfied that the two looms were fixed to the soil and the other party was satisfied that the thirty-three looms were not fixed to the soil, and, acting on that, not in any give-and-take way, but merely acting on this belief in that respect, they proceeded to this consent order.

Another point was made, namely, that these thirty-three looms were unfixed before the mortgagee took possession; but, as has been pointed out with reference F to *Gough* v. *Wood* (8), that case proceeded upon the ground that they were unfixed by the implied authority of the mortgagees. Whereas in that case it might be said that they were removed in that way, that cannot be said in the present case. I have come to the conclusion, therefore, that the learned judge was right in his judgment in every respect, and that the appeal should be dismissed.

G

KAY, J. I will add a few words on my own behalf, because one of the questions raised in this case is of very considerable importance. It was denied in argument that the court had any jurisdiction whatever to set aside a consent order except in the case of fraud. What is a consent order? After all it is only the order of the court carrying out an agreement between the parties. Supposing the H order out of the way, and the agreement only to exist, there can be no sort of doubt that the agreement could be set aside, not merely for fraud, but also in case it was based upon a mistake of material fact which was common to all the parties to it. If you may set aside an agreement on that ground, why should you not be able to set aside such an agreement simply because an order has been founded upon it? It seems to me that, both on principle and on authority, when once you find I that an agreement has been come to between parties who were under a common mistake of a material fact, you may set aside the agreement, and this court has ample jurisdiction to set aside the order founded upon that agreement. Of course, if the order had been acted upon by them and interests of third parties had intervened, and so on, difficulties might arise, but nothing of that kind occurs here. Here we have got simply the parties to this agreement and order before us. No one else seems to have obtained any kind of interest under it. Therefore, it seems to me that, if it be made out that it proceeded upon the common mistake of a material fact, there is ample jurisdiction in the court to set it aside.

Did it or did it not? The only bodies or persons who were parties to this agreement and this consent order for this purpose were the original mortgagees and the subsequent debenture-holders. The question was which of the looms that were in the mortgaged property were in the nature of fixtures. It was agreed that two were and that thirty-three were not, but as to the thirty-three there does not seem to have been any dispute or consent whether they were fixtures or not. Experts examined what the condition of things was, and found that these thirty-three looms were completely loose. They came to the conclusion that they never had been fixed, and they were not treated as fixtures at all. That was not the fact. The fact was that they had been fixtures just as much as the two that were treated as fixtures. I think that the learned judge came correctly to the conclusion that they had been, owing to the manner in which they were fixed to the floor, as much fixtures as the two which it was agreed must be treated as fixtures.

But then this point was raised. It was said: "True they may have been at one time fixtures, but if they were, they were never fixed by the authority of the mortgagors who were in possession, but it was done without any authority from them at all." How stand the facts? As far as I can make out, these looms certainly had, when this question arose, or when the question was about to arise, been fixed to the floor for some months. During all that time the mortgagors were in possession, and it would be very difficult to persuade me that they must be treated as being entirely ignorant of the fact that these looms were fixed to the floor of their own mill. When I come to look at the evidence I find that they were affixed by the workmen of the mortgagors themselves, and that one of the mortgagors of this company, Mr. Lister, told the workmen to make a firm job of it. In pursuance of those general instructions what the workmen did was to lay down the planks on the floor to strengthen the floor. The planks were nailed down to the joists of the floor, and then upon those planks were fixed the looms, by screwing into the slots in the feet of the looms these screws that have been spoken of, which, as to the two looms, which were admitted to be fixtures, had heads wide enough to extend beyond the width of the slot itself, and so to hold those two looms down vertically, as well as to prevent them sliding horizontally. As to the thirty-three looms the evidence is clear that the workmen would have done to them exactly the same if they had had screws with heads of that same size, but they had not, though they seem to have had plenty of screws with heads of a smaller size, that is, heads of such size, I understand, that they would slide up and down in the slots. In order to prevent that they put under the heads of each of these smaller screws a washer of iron which extended beyond the sides of the slot, and which made them for this purpose equivalent to the larger screws that fastened down the two. That that was done by the authority of the mortgagors seems to me upon the evidence to be beyond the possibility of reasonable question.

I, therefore, think that there was a mistake of fact, and of a material fact, which was common both to the mortgagees and to the debenture-holders between whom this agreement was made, and on whose behalf this consent order was made. The mortgagees were induced to consent by ignorance of this material fact, of which the other side also were ignorant. That seems to me to enable this court to deal with, and to have enabled the learned judge in the court below to deal with, the consent order as he did deal with it, namely, to say that the agreement upon which it was founded was based upon a common mistake of a material fact, and that, therefore, the court had jurisdiction to set that agreement aside, and consequently to set aside the order which was founded upon it.

It was argued by counsel for the defendants that this was a compromise. What does a compromise mean? A compromise means, if there is a question of doubt and the parties agree: "We will not try it out, but we will settle it between ourselves by a give-and-take arrangement." I quite agree, if that was so, it would be extremely difficult to interfere with the order. But was there ever any doubt as to these thirty-three looms? Did either of the parties consider that they

were fixtures? They did not. There never was any such doubt at all, and therefore, there certainly was no settlement of any doubt of that kind. I cannot see that in this case there is any element of a compromise. It seems to me that that argument fails in point of fact, because there was no question of doubt as to these thirty-three looms which was compromised by the arrangement that was made. Then it was suggested that there was one large arrangement, and that this was only a part of the large arrangement. We have looked into the evidence with regard to that, and as between the mortgagees and the mortgagors I can find nothing like an arrangement except as to the thirty-five looms; and that arrangement, so far as it was made, I have dealt with already, and have come to the conclusion that it proceeded upon a mistake of material fact.

Gough v. *Wood & Co.* (8), and the case before NORTH, J., of *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (7) were referred to as supporting the argument that, even if the looms had at one time been fixtures, yet before the mortgagees took possession the mortgagors had a right to remove them. As between mortgagor and mortgagee I simply dissent from that proposition entirely, and if *Gough* v. *Wood & Co.* (8) is examined it will be found that it proceeded absolutely and entirely upon this, that from the circumstances of that particular case the mortgagees must be taken to have assented to that which the mortgagors did in removing the fixtures before they took possession. Here there is no pretence for saying that this was not a removal of the looms in the course of the trade of the mortgagors. The analogy in *Gough* v. *Wood & Co.* (8) was that of a nurseryman who, in carrying on his business of a nurseryman, removed trees which had been planted in the soil for the purpose of selling them, and converted them into chattels and sold them. That would be a proper thing to do in the course of carrying on his business. But there is nothing of that kind here. Therefore, I think that those cases do not support the argument attempted to be founded upon them, and on the whole I agree with the decision of the learned judge in the court below. I think that this appeal fails, and that it must be dismissed with costs.

Appeal dismissed.

Solicitors: *Ramsden, Ratcliffe & Co.*, for *Ramsden, Sykes & Ramsden*, Huddersfield; *Iliffé, Henley & Sweet*, for *Laycock, Dyson & Laycock*, Huddersfield.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

LOUIS *v.* SMELLIE

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), July 8, 9, 1895]
[Reported 73 L.T. 226; 11 T.L.R. 515; 39 Sol. Jo. 654]

Master and Servant—Duty of servant—After termination of service—Use of information and materials acquired during service—Injunction—Damages.

The good faith which exists between an employer and those in his employ renders it illegal, even in the absence of any stipulation to the contrary, for the persons so employed to make use after the termination of the employment of any materials or any information acquired by them while they were in that confidential relationship. The court will grant an injunction to restrain such use, in addition to awarding damages.

Lamb v. *Evans* (1), [1893] 1 Ch. 218, followed.

Notes. Referred to: *Putsman* v. *Taylor*, [1927] 1 K.B. 637. A

As to duty of servant after termination of employment, see 25 HALSBURY'S LAWS (3rd Edn.) 465, and for cases see 34 DIGEST 121 et seq.

Case referred to:

(1) *Lamb* v. *Evans*, [1893] 1 Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 41 W.R. 405; 9 T.L.R. 87; 2 R. 189, C.A.; 34 Digest 121, *927*. B

Also referred to in argument.

Tipping v. *Clarke* (1847), 8 L.T.O.S. 554; 34 Digest 121, *923*.

Merryweather v. *Moore*, [1892] 2 Ch. 518; 61 L.J.Ch. 505; 66 L.T. 719; 40 W.R. 540; 8 T.L.R. 539; 36 Sol. Jo. 488; 34 Digest 121, *926*.

Robb v. *Green*, post; [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695; 44 W.R. 25; 11 T.L.R. 517; 39 Sol. Jo. 653; 14 R. 580, C.A.; 34 Digest C 121, *928*.

Appeal from a decision of KEKEWICH, J., awarding the plaintiff damages in an action brought by the plaintiff, Adolphus Herman Louis, who carried on in London the business of a process-server, under the title of "Flowerdew & Co.," to restrain the defendant, Robert Smellie, who had recently started a similar business under D the name of "Smellie & Co.," from pirating the plaintiff's register and index of agents and forms used in process-serving.

The plaintiff's business was extensive, he being employed by more than 2,000 solicitors for the purpose of process-serving, and having upwards of 1,000 agents throughout the United Kingdom. For carrying on his business he kept a register and index of his agents, and had also compiled many special forms of documents E differing from those previously compiled by other persons. In 1886, after the plaintiff had been carrying on business for about two years, the defendant, then a lad, entered his service as a shorthand clerk, and for some time he was also employed by the plaintiff in the special business of process-serving. The plaintiff alleged that the defendant took advantage of his position to secretly make, for his own purposes, extracts from the plaintiff's register and index of agents, and to copy F the plaintiff's forms. In October, 1894, the defendant left the plaintiff's employ and set up as a process-server on his own account, and for that purpose sent out circular cards copied, it was said, from the plaintiff's form of circular card, and also made use of the extracts and copies he had made while in the plaintiff's service.

The plaintiff thereupon brought this action for an injunction and other relief, G and also for damages. The action came on for trial before KEKEWICH, J., who decided in favour of the plaintiff, awarded him nominal damages but refused to grant an injunction. The plaintiff now appealed, claiming that he was entitled to an injunction as well as to damages.

Renshaw, *Q.C.*, and *W. F. Hamilton* for the plaintiff.

Warrington, *Q.C.*, and *Austen Cartmell* (with them *J. G. Butcher*) for the H defendant.

LINDLEY, L.J.—This case is rather more serious than I was disposed at first to think, and I am satisfied that it is one of importance, and it is by no means an easy case. On the one hand we must bear in mind that the plaintiff, with regard I to the clerk who left him, never took the trouble to get any covenant by the clerk not to carry on business in opposition to his master. We must, therefore, be very careful not to deal with the case as if the plaintiff had obtained the benefit of any such covenant. On the other hand, we must bear in mind that the defendant was entitled to set up in business in the absence of such a covenant in rivalry with his late employer. What he is not entitled to do is to make an unfair use in the carrying on of such a rival business of information acquired by him while he was acting as clerk to the plaintiff. The difficulty lies in drawing the line.

A With respect to the law, I do not think it is necessary to say more than that it was laid down by this court with quite sufficient accuracy for this purpose in the case which has been referred to of *Lamb* v. *Evans* (1). The good faith which exists between an employer and those in his employ renders it improper and illegal for the persons so employed to make use after the termination of the employment of B those matters which they learnt whilst they were in that confidential relationship. The defendant is perfectly entitled, when he starts as a rival in business to the plaintiff, to carry it on in the same way as his principal does. He has learnt to do it, and he is entitled to the benefit of that knowledge. The difficulty is in drawing the exact line as to what he may or may not do. But it is quite obvious to my mind, assuming for the moment that he has got copies of the plaintiff's C register, or extracts, or memoranda, and so on, that he has no business to use them. Those are things that the court can forbid to be used. The plaintiff says that the defendant has in his possession or has had (I do not know whether he has it now or not) either copies of extracts from, or memoranda relating to, persons mentioned in this register of agents and index of agents. The plaintiff says that while the defendant was in his employ he got extracts from that register, or copies D of it, which he has no right to use. The defendant denies that. It is for the plaintiff to make out his case, and that gives rise to some difficulty. It does not follow that, because the defendant is an untruthful witness as he obviously is, that the plaintiff's case is made out. It would be a very curious method of reasoning to infer that the plaintiff's case was true because the defendant had told lies. But counsel for the plaintiff does bring before us certain specific instances which I E think force one to the inference that the defendant either has or has had a good deal more in the shape of extracts or memoranda made out of these books than the defendant admits. That he has a copy of the register I should doubt very much; but that he has more than is allowed, is, I think, established. Whether he has it now or not I do not know; he may have destroyed it; but he had it at one time.

[HIS LORDSHIP discussed the evidence and continued:] I think that enough is F established to warrant our granting an injunction against the defendant upon the principle that the court is satisfied that he had these notes and was making an improper use of them, and that he would do it again now if he were not stopped. I think, therefore, an injunction ought to go, although not quite in the form in which the plaintiff asks for it. What I think the plaintiff is entitled to is an injunction to restrain the defendant, his servants and agents, from making use of G any copies or extracts from the plaintiff's register of agents, or index, or any memorandum made or obtained by the defendant when in the plaintiff's employ relating to any person named in those books or either of them. That, I think, is as far as we can go. If the defendant happens to remember that there is an agent whose address he can find out from the ordinary directories, he is at liberty to do it. But he has no right to do that which he has done, and which he certainly H would do again if he had the chance. As regards the plaintiff's forms, inasmuch as the defendant has certainly violated the plaintiff's rights in that respect, I think that the plaintiff is entitled to an injunction as to them. I think that the plaintiff is entitled to an injunction to restrain the defendant from further printing and publishing, sending, delivering, or otherwise disposing of, sheets of letter-press paper, marked so and so, or any copy or copies thereof, and so on. It follows I that the injunction will be added to the order made by KEKEWICH, J., and the defendant, of course, will have to pay the costs of the appeal.

LOPES, L.J.—I am entirely of the same opinion. In the circumstances of this case the defendant no doubt was entitled to set up as a rival to the plaintiff, his employer. There being no covenant entered into between the plaintiff and the defendant that the defendant would not, when the period of his contract terminated, carry on his business as a rival in trade, he was entitled to set up as a rival to the plaintiff. But, although he was entitled to set up as a rival to the plaintiff, he was

not entitled to use any materials or any information which had been acquired by him when he was in the confidential employ of the plaintiff. He is not entitled to utilise any memoranda which he had obtained from the books of the plaintiff when he was in his employ. For instance, if he made a copy of the list of the plaintiff's agents, as is complained of in this case, he would not be entitled to use it. Clearly he had some memoranda, and I think it cannot be doubted that he used those memoranda. I think it is equally clear that, if this action had not been brought, he would have continued to use them. What he says is this: "True it is that I had these memoranda; but I have destroyed them—or I am ready and prepared to destroy them, and I will have no more." The question is whether we can believe him when he so says. He is a person, as is clearly established by the evidence, who is not trustworthy, and the learned judge in the court below so thought.

[His Lordship discussed the evidence and continued:] But then it is said that, although the defendant may have perjured himself in that matter, he still may be telling the truth with regard to other matters. That, no doubt, is correct; but it is not only here that the defendant is to be believed; because, according to my view, the plaintiff makes out what I may call a prima facie case. He establishes circumstances with regard to certain specific matters which in my judgment raise the presumption that the defendant must have more materials in his possession than those which he says he has. If that is so, then, when we get that presumption raised on the part of the plaintiff, and also come to the conclusion that the defendant cannot with any degree of safety be believed, it seems to me that a case is made out by the plaintiff entitling him to relief, and entitling him, in my opinion, to an injunction. As to what form that injunction should take, is a matter about which it is necessary to take some care. The form of the injunction which the court is disposed to grant in this case has been stated by my brother Lindley, and, although it will not unduly press the defendant, having regard to the gross violation of confidence of which he has been guilty, still it will afford all the protection that is necessary for the plaintiff. I agree, therefore, that the injunction should be in the form which my brother has stated.

RIGBY, L.J.—I am of the same opinion. Of course, it is necessary for the plaintiff to make out his case on which the court will act. I think it is plain that the defendant had some memoranda, and the probability is that he had some memoranda showing the names of the agents. [His Lordship considered the facts of the case and continued:] I do not think the case can be more favourably considered for the defendant than by treating it as if he had allowed the matter to go to the court without any evidence at all to the contrary, for I think his evidence is entirely unsatisfactory, and for the purpose of deciding this case I shall strike it out altogether. Then it becomes an action not met by any credible evidence at all, and in such a case I think the plaintiff has gone far enough (I do not say that he has done more than to raise a presumption) to entitle us to grant an injunction in general words, it being proved that the defendant had made memoranda, and made use of those memoranda. I think that the injunction granted by my brother Lindley will not be unduly oppressive, and I have no doubt that the defendant's business will not be much interfered with. But, if it is unduly oppressive, then I think that, having regard to the evidence put before us, it is the defendant's own fault for allowing the litigation to come into court.

Order varied.

Solicitors: *Haynes & Claremont; Emanuel, Round & Nathan.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

A

R. *v.* TOMLINSON

[Court for the Consideration of Crown Cases Reserved (Lord Russell of Killowen, C.J., Pollock, B., Wills, Charles and Lawrance, JJ.), February 2, 1895]

B

[Reported [1895] 1 Q.B. 706; 64 L.J.M.C. 97; 72 L.T. 155; 43 W.R. 544; 11 T.L.R. 212; 39 Sol. Jo. 247; 18 Cox, C.C. 75; 15 R. 207]

Criminal Law—Demanding money with menaces—Threat of accusation of immorality—Larceny Act, 1861 (24 & 25 *Vict.*, *c.* 96), *s.* 44.

C By s. 44 of the Larceny Act, 1861 [see now s. 29 (1) of the Larceny Act, 1916] : "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any property . . . or other valuable thing, shall be guilty of a felony. . . ."

D Threats of danger to a person by the making of accusations of misconduct against him amount to "menaces" within the meaning of the section, even though the accusations are not of criminal, but of immoral, conduct.

Notes. Sections 44, 45, 46, 47 and 49 of the Larceny Act, 1861, have been repealed. See now the Larceny Act, 1916, ss. 29 and 30 (5 Halsbury's Statutes (2nd Edn.) 1029, 1030).

E Considered : *R.* v. *Boyle and Merchant*, [1915-16] All E.R. Rep. 553; *R.* v. *Wyatt* (1921), 91 L.J.K.B. 402. Referred to : *Allen* v. *Flood*, ante p. 52; *Thorne* v. *Motor Trade Association*, [1937] 3 All E.R. 157.

As to extortion by threats, see 10 Halsbury's Laws (3rd Edn.) 797 et seq.; and for cases see 15 Digest (Repl.) 1121 et seq.

F Cases referred to :

(1) *R.* v. *Smith* (1850), T. & M. 214; 2 Car. & Kir. 882; 1 Den. 510; 19 L.J.M.C. 80; 14 J.P. 69; 14 Jur. 92; 4 Cox, C.C. 42, C.C.R.; 15 Digest (Repl.) 1122, *11,197*.

(2) *R.* v. *Walton and Ogden* (1863), Le. & Ca. 288; 1 New Rep. 374; 32 L.J.M.C. 79; 7 L.T. 754; 27 J.P. 165; 9 Jur.N.S. 259; 11 W.R. 348; 9 Cox, C.C. 268, C.C.R.; 15 Digest (Repl.) 1119, *11,138*.

G

Case Stated by Lawrance, J., for the consideration of the court.

William Beswick Tomlinson was tried before Lawrance, J., at the assizes at Carnarvon on Oct. 26, 1894, on an indictment charging him, under the Larceny Act, 1861, s. 44, with sending a letter to one John Thomas Morgan demanding money with menaces, and in a second count of the indictment with uttering the

H letter. It was proved at the trial that the prisoner, who was in the employment of the prosecutor, was discovered by the prosecutor and his wife in the act of connection with a woman named Kate Yende, in the prosecutor's stable, in consequence of which the prosecutor discharged the prisoner from his service. On June 25 the prosecutor received the following letter in the handwriting of the prisoner by post :

I

"18, Penrallt Street, Carnarvon.—On the rocks only had a day and half work since leaving Wrexham i want you to let me have 10s. so that i can get a can and Brush and if i do not get it on or before Tuesday morning i shall let Mrs. Morgan and your friends know of your doings with [Kate Yende] you must understand i am not going to suffer to hide you i have had enough of it. You are at liberty to show this to your lawyer or any one else if you like, but i shall certainly do it.—Yours, W. B. Tomlinson."

At the close of the case for the prosecution it was contended by the counsel for the

prisoner that the menaces contained in the letter were not menaces within the meaning of s. 44 of the Larceny Act, 1861, but that such menaces must be of injury or violence to the person or property, or of accusation as contained in ss. 46 and 47 of the said statute. LAWRANCE, J., overruled the objection and left the case to the jury, who found the prisoner guilty. The prisoner was then released on his own recognisances until the determination of the Case. The question for the opinion of the court was whether the learned judge was right in holding that the threats contained in the letter above set out were such threats as were contemplated by s. 44 of the above-mentioned statute.

No counsel appeared on either side.

LORD RUSSELL, C.J.—The point is not altogether free from difficulty; and it is a matter of regret that no one is instructed to argue it. The question turns upon the construction of s. 44 of the Larceny Act, 1861. But it is necessary, in order to determine the true construction of that section, to look at certain other sections cognate to the subject treated of in that section. It is enacted by s. 44 that: [HIS LORDSHIP read the section and continued:] Section 45 [see now s. 30 of the Larceny Act, 1916] provides that,

> "Whosoever shall with menaces or by force demand any property, money, or with intent to steal the same, shall be guilty of felony."

And s. 46 [see now s. 29 (1) (ii) and s. 29 (3) of the 1916 Act] provides that,

> "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing and property, etc., from any person,"

shall be guilty of the offence, and subject to the punishment named in the statute. It is to be observed that the accusations to which that section relates are accusations of crime. The only other section which is material is s. 49 [see now s. 29 (4) of the 1916 Act] by which it is enacted that,

> "It shall me immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or any other person."

To come back to what is the true construction of s. 44, and to whether the letter, of the writing and sending of which the prisoner has been found guilty, is evidence of a demanding with menaces any property, money, etc.: the point seems to have been taken by counsel for the prisoner that menaces within the meaning of that section means menaces importing a threat of injury to the person or property. In other words, menaces, or threats suggesting, if not coupled with, injury to the person or property. It is to be observed that the very next section draws a distinction between the two classes of menaces, because it says "with menaces or by force." Therefore, it would seem that there was contemplated under the word "menaces" not merely threats of injury to the person or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property. In this case we can well see how a menace of some indecency of conduct would be a holding out of a threat of injury much more serious than if the word were confined to the class of cases suggested. It would be matter of regret if the court felt itself compelled to put a narrow construction upon the term.

It was further suggested that s. 49, which states that it shall be immaterial whether the menaces or threats mentioned in the previous sections be of violence, injury, or accusation to be caused or made by the offender or any other person, means violence to the person, injury to the person, or accusation in the sense in which those words are used in s. 46, which would be, so far as the word "accusation" is concerned, accusation of crime. Upon the whole, though not without doubt, I have come to the conclusion that the word "menaces" in s. 44 is to have a wider meaning than that suggested; and that it may well be held to include threats of danger by the making of accusations of misconduct, although that misconduct may not have amounted to a crime. I think there is some authority for that from what is given as the meaning of the word "menace" in the dictionaries. In some, as in Johnson's Dictionary, its meaning is given as merely a "threat"; but in Webster's Dictionary it is defined amongst other things as "the show of a probable evil or catastrophe." There being no definition of the precise meaning that the legislature intended, we have to look at the ordinary and natural meaning of the word, unless that meaning is displaced by anything contained in the statute. It does not seem to me that there is anything in the statute which would authorise us to displace that meaning.

I have said that there is no authority; but, in *R.* v. *Smith* (1), a letter was written to the effect that if a sum of money was paid an impending catastrophe would be averted; and the question was, whether this came within the earlier Larceny Act, 1827 (7 & 8 Geo. 4, c. 29), s. 8, which enactment is in point of fact reproduced in the statute on which the indictment in the present case is based. In that case Wilde, C.J., said (19 L.J.M.C. at p. 82):

> "Here the demand for money is accompanied by a statement that, if the money be not paid, the evil before spoken of in the letter will happen, and that evil is, that certain burglars of a most horrid gang will break into the house, burn the banker's books, and cause a stoppage of the bank. We are all of opinion that the terms of the letter amount to a distinct menace that the evil will happen unless the money is paid."

There is one other case called *R.* v. *Walton and Ogden* (2). I refer to this case because, while stating what I conceive to be the meaning of the section, it points out what is the character of the threat before it comes within the section. There the prisoner had obtained money by threatening to execute a distress-warrant, which he had no authority to do, and the jury were directed, as a matter of law, that the conduct of the prisoner constituted a menace within the statute. The Court for Crown Cases Reserved, however, quashed the conviction on the ground that it was not for the judge to do more than lay down the principle upon which the jury ought to proceed in considering whether the threat which had been used there was or was not within the statute, and that it was not for him to say as a matter of law that it did amount to a menace within the statute. The court further held that he ought to have told the jury that the question was whether or not the threat or words used, which were said to amount to a threat, was such as would naturally unsettle the mind of the person on whom it operates, and cause him to act in a way in which he would not otherwise act. In this case no complaint is made of the summing up of the learned judge; therefore, it must be assumed that that was the character of his summing up. It seems to me that there is no restriction placed by the statute upon the ordinary meaning of the term menaces in s. 44, and that, therefore, this conviction must be affirmed.

POLLOCK, B.—I have come to the same conclusion.

WILLS, J.—I am of the same opinion. I think that the case comes within s. 49 of the Act [see now s. 29 (4) of the Larceny Act, 1916]. I do not think that it is necessary even to rely upon that section, for I think that the injury with which

a person is threatened should, in order to bring the menace within s. 44, receive a liberal interpretation, and that it does not mean an actionable injury only, but includes any injury which is calculated to do a person harm. I also think that the accusation is certainly not to be confined to cases which come within s. 46. What that section says is that, if the accusation takes the form of the cases stated in the section, then a larger amount of punishment is to be awarded. I think that the term "accusation" means that which in the ordinary sense of the term would amount to an accusation. I have always thought that persons who are practised upon in this way are not possessed of the ordinary powers of resisting; therefore, I think that a liberal interpretation should be put upon the words. In my opinion this conviction should be affirmed.

CHARLES, J.—I am of the same opinion. I do not think that in either ss. 45, 46, 47, or 49 are any words which would justify us in placing the restrictive meaning upon the words in s. 44 which it is sought to place upon them.

LAWRANCE, J., concurred.

Conviction affirmed.

[*Reported by* R. CUNNINGHAM GLEN, ESQ., *Barrister-at-Law.*]

NICHOLSON AND OTHERS *v.* HARPER

[CHANCERY DIVISION (North, J.), May 24, 1895]

[Reported [1895] 2 Ch. 415; 64 L.J.Ch. 672; 73 L.T. 19; 59 J.P. 727; 43 W.R. 550; 11 T.L.R. 435; 39 Sol. Jo. 524; 13 R. 567]

Sale of Goods—Goods left in possession of warehouseman—Charge by seller in favour of person in possession—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 25 (1).

By s. 25 (1) of the Sale of Goods Act, 1893: "Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

In September, 1893, A. hired from the defendants B. & Co. cellar room for 4,500 dozen bottles of wine and deposited a large quantity of wine in their cellars. In January, 1894, A. sold to the plaintiffs 250 dozen bottles of port subject to an agreement that it should be left for a year in cellars to be provided by A. rent free. The plaintiffs were informed that the wine was in the cellars of B. & Co., but they never received a delivery order, and no notice of the sale was given to B. & Co. The plaintiffs paid for the wine. By a letter dated May 31, 1894, A. gave B. & Co. a lien on the wine in their cellars in consideration for an advance by them of £1,500, and by another letter dated Nov. 7, 1894, he pledged the same wine as security for two bills accepted by B. & Co. for his accommodation and for any further bills they might so accept. A. became bankrupt in March, 1895, and there was then a balance due from him to B. &

Co., charged upon the wine bought by the plaintiffs. The trustee in bankruptcy and B. & Co. put up this wine for sale by auction. In an action by the plaintiffs for an injunction to restrain the sale,

Held: there was no delivery or transfer of the goods or documents of title to B. & Co. within the meaning of s. 25 (1) of the Act of 1893, as A. had no property in the wine at the date of his letters, B. & Co. obtained no charge; and, therefore, the wine must be delivered to the plaintiffs, but without prejudice to the common law lien of B. & Co. for warehouse charges.

Notes. As to disposition by seller in possession, see 34 HALSBURY'S LAWS (3rd Edn.) 84 et seq.; and for cases see 39 DIGEST 535. For the Sale of Goods Act, 1893, see 22 HALSBURY'S STATUTES (2nd Edn.) 985 et seq.

Application by the plaintiffs in the action for an interlocutory injunction restraining the defendants from selling certain goods.

In January, 1894, the plaintiffs, J. W. Nicholson & Co., purchased of one W. Goldsmith 250 dozen of port wine subject to an agreement that it should be allowed to remain for a year in cellars to be provided by Goldsmith rent free. The wine was part of a quantity belonging to Goldsmith then lying in the cellars of Messrs. Gammage and Hollingum, from whom Goldsmith had in 1893 hired cellar room for not more than 4,500 dozen wines and spirits for five years at a yearly rent of £120. The day after the sale Goldsmith wrote to the plaintiffs:

"I beg to send invoice and delivery order for the port. If you wish to take delivery please arrange with Messrs. Gammage & Co. as this cellar is not always open."

The plaintiffs duly received the invoice and paid for the wine, but the delivery order was not enclosed. The plaintiffs never received any delivery order, and gave no notice of the sale to Messrs. Gammage & Co. On May 31, 1894, Goldsmith wrote to Messrs. Gammage and Hollingum:

"In consideration of your having advanced to me this day the sum of fifteen hundred pounds (£1,500) as a loan for twelve months at 7 per cent. per annum interest, I hereby give you as collateral security a lien on all wines and spirits now lying in your cellars."

And on Nov. 7, 1894:

"In consideration of your accepting for my accommodation the two drafts enclosed, viz., £149 17s. due Feb. 5, 1895; £200 due Feb. 11, 1895, I give you as security for these and any other similar drafts you may hereafter accept for me all my stock of wines and spirits held by you over and above those you retain as security for your loan to me of May 31 last."

In March, 1895, Goldsmith became bankrupt, and the defendant Harper was appointed his trustee. At the date of the bankruptcy there was due to Messrs. Gammage & Co., £2,391, of which £1,900 was secured upon wine other than that now in question. Messrs. Gammage & Co. claimed a charge upon the wine sold to the plaintiffs for the balance of £491. By arrangement between that firm and the trustee in bankruptcy the wine was put up for sale. On the sale being advertised the plaintiffs brought this action to restrain it, and now moved for an interlocutory injunction.

The sections of the Sale of Goods Act, 1893, on which the argument turned (apart from s. 25 (1)) are as follows:

"Section 17.—(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such a time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. Section 18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property

in the goods is to pass to the buyer: Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

By the Factors Act, 1889, s. 1:

"For the purposes of this Act. . . . (4) the expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

Swinfen Eady, Q.C., and *Eve* for the plaintiffs.
Vernon Smith, Q.C., and *Rowden* for the defendants Gammage and Hollingum.

NORTH, J.—I think the plaintiff has made out his case. [His Lordship stated the facts of the case and continued:] On looking at ss. 17 and 18 of the Sale of Goods Act, 1893, it seems clear that the purchasers were entitled to the property in the goods. At the date of the purchase they did not wish to have possession of the goods, which were accordingly left with the vendor. On Jan. 16, 1894, the purchasers received a letter which informed them that the goods were in the possession of the defendants, Messrs. Gammage & Co., but it appears that they never received a delivery order which was said to have been sent them. In the spring of 1895 the plaintiffs became aware that the defendants were intending to sell the goods, and applied to the court to restrain the sale. The question to be decided is, whether the goods belong to the plaintiffs free from any claim by the defendants, or whether the defendants have established their claim. The goods were left by Goldsmith in the defendants' warehouse, and it was agreed that Goldsmith was to have cellar room for five years for a certain payment. After this Goldsmith became bankrupt.

The defendants say that they have a valid charge given them upon the wine by the two documents of May 31, 1894, and Nov. 7, 1894. The question arises whether Goldsmith was in a position to give the defendants a valid charge by these two documents. It turns upon the construction of the Sale of Goods Act, 1893. There were cases before that Act with which I need not deal now. It is clear that Goldsmith could not give any charge upon goods unless they were really his. [His Lordship read s. 25 and continued:] What is necessary to establish title is that a person, in the position which Goldsmith is in here, should make an actual delivery of the goods or a transfer of the documents of title to some person without notice. Either a delivery or transfer is necessary. The defendants were in possession long before sale, and continued in possession. The words of the section mean a delivery of goods, or where the goods are not delivered a handing over of the documents of title, which are certain well-known mercantile documents. There has been no delivery of goods since sale, and no transfer of the documents of title. The defendants' counsel says something has taken place which is not a delivery of the goods or a transfer of the documents of title, but a transfer of some interest in the goods. But the requirements of the Act must be observed. The defendants have been in possession ever since sale. There has been no delivery or transfer of any kind. I think that the defendants have failed to show that they are entitled to keep these goods, and must hand them over to the plaintiffs. But the defendants' lien for their charges for warehousing the goods is not to be prejudiced by anything that has been said to-day; that is to say, the common law right of lien on the goods is not to be interfered with.

Solicitors: *Nash, Field & Co.; Park, Nelson & Co.*

[*Reported by* J. R. Brooke, Esq., *Barrister-at-Law.*]

DOBELL & CO. *v.* STEAMSHIP ROSSMORE CO., LTD.

[COURT OF APPEAL (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), July 3, 1895]

[Reported [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 44 W.R. 37; 11 T.L.R. 501; 8 Asp.M.L.C. 33; 14 R. 558]

Shipping—Bill of lading—Exception—Damage to cargo—Condition that due diligence exercised by owners to make ship seaworthy—Negligence of employee resulting in unseaworthiness—Liability of shipowners.

Goods were shipped under a bill of lading which exempted the shipowners from liability for damage to cargo arising from faults or errors in navigation or in the management of the ship, provided that due diligence had been exercised by the owners to make the ship in all respects seaworthy. Damage by sea water was caused to the goods during the voyage through the unseaworthiness of the vessel owing to a port, which was not readily accessible, being improperly caulked. The unseaworthiness of the vessel was due to the negligence of a carpenter employed by the shipowners to see that the vessel started on her voyage in a seaworthy condition. In an action brought by the shippers for the damage to the cargo,

Held: "owners" of the vessel in the exemption clause must be construed as including the agents by which they acted, so that they must exercise due diligence both personally and through their agents, and the negligence of the carpenter must be regarded as the negligence of the owners; accordingly, they had not exercised due diligence to make the ship seaworthy, they could not avail themselves of the exemption clause, and the shippers' action succeeded.

Notes. Considered: *The Torni*, [1932] All E.R. Rep. 374; *Riverstone Meat Co. Pty., Ltd.* v. *Lancashire Shipping Co., Ltd.*, [1961] 1 All E.R. 495. Referred to: *The Glenochil*, [1896] P. 10; *Rowson* v. *Atlantic Transport Co.*, [1903] 2 K.B. 666; *McFadden* v. *Blue Star Line*, [1905] 1 K.B. 697; *Hordern* v. *Commonwealth and Dominion Line*, [1917] 2 K.B. 420; *The Dimitrios Rallias* (1922), 128 L.T. 491; *Angliss (Australia) Proprietary* v. *Peninsular and Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; *Vita Food Products, Inc.* v. *Unus Shipping Co.*, [1939] 1 All E.R. 513; *Ocean Steamship Co.* v. *Queensland State Wheat Board*, [1941] 1 All E.R. 158; *Minister of Food* v. *Reardon Smith Line, Ltd.*, [1951] 2 T.L.R. 1158; *Maxine Footwear Co.* v. *Canadian Government Merchant Marine*, [1959] 2 All E.R. 740.

As to exceptions of negligence, see 35 HALSBURY'S LAWS (3rd Edn.) 299-303; and for cases see 41 DIGEST 425 et seq.

Cases referred to:

(1) *Steel* v. *State Line Steamship Co.* (1877), 3 App. Cas. 72; 37 L.T. 333; 3 Asp.M.L.C. 516, H.L.; 41 Digest 428, *2693*.

(2) *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (1887), 19 Q.B.D. 242; 56 L.J.Q.B. 428; 57 L.T. 550; 35 W.R. 793; 3 T.L.R. 636; 6 Asp.M.L.C. 184, C.A.; 29 Digest 439, *3397*.

(3) *Franklin Sugar Refining Co.* v. *Steamship Sylvia*, 64 Fed. Rep. 607.

(4) *Hedley* v. *Pinkney & Sons Steamship Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 42 W.R. 497; 10 T.L.R. 347; 7 Asp.M.L.C. 483; 6 R. 106, H.L.; 41 Digest 297, *1591*.

Also referred to in argument:

The Ferro, [1893] P. 38; 62 L.J.P. 48; 68 L.T. 418; 7 Asp.M.L.C. 309; 1 R. 562; 41 Digest 432, *2714*.

The Warkworth (1884), 9 P.D. 145; 53 L.J.P. 65; 51 L.T. 558; 33 W.R. 112; 5 Asp.M.L.C. 326, C.A.; 41 Digest 918, *8088*.

Appeal from the decision of LAWRANCE, J., sitting without a jury, at the trial of the action at Liverpool.

The action was brought by the shippers of a cargo of oil cake against the owners of the steamship *Rossmore* for damage caused to the cargo during the voyage, the amount of which was agreed at £70. The oil cake was shipped at Baltimore, U.S.A., for carriage to Liverpool under a bill of lading, of which the material parts are as follows:

> "Shipped in good order and condition by J. C. Moore and Co. . . . for shipment in the s.s. *Rossmore* (from Baltimore for Liverpool) . . . 768 bags oil cake . . . and the said goods are to be delivered in the like good order and condition at the port of Liverpool. . . . Neither the vessel, her owners, agents, or charterers shall become, or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, provided due diligence has been exercised by her owners to make said vessel in all respects seaworthy, and properly manned, equipped, and supplied . . . not accountable for the unseaworthiness of the vessel at the commencement of the voyage (provided all reasonable means have been taken to provide against such unseaworthiness), or otherwise howsoever. It is also mutually agreed that this shipment is subject to all the terms and provisions of, and all the exceptions from liability contained in, the Act of Congress of the United States approved on Feb. 13, 1893."

By the Act of Congress of the United States approved on Feb. 13, 1893 (fifty-second Congress, sess. II, c. 105) [the Harter Act], it was provided:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement, whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. . . . 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The *Rossmore* left Baltimore with a port improperly caulked, through which the sea-water entered during the voyage, and damage was thus caused to the cargo. The port was not easily accessible during the voyage, and it was admitted that, according to the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* (1), the vessel was unseaworthy. It was also admitted that this unseaworthiness was due to the negligence of the carpenter who had been employed by the shipowners to see that the vessel was in a seaworthy condition before she started on her voyage, but the shipowners relied upon their having exercised due diligence in em-

ploying an efficient carpenter for this purpose. At the trial of the action, LAWRANCE, J., gave judgment for the shippers, and the shipowners appealed.

Pickford, *Q.C.*, and *Bateson* for the shipowners.
Walton, *Q.C.*, and *Carver* for the shippers.

LORD ESHER, M.R.—In this case we have to deal with a bill of lading, which, though given at Baltimore, in America, is an English bill of lading. By it English shipowners contracted with an English shipper for the carriage of certain goods from America to Liverpool. On the voyage the goods were damaged by sea-water which got through a port that had not been properly fastened, and the shipper has now brought this action against the shipowner upon the bill of lading for breach of his agreement to deliver the goods in good order and condition. The shipowner says he is not liable, and he relies upon the exceptions in the bill of lading.

The facts as to the cause of the damage to the goods are not in dispute, and the sole question we have to decide is as to the true construction of the bill of lading. By reference to a United States Act of Congress, certain words have been brought into the bill. The American Act is not, as an Act of Congress, binding on the parties to this action, but the words used in it are by reference introduced into this bill. That is a very clumsy contrivance, but we have to construe the bill, reading into it the words so introduced by reference. First, we have a clause in it expressly providing that

> "neither the vessel, her owners, agents, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel, provided due diligence has been exercised by her owners to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied."

That means that, unless the obligation of the owners to use due diligence to make the vessel seaworthy has been fulfilled, the exception in the earlier part of the clause is not to have any effect. Then comes the clause which brings in the words of the American Act, the effect of which is to repeat over again some of the words which are already in the bill. That again is a very clumsy contrivance. However, we have got to construe the words.

The words of the Act which are brought into the bill are these: Section 1 provides that it shall not be lawful to insert in any bill of lading any clause whereby the owner of the vessel shall be relieved from liability for loss or damage arising from negligence in loading, stowing, keeping, or delivering the goods that have been shipped on the vessel. After that comes s. 3 which, say the owners, relieves them from liability for damage caused through the unseaworthiness of the vessel to the plaintiffs' goods. That seems to me to be rather nonsensical. The section provides that the owners shall not be held responsible for damage resulting from faults or errors in navigation, or in the management of the vessel, upon the condition that they shall have exercised due diligence to make the vessel in all respects seaworthy. In the present case, the vessel was not seaworthy, but the owners contend that they are not liable for the resulting damage to the goods of the plaintiffs on the ground that they used due diligence to make the vessel seaworthy.

It is argued that, if the owner of a ship has done all that he personally could do to make his ship seaworthy, but through the fault of one of his servants she is not seaworthy, he is protected by the words of s. 3 from liability for the consequences. The owners of the *Rossmore* were not at Baltimore when she started on her voyage, nor were their managers there, and that was known to the parties to this action. How can it be said that anyone supposed that the owners were there, personally seeing what was being done to make the ship seaworthy? It seems to me obvious that in this clause "owners" must include not only the owners personally, but also their agents, whose business it is to see that the ship starts on her voyage in a seaworthy condition. If the owners' agent appointed a carpenter, he ought to have

seen that the carpenter did what was necessary to make the ship seaworthy. If the carpenter himself was the owners' agent, then it was still his duty to make the ship seaworthy. Here the ship was not seaworthy when she started on her voyage, and whether that was the fault of the agent or the carpenter, it was the fault of the person who was bound to attend to the owners' duty to see that the ship started in a seaworthy condition. The ship started with a port open. If that had been all, and the port could have been shut immediately it became necessary, the ship would not have been unseaworthy. It is true that it would have been possible to fasten the port during the voyage, but the ship was so loaded that there was no facility for doing so after the voyage had begun. It could not have been shut without considerable exertion, as the crew would have to be employed for some time in moving the cargo, in order to get at the port. In the meantime, while they were doing that, the water would have been coming in through the port, and doing damage to the cargo.

The result is that this ship was not seaworthy at starting, and that was so through the fault of some agent of the owners, whose duty it was to see that she started in a seaworthy condition. Therefore, the owners have not used due diligence, through their servant, to make the ship in all respects seaworthy. The two cases cited by the shipowners, *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (2) and *Franklin Sugar Refining Co.* v. *Steamship Sylvia* (3), have no bearing upon this case. The owners have not fulfilled their duty, and are not relieved from responsibility by the bill of lading. The appeal is dismissed.

KAY, L.J.—Nothing could be more inartistically drawn up than this bill of lading. On the whole the result of the provision as to relief of the owners from liability if they have exercised due diligence to make the vessel seaworthy, and of the words which have been incorporated from the United States Act of Congress, seems to me to be this. The owners meant that, upon the fulfilment of certain conditions, they should be exempt from liability for any damage to the goods arising from "faults or errors in navigation or in the management of the ship." Those last words I will agree are equivalent to faults or errors in the management of the ship during the voyage, because it seems to me quite plain that the owners must have exercised due diligence in making the ship in all respects seaworthy and properly manned, equipped, and supplied, before they are to be entitled to the exemption. That seems to me to be fully expressed in the bill of lading without any reference to the incorporated words of the American Act, because the express words used in the bill are much the same as the words used in the Act. Not only is the bill badly drawn, but the wording of the Act itself seems to me most inartistic, ss. 1 and 2 being somewhat contradictory, as the Master of the Rolls has pointed out. But, however that may be, the meaning of these clauses in the bill are that, provided the owner has fulfilled certain conditions, he is not to be held liable for "faults or errors in navigation or in the management of the ship." The point that was argued was, that there had not been any such fault or error in this case. What happened was this. The ship put to sea, with one of her ports insufficiently fastened, so that water got into the ship and damaged the cargo. It is unnecessary for me to give any opinion whether that was a "fault or error in navigation or in the management of the vessel," but I confess I should be inclined to think that those words would apply to faults or errors in sailing the ship during her voyage, and would not include the matter which caused the damage in this case. But it is not necessary to give a decided opinion on this point. The real point is whether the owners exercised due diligence to make the vessel seaworthy and thereby fulfilled the condition of their exemption from liability for the damage to the goods. After the decision of the House of Lords in *Steel* v. *State Line Steamship Co.* (1) it cannot be denied that the ship was unseaworthy. LORD BLACKBURN there said that, if a ship went to sea with a port unfastened, and it would take a great deal of time to remove the cargo in order to get at it and fasten it, the ship would be unseaworthy; but if

A the port could be shut at a moment's notice if the sea became rough, then the ship could not be called unseaworthy. Those words of LORD BLACKBURN were referred to with approval by LORD HERSCHELL in *Hedley* v. *Pinkney & Sons Steamship Co.* (4). Therefore, it is clear that the *Rossmore* was unseaworthy when she left Baltimore. The essential point in this case is whether that unseaworthiness was owing to a want of due diligence on the part of the owners. The owners say it was B not, because they had appointed a fit and proper carpenter to see that the ship was seaworthy. I cannot agree that that is an answer to the question. The contract is that the owners shall, if not personally, at least by the eyes of proper and competent agents, be sure that the ship is seaworthy before she leaves the port. It is obvious that the owners themselves cannot make the ship seaworthy. They must C act through agents. Therefore, the word "owners" in this clause must be construed as including the agents by whom they act. There is nothing in the bill to exempt the owners from the negligence of their agent, even if they should appoint the best they could find. It cannot be said that the owners fulfilled their duties under this bill of lading by appointing a competent agent. I think the negligence of the carpenter was the negligence of the owners. As they have been D negligent in sending the ship to sea in an unseaworthy condition, they have not fulfilled the condition that they should exercise due diligence in the matter, and, therefore, they cannot rely upon the exemption from liability. I agree that the appeal must be dismissed.

A. L. SMITH, L.J.—This is an action by the owners of goods which were damaged by sea-water during their carriage on the defendants' ship. They sue E the shipowners for breach of their agreement to deliver the goods in good order and condition. The shipowners rely on the exemptions from liability contained in the bill of lading. It is clear that the ship was not seaworthy when she sailed from Baltimore, and that by reason of her unseaworthiness the plaintiffs' goods were damaged. The owners, however, claim to be exempt from liability under a clause in the bill of lading which incorporates in the bill the words of an American Act F of Congress. The bill must be construed as if the words of that Act were written out in it. Sections 1 and 2 are in favour of the shipper, and provide that it shall not be lawful for a shipowner to exempt himself from liability for damage to the cargo arising from the negligence of himself or his crew. Section 3 is in favour of the shipowner, and provides for his exemption from liability in certain cases if he shall have exercised due diligence to make the vessel in all respects seaworthy. G Does that mean that by means of his own eyes and hands he is to make the ship seaworthy? It is impossible that that should be the meaning. It must mean that he is to exercise due diligence both personally and through his agent. That is what the defendants have to prove here. It is not denied that the carpenter employed by the shipowners did not use due diligence in seeing that the ship was seaworthy when she left Baltimore. Therefore, the shipowners have not shown that they H have fulfilled the condition without which the rest of the clause exempting them from liability does not come into play. It is, therefore, unnecessary to give any opinion as to the meaning of the words used in the other part of the clause, "faults or errors in navigation or in the management of the ship." One word with regard to *Carmichael* v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association* (2). That case has no application to this. It arose on a policy of insurance against loss I or damage to goods caused by the "improper navigation of the ship carrying the goods." A loss was caused by water getting through a port which had been insufficiently fastened and damaging the goods. The court held that the damage arose from improper navigation of the ship. I agree that this appeal should be dismissed. *Appeal dismissed.*

Solicitors: *Walker, Son & Field*, for *Weightman, Pedder & Weightman*, Liverpool; *Alfred Bright*, for *Bateson & Co.*, Liverpool.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

Re DARTNALL. SAWYER *v.* GODDARD

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), March 1, 1895]

[Reported [1895] 1 Ch. 474; 64 L.J.Ch. 341; 72 L.T. 404; 43 W.R. 644; 12 R. 237]

Trust—Cestui que trust—Right to information as to trust investments—Solicitor—Misconduct—Unreasonable proceedings—R.S.C., Ord. 65, r. 11.

The plaintiff was entitled under a will to the sum of £100, subject to the life interest therein of the testator's widow, who was eighty-four years of age. The testator died in July, 1894, and probate of his will was granted in August. In November the plaintiff, being desirous of raising money on the security of her reversionary interest, asked the trustees for the particulars of the securities in which the estate was invested. Correspondence took place between the parties, and in a letter of Dec. 11 the trustees said that at the date of the proof of the will the securities consisted of a variety of foreign railway and government bonds, and also a considerable quantity of English railway stock, and that the net amount of the personal estate was £12,286 2s. 11d., but they refused to add to these particulars, which they said they regarded as satisfactory. On an originating summons taken out by the plaintiff asking that the trustees be ordered to furnish her with particulars of the trust investments,

Held: the plaintiff was strictly entitled to the particulars of the investments of the trust estate, and the trustees must furnish them to her, but while the trustees had acted unreasonably in refusing the information, the plaintiff and her solicitor had also acted unreasonably in issuing the summons, and, both sides being in the wrong, there would be no order as to the costs, either on appeal or in the court below, except that the plaintiff's solicitor should be disallowed all costs as against her.

Notes. Referred to: *Edwards* v. *Edwards*, [1958] 2 All E.R. 179.

As to a cestui que trust's right to information about the trust estate, see 38 HALSBURY'S LAWS (3rd Edn.) 948, 949, 974-977; and for cases see 43 DIGEST 829, 861-863. As to a solicitor's liability to pay costs, see 36 HALSBURY'S LAWS (3rd Edn.) 198-201; and for cases see 42 DIGEST 337 et seq.

Cases referred to in argument:

Ottley v. *Gilby* (1845), 8 Beav. 602; 14 L.J.Ch. 177; 4 L.T.O.S. 411; 50 E.R. 237; 43 Digest 828, *2734*.

Re Tillott, Lee v. *Wilson*, [1892] 1 Ch. 86; 61 L.J.Ch. 38; 65 L.T. 781; 40 W.R. 204; 43 Digest 863, *3090*.

Re Bradford (1883), 15 Q.B.D. 635; 50 L.T. 170; sub nom. *Re Milton and Bradford*, 53 L.J.Q.B. 65; 32 W.R. 238, C.A.; 42 Digest 355, *4038*.

Appeal from a decision of NORTH, J., on an originating summons taken out by a cestui que trust against trustees for an order for information regarding the trust estate.

By his will, dated Feb. 13, 1891, the testator, William Dartnall, devised and bequeathed his real and personal estate to the defendants, E. Goddard and W. F. G. Roberts, upon trust for conversion, and after payment of his funeral and testamentary expenses, debts, and the legacies bequeathed by his will or any codicil thereto, to stand possessed of the residue upon trust to pay the income arising therefrom to his wife during her life, and after her death to divide the sum of £900 equally between the children of his cousin, Thomas Dartnall, living at the death of the testator, and the issue then living of any such child who might have died in the testator's lifetime, in manner therein mentioned, and then to divide the residue of his estate among certain other persons. The will contained no investment

clause, but directed that the executors and trustees should permit the personal estate invested at the testator's decease in or upon any securities yielding income to continue in the same state of investment so long as they should think fit. The testator died on July 23, 1894, and his will was duly proved by the defendants in the following August. His widow was still alive. The plaintiff, Mrs. E. S. Sawyer, was one of the nine children of Thomas Dartnall, and was desirous of raising some money on the security of her reversionary interest in order to assist her husband in his business, and, accordingly, on Nov. 26, 1894, her solicitors wrote to the defendant Goddard the following letter:

"We have been instructed by Mrs. Edith Sarah Sawyer, one of the children of Mr. Thomas Dartnall, with reference to her interest under the will of William Dartnall, of which you are one of the trustees. We understand that she is entitled to a ninth of a sum of £900 bequeathed to the children of Thomas Dartnall living at the testator's death. Perhaps we had better send you a few questions, and we accordingly inclose same, and shall be glad if you will favour us with replies thereto. We inclose Mrs. Sawyer's authority to the trustees to give us the information."

On Nov. 28 the trustees' solicitors replied:

"Your letter of the 2nd inst. with inclosure has been handed to us. We first of all do not understand the object of the inquiries which you desired to have answered, or any reason given why these requisitions should be put. Are we to conclude that your clients contemplate hostile proceedings against the trustees, and, if so, on what ground? We are prepared to give such information as our clients may be reasonably required to give, and on the usual terms."

The plaintiff's solicitors replied:

"The reason the inquiries have been made is that Mrs. Sawyer is about to mortgage her interest under the will. No hostile proceedings against the trustees have been contemplated or thought of. Kindly, therefore, let us have the replies, and we shall be happy to pay your charges."

On Nov. 30 the trustees' solicitors wrote as follows:

"We have your letter of to-day, and are glad to notice what you say with regard to the object of your inquiries. We will see the executors upon the subject of your requisitions, and when they are ready for delivery we will let you know."

On Dec. 6 the trustees' solicitors replied:

"We have seen our client (the senior executor) and have obtained the information you wish, so that the answers to the requisitions could be had by you at any time on your sending down for them and upon payment of our charges (£1 11s. 6d.)."

On Dec. 8 the plaintiff's solicitors wrote as follows:

"We are obliged by the replies to the questions. Referring to question 3 and reply thereto please send us a statement showing the investments forming the trust estate of the testator."

On Dec. 11 the trustees' solicitors replied:

"We have seen our client upon your letter of the 8th inst., and he considers that ample particulars have already been given, and therefore, will not instruct us to furnish particulars of the present investments. We will say generally that at the date of proof of the will the securities consisted of a variety of foreign railway and government bonds, and also a considerable quantity of English railway stock. The amount at which the personal estate was sworn was

£12,286 12s. net. so that you may draw your conclusion as to the security of Mrs. Sawyer. You will have examined the will and will have observed that the executors have a very wide power, viz., that of continuing the investments in the same state as they were at the testator's decease, providing that they yield income. We cannot add to these particulars, which we trust will be now considered satisfactory."

The questions sent in the letter of Nov. 26 were as follows:

"1. Who has the probate will of William Dartnall and trust securities for the £900? 2. Who are the present trustees of the will, and what are their addresses and descriptions? 3. Please state how the £900 bequeathed to the children of Thomas Dartnall is invested. 4. Have the trustees received notice of any sale, settlement, or mortgage of, or other incumbrance on or dealings with the share or interest of Mrs. Sawyer, a daughter of Thomas Dartnall, in the £900, and, if so, what? 5. Do you know the age of Mrs. Eliza Dartnall, the tenant for life? If so, please state same. 6. Do you know the address of the tenant for life? If so please state same. 7. Have the succession or legacy duties been paid? 8. Have the testator's debts been paid? 9. Have all the legacies been paid? If not, what legacies are there to pay. 10. Has the estate or trust been administered in Chancery? 11. What is the address of Mr. Roberts (one of the trustees)?"

The answers referred to in the letter of Dec. 6 were as follows:

"1. Probate of the will is in the possession of the first named executor, Mr. Edmund Goddard. See answer 3 for remainder of question. 2. The same persons occupy the positions of executor and trustees, their names are: [The names and addresses were then given.] 3. There has been no appropriation of securities, nor is it necessary or desirable there should be until the life tenant of the whole estate died. 4. No. 5. Mrs. Eliza Dartnall is believed to be about eighty-four years of age. 6. Dorking, Surrey. 7. No; the time has not arrived for doing so. 8. The statutory notice has expired. All debts of which the executors have any knowledge have been paid. 9. The period allowed for payment of legacies expires in July, 1895. A perusal of the will shows that the pecuniary legacies payable at once are trifling. 10. No. 11. See answer 2."

On Dec. 14, 1894, an originating summons was taken out on behalf of Mrs. E. S. Sawyer, the trustees being the defendants, claiming:

"1. That the defendants, who are the trustees of the said will, may be ordered to furnish the plaintiff with proper particulars and accounts of the real and personal estate of the testator, devised and bequeathed to the defendants by the testator upon the trusts declared by his said will, and the investments thereof; and that the defendants be ordered to sign proper authorities to the railway and other companies in which any part of the trust funds may be invested to supply information to the plaintiff as to the amount of stock or shares, and in whose names the same stand. 2. That the estate of the testator may be administered under the direction of the court if and so far as may be necessary. 3. That the defendants do pay the costs of and incident to this application."

The executors and trustees made an affidavit in opposition to the summons, in which they stated that part of the testator's estate consisted of holdings in twenty-five different colonial or foreign government bonds or stocks, or proprietary shares or debentures in public companies; that his debts amounted to £18, and his funeral expenses to £22 15s.; that the net value of the estate was £12,286 2s. 11d., upon which sum probate and estate duty were paid. They also stated that they had caused the statutory notice to creditors to be inserted, and the period fixed thereby had expired on Oct. 20, 1894, and that no claims had been sent in.

The defendant Goddard referred to the receipt of the questions mentioned, and said that, when asked for the details of the investments, he instructed his solicitors that, in his judgment, ample particulars had been furnished, and there was no necessity to do more. The defendant Roberts deposed that he called on the plaintiff to endeavour to persuade her to abandon the proceedings, and to point out to her how impossible it was to suppose that they would benefit her, and that she said it was her solicitor, Mr. Mear (to whom she had gone for an advance of money, and through whom she received £20), who advised her to take the proceedings, and that before she would authorise the proceedings he had expressly said that the costs would come out of the estate. The defendants also stated that they had received notice that by an indenture dated Dec. 20, 1894, the plaintiff had assigned her share and interest in the legacy to the Legal Reversionary Society, Ltd., and they submitted that they had given ample particulars to the plaintiff, and that the action was not brought bona fide, but for the purpose of incurring costs, and involving the estate in lengthy and expensive proceedings.

The plaintiff and Mr. Mear made an affidavit in reply, in which the plaintiff said that the defendant Roberts called on her as stated, and told her she could not compel the trustees to give her information as to what the trust funds were invested in, and that she would not get it; that her solicitors had all the information she was entitled to; that she had better stop the proceedings; and that she would have to pay all the costs out of the £100. She also stated that she wished to raise the money to assist her husband, who had lately started a business; and that, at her urgent request, just prior to Christmas day, Mr. Mear induced the Legal Reversionary Society, Ltd., to lend her £27 to enable her to pay the rent of the premises in which her husband carried on his business, and which was in arrear, and thereby prevent a distress for rent which would have resulted in the loss of the business. Mr. Mear stated that, when the plaintiff applied to him to advise her whether she could raise money on a mortgage of her reversionary interest, he advised her that she could do so on ascertaining what the investments forming the testator's estate consisted of; that from his experience as a director and solicitor of an insurance company he knew that it would be practically impossible for the plaintiff to raise a loan on mortgage of her interest without such particulars being obtained; and that for the replies to the questions his firm paid the defendants' solicitors £1 11s. 6d. on behalf of the plaintiff. He also said he did not advise the plaintiff that the costs of these proceedings would come out of the estate, but told her that, in his opinion, the trustees' refusal to give particulars of the investments was unreasonable; that she was entitled to have such particulars; and that, as the trustees refused to furnish them, he thought the court would visit them with the cost of proceedings to obtain them.

The summons came before NORTH, J., in chambers and was dismissed with costs to be paid by the plaintiff, the plaintiff's solicitors being disallowed their costs of the application against her, and being ordered to pay to the plantiff the costs by the order directed to be paid by her to the defendants. The plaintiff and her solicitors appealed.

Cozens-Hardy, Q.C., and *Macnaghten* for the plaintiff and her solicitors.
Micklem for the trustees.

LORD HALSBURY.—I confess I have the greatest possible difficulty in apportioning the blame, which appears to me to rest on both sides. The application made on behalf of the plaintiff to the trustees for particulars of the trust estate and the investments was, in my opinion, a just and proper one, and they ought to have complied with the request, and I see no reason why the trustees should not grant it. They did not base their objection upon the fact that the application was made within five months of the testator's death, and I am wholly unable to understand what their objection was. If the matter stopped there, the order asked for by this summons directing the trustees to give those particulars ought to have been made, and

the trustees ordered to pay the costs of the application. But the matter does not stop there. A correspondence then took place between the parties, and three days after the last letter of the trustees, dated Dec. 11, this originating summons was taken out, the trustees being the defendants, which is of a hostile character, and asks that the trustees may be ordered to pay the costs of it. When the matter came before NORTH, J., the trustees still adhered to their original view that they had given ample information to the plaintiff, and they made no offer to give her more. I think the plaintiff was entitled to the information she asked, although she was interested in only a small sum, and I confess I am unable to understand the decision of NORTH, J. Both parties had been unreasonable, but he dismissed the summons with costs, and ordered that the plaintiff's solicitors should not only be disallowed any costs against the plaintiff, but should repay all the costs which she was called on to pay. I do not think that is a proper application to the transaction of Ord. 65, r. 11. I think the order of NORTH, J., must be discharged, and the trustees must be ordered to give the particulars asked for. Considering all the circumstances under which this litigation was commenced, there should be no order as to the costs either here or below, except that the plaintiff's solicitors shall be disallowed all costs as against her, for, although I do not think it right to order the solicitors to pay costs in this case, I do not think they ought to have any costs from their client.

LINDLEY, L.J.—The difficulty in this case is to do justice with reference to these costs, which must now be very considerable. It was unfortunate, to say the least, that the trustees' solicitors wrote the letter of Dec. 11, 1894, declining to give any further particulars. I do not think any injustice was done to the plaintiff by the refusal to give those particulars, because I do not believe that practically she wanted information as to the investments of the trust estate; but the trustees were unreasonable, because in strict right the plaintiff was entitled to the further information which she asked for. But then this summons was immediately taken out without any further communication with the trustees or their solicitors, and was a very hostile summons. In my opinion, the order of NORTH, J., went too far, though I think he was quite right in endeavouring to save the testator's estate as far as possible from the costs of this litigation. I think the right order will be as follows: Discharge the order of NORTH, J.; direct the trustees to give a list of the investments of the testator's estate; no order as to the costs of the appeal or of the proceedings before NORTH, J., except that the plaintiff's solicitors are to be disallowed all costs as against her.

A. L. SMITH, L.J.—I agree.

Appeal allowed.

Solicitors: *Mear & Fowler; Nield & Strouts.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

LLANDUDNO URBAN COUNCIL *v.* WOODS

[CHANCERY DIVISION (Cozens-Hardy, J.), July 25, 26, August 2, 1899]

[Reported [1899] 2 Ch. 705; 68 L.J.Ch. 623; 81 L.T. 170; 63 J.P. 775; 48 W.R. 43; 43 Sol. Jo. 689]

Foreshore—Right of public to enter on—Navigation or fishing—Rights acquired by custom or prescription—Need for strict proof.

The foreshore is not a highway in the full sense of the word, and the public have no right at common law to enter on it, when dry, except for the purposes of navigation or fishing. More extensive rights may be acquired by custom or prescription, but the existence of such rights will not be presumed, and must be strictly proved.

Blundell v. *Catterall* (1) (1821), 5 B. & Ald. 268, applied.

The plaintiffs, the local authority of L., were lessees of the foreshore at L. from the Crown. The defendant, a clergyman of the Church of England, having held services and delivered addresses on the foreshore without the plaintiffs' consent, the plaintiffs brought an action against him claiming a declaration that he was not entitled without their consent to hold meetings, or deliver addresses, lectures or sermons on any part of the foreshore in lease from the Crown, and an injunction to restrain him from so doing. There was no evidence that the defendant had caused a breach of the peace, nor of disorder, nor of inconvenience, except of the most trivial kind, to members of the public resorting to the foreshore.

Held: the plaintiffs were entitled to the declaration asked for, but the matter was too trivial for an injunction to be granted.

Notes. Followed: *Behrens* v. *Richards*, [1905] 2 Ch. 614. Referred to: *Brinckman* v. *Matley*, [1904] 2 Ch. 313; *A.-G.* v. *Sewell* (1918), 88 L.J.K.B. 425.

As to rights over the foreshore, see 33 HALSBURY'S LAWS (2nd Edn.) 535 et seq.; and for cases see 44 DIGEST 77 et seq.

Case referred to:

(1) *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; 106 E.R. 1190; 44 Digest 77, *580.*

Also referred to in argument:

Mace v. *Philcox* (1864), 15 C.B.N.S. 600; 3 New Rep. 472; 33 L.J.C.P. 124; 9 L.T. 766; 28 J.P. 297; 10 Jur.N.S. 680; 12 W.R. 670; 143 E.R. 920; 38 Digest (Repl.) 208, *314.*

Ex parte Lewis (1888), 21 Q.B.D. 191; 57 L.J.M.C. 108; 59 L.T. 338; 52 J.P. 773; 37 W.R. 13; 4 T.L.R. 649; 16 Cox, C.C. 449, D.C.; 26 Digest (Repl.) 327, *458.*

Attorney-General v. *Wright*, [1897] 2 Q.B. 318; 66 L.J.Q.B. 834; 77 L.T. 295; 46 W.R. 85; 13 T.L.R. 480; 8 Asp.M.L.C. 320, C.A.; 44 Digest 108, *869.*

Witness action for a declaration and an injunction.

By an indenture of lease, the foreshore of the town of Llandudno was demised by the Crown to the plaintiffs' predecessors in title for a term of years expiring in October, 1901. The plaintiffs had also jurisdiction over the promenade, for the regulation of which they had, in 1878, with the sanction of the Local Government Board, made certain byelaws. The defendant was a clergyman of the Church of England, and was carrying on an anti-Ritualistic crusade in North Wales, in the course of which he visited Llandudno. In July, 1898, he requested the plaintiffs to allow him to hold religious services on the promenade and foreshore, which was refused. Nevertheless, he held meetings on the promenade, and was convicted before the magistrates of committing a breach of the byelaws, and fined. Immediately

after the conviction, the defendant began to hold meetings and deliver addresses on the beach or foreshore.

The plaintiffs brought this action claiming a declaration that the defendant was not entitled without their consent to hold meetings or deliver addresses, lectures, or sermons on any part of the foreshore, and an injunction to restrain him from so doing. They alleged that the matter and manner of the defendant's addresses gave offence to the inhabitants and visitors of the town; that large crowds assembled and angry discussions took place, and that the meetings seriously interfered with the free use and ordinary enjoyment by the public of the beach and foreshore. An interim injunction was obtained in August, 1898, and the action now came on for trial, the defendant contending that he had a right as a member of the public to do as he had done.

Eve, *Q.C.*, and *E. P. Hewitt* for the plaintiffs.

The defendant appeared in person.

Cur. adv. vult.

Aug. 2, 1899. **COZENS-HARDY, J.**—The plaintiffs have, in respect of the promenade at Llandudno, by virtue of byelaws approved by the Local Government Board in 1878, the right of preventing any public address from being delivered, and they took proceedings against the defendant before the magistrates for breach of these byelaws. This action in no way relates to the promenade. Between the foot of the promenade and the commencement of the foreshore is a strip about which I know nothing. The defendant has sometimes delivered addresses from this strip. But this action in no way relates to this strip. In June, 1898, he applied civilly to the plaintiffs for permission to hold religious services on the shore. In reply he received the following answer:

> "Dear Sir,—Your application for permission to hold religious services on the beach was submitted to my council this afternoon, when I was requested to express regret that they cannot accede thereto, inasmuch as they have granted a similar privilege to the organisation which has been in the habit of visiting Llandudno in past years, and proposes to come again this season.—Yours truly, Alfred Conolly."

I may observe that the organisation referred to in this letter is not antagonistic to the defendant, and that there is ample space on the extensive shore for more than one service. The defendant has since held services on the shore, until he was restrained by an interlocutory injunction. The evidence satisfies me that there was no breach of the peace, no disorder worth mentioning, and no inconvenience except of the most trivial kind to any of the public resorting to the shore.

It is, however, contended on the part of the plaintiffs that they are entitled as lessees to the possession of the foreshore, and that the public have no right at common law to enter on the shore, when dry, except for the purposes of navigation or fishing. I think I am bound by the decision of the majority of the judges of the Court of King's Bench in 1821 in *Blundell* v. *Catterall* (1) to hold that, in strict law, this proposition is well founded. The public are not entitled to cross the shore even for purposes of bathing or amusement. The sands on the seashore are not to be regarded as in the full sense of the word a highway. A more extensive right may possibly have been gained by prescription or by custom either by individuals or by the permanent or temporary inhabitants of Llandudno: but the existence of this more extensive right must be proved, and will not be presumed in the absence of proof. The plaintiffs have, therefore, prima facie a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey, and every preacher on the shore at Llandudno as a trespasser.

In the present case, there is no evidence from which I can find the existence of a legal usage or custom entitling the defendant to deliver sermons or addresses on the shore at Llandudno. The defendant seems to imagine that his position as a clergy-

man of the Established Church, bound to preach the Gospel both in season and out of season, gives him some special and peculiar rights. It is needless for me to say that this contention cannot for one moment be maintained. I must treat the defendant precisely as I should treat a Roman Catholic priest, a Methodist preacher, or a Salvation Army captain. This court has nothing to do with the truth or falsehood of the doctrines which the defendant has preached. I feel bound to say that I consider this action wholly unnecessary, and one which ought not to have been brought. It is no part of the duty of the plaintiffs, as lessees from the Crown for an unexpired term of two years, to prevent a harmless user of the shore. There are persons who derive satisfaction from listening to the addresses of the defendant, and the defendant derives satisfaction from delivering these addresses. I cannot conceive why they should be deprived of this innocent pleasure. Nobody is obliged to listen; nobody is molested. This action is an attempt to assert rights which the Crown would never have thought of putting forward, and which are in no way necessary for the peace and good order of the town of Llandudno. Charges have been made against the defendant in the pleadings and in the evidence for which there is no justification. I cannot refuse to make a declaration that the defendant is not entitled without the consent of the plaintiffs to hold meetings or deliver addresses, lectures or sermons on any part of the foreshore in lease from the Crown, but I decline to go further. I decline to grant an injunction. That is a formidable legal weapon which ought to be reserved for less trivial occasions, and I make no order as to costs.

Solicitors: *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno; *J. Girdlestone.*

[*Reported by* A. L. MORRIS, ESQ., *Barrister-at-Law.*]

Re FARNHAM

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), July 29, 1895]

[Reported [1895] 2 Ch. 799; 64 L.J.Ch. 717; 73 L.T. 231; 11 T.L.R. 556; 3 Mans. 109; 12 R. 554]

Bankruptcy—Mentally disordered person—Liability to be made bankrupt—Right of trustee to take bankrupt's property—Control of court in lunacy.

A person found lunatic by inquisition was subsequently adjudicated a bankrupt, and a trustee in bankruptcy was appointed.

Held: (i) the trustee in bankruptcy could only take the bankrupt's property subject to the powers of the court in lunacy under the Lunacy Act, 1890; (ii) it was the duty of the court to protect the interests of the lunatic, and, in view of the limited amount of his income, the court would order that the property be applied towards his maintenance.

Per LINDLEY, L.J.: A lunatic can be validly adjudicated a bankrupt under the direction of the court in lunacy.

Notes. The Lunacy Act, 1890, was repealed and inquisitions abolished by the Mental Health Act, 1959. For the management by the court of the property and affairs of mental patients see the Mental Health Act, 1959 (39 HALSBURY'S STATUTES (2nd Edn.), Part 8, p. 964).

Explained and Distinguished: *Re Farnham*, [1896] 1 Ch. 836. Considered: *Re Sims, Ex parte Sheffield* (1896), 3 Mans. 340; *Re Debtor (No. 1 of 1941), Debtor* v. *Petitioning Creditor and Official Receiver*, [1941] 3 All E.R. 11. Referred to:

Farnham v. *Milward*, [1895] 2 Ch. 730; *Re Tankard, Ex parte Official Receiver*, [1899] 2 Q.B. 57. A

As to the bankruptcy of mentally disordered persons see 2 HALSBURY'S LAWS (2nd Edn.) 256, 257, and for cases see 4 DIGEST (Repl.) 30, 31.

Case referred to:

(1) *Sanquinetti* v. *Stuckey's Banking Co.*, [1895] 1 Ch. 176; 64 L.J.Ch. 181; 71 L.T. 872; 43 W.R. 154; 11 T.L.R. 44; 39 Sol. Jo. 59; 1 Mans. 477; 13 R. 66; 5 Digest (Repl.) 909, *7531*. B

Also referred to in argument:

Re James (1884), 12 Q.B.D. 332; 53 L.J.Q.B. 575; 50 L.T. 471, C.A.; 4 Digest (Repl.) 31, *261*.

Re Cahen, Ex parte Cahen (1879), 10 Ch.D. 183; 39 L.T. 645; 27 W.R. 387, C.A.; 4 Digest (Repl.) 31, *263*. C

Re Lee (1882), 23 Ch.D. 216; 48 L.T. 193; 31 W.R. 802, C.A.; 4 Digest (Repl.) 31, *259*.

Re Spence, Ex parte Stamp (1846), De G. 345; 4 Digest (Repl.) 30, *254*.

Anon. (1807), 13 Ves. 590; 33 E.R. 415; 4 Digest (Repl.) 30, *255*.

Horne v. *Pountain* (1889), 23 Q.B.D. 264; 58 L.J.Q.B. 413; 61 L.T. 510; 54 J.P. 37; 38 W.R. 240, D.C.; 33 Digest 202, *1069*. D

Re Leavesley, [1891] 2 Ch. 1; 60 L.J.Ch. 385; 64 L.T. 269; 39 W.R. 276, C.A.; 33 Digest 203, *1070*.

Re Hinds (1877), 7 Ch.D. 26; 37 L.T. 768; 26 W.R. 193, C.A.; 5 Digest (Repl.) 703, *6139*.

Re Winkle, [1894] 2 Ch. 519; 63 L.J.Ch. 541; 70 L.T. 710; 42 W.R. 513; 38 Sol. Jo. 455; 7 R. 255, C.A.; 33 Digest 203, *1076*. E

Ex parte Layton, Ex parte Hardwicke (1801), 6 Ves. 434; 31 E.R. 1131; 4 Digest (Repl.) 29, *243*.

Re Plenderleith, [1893] 3 Ch. 332; 62 L.J. 993; 69 L.T. 325; 58 J.P. 164; 42 W.R. 224; 37 Sol. Jo. 699; 2 R. 625; 33 Digest 203, *1072*.

F

Summons taken out by the trustee in the bankruptcy of W. Farnham, a lunatic, asking that certain chattels—chests of silver plate—which had been deposited in court in the lunacy, might be delivered out to the applicant as being property of the bankrupt. The application was opposed by the lunatic's wife, who had been appointed committee of his person and estate.

G

Swinfen Eady, Q.C., and *R. J. Parker* for the trustee.

Warmington, Q.C., and *S. O. Buckmaster* for the wife.

LINDLEY, L.J.—This is an application by the trustee in bankruptcy of a lunatic, Mr. Farnham, that certain articles of silver plate now deposited in court in this matter may be delivered out to him. The summons raises a question of some little difficulty. Before I allude to the legal aspect of the case I will state shortly those facts which give rise to the controversy. H

In August, 1893, Mr. Farnham was found lunatic by inquisition, and a committee has been appointed. In May, 1894, he was adjudicated bankrupt, the act of bankruptcy being that the sheriff had seized and been in possession for twenty-one days, which is sufficient to constitute an act of bankruptcy under s. 1 of the Bankruptcy Act, 1890 [now Bankruptcy Act, 1914, s. 1 (1) (e)]. In March, 1895, the master in lunacy directed the plate which is in question to be brought into court, and on Mar. 28 an order was made in bankruptcy for delivery of that plate to the trustee, subject to the directions of the judge in lunacy. This summons has been taken out in order to obtain the sanction of the judge in lunacy for the delivery up of this plate. The committee of the lunatic is his wife, and at one period she set up a claim to this plate under an alleged gift by her husband to her, which she said was made in December, 1892, or January, 1893. She supported that claim by an I

affidavit comprising a memorandum, which, coupled with the alteration of the address on the chests wherein the plate was contained, looks like a gift from the husband to her. But it was pointed out, and she was advised, that, if it was a gift to her, being within two years of his bankruptcy, it was liable to be set aside under s. 47 of the Bankruptcy Act, 1883 [see s. 42 of the Act of 1914], and, consequently, she abandoned all claim to that. The point is an important one, and I shall have to allude to it again presently. It was because she abandoned all claim to the plate as a gift to her that she was advised that she ought, nevertheless, to assert, I do not say her right as committee to it, but to bring before the notice of the Bankruptcy Court the fact that the plate was under the control of the judge in lunacy, and could not be parted with without his order.

The legal questions which arise are these. First of all, there is the broad question, and it is an important one, whether a person who has been found lunatic by inquisition can be adjudicated a bankrupt at all. That question is by no means so free from difficulty as at first sight appears. There is no doubt whatever that s. 1 of the Bankruptcy Act, 1890, applies in terms to all debtors, and all debtors include not only lunatics but infants. But there might be a difficulty in holding that an infant could be adjudicated a bankrupt under that section, and there may be difficulty in holding that a lunatic could be so adjudicated. It appears that this doubt about the validity of adjudications in bankruptcy against lunatics is a very old one, and has not yet been altogether removed. I do not propose on the present occasion to solve that doubt. If it were necessary to do so, I should like to look a little more closely than I have done into the course that legislation has taken about lunatics, and into the authorities. But I shall assume, for the purpose of the present decision, that Mr. Farnham has been validly adjudicated a bankrupt, and that his trustee has been validly appointed.

Assuming that, counsel for the trustee in bankruptcy says that everything follows in his favour, and that the court ought to direct this plate to be handed over to the trustee. But it is said, and I think very properly, that inasmuch as this lunatic was adjudicated a bankrupt some time after he was found a lunatic by inquisition, the trustee in bankruptcy must take the property subject to the powers of the judge in lunacy conferred by the Lunacy Act, 1890. Sections 117 and 120 of the Lunacy Act, 1890 [see now Mental Health Act, 1959, ss. 102-107], vest in, or confer upon, the judge in lunacy various powers, among others power to apply the estate of a lunatic in discharge of his debts. Although I believe it is perfectly well settled that a lunatic can be adjudicated a bankrupt under the direction of the committee acting under the order of the judge in lunacy, yet there is a question whether he can be validly adjudicated apart from that direction. Supposing that the trustee takes subject to the statutory powers, the main point in counsel's argument is answered. I think that counsel for the wife was quite right in saying that, whatever may be true of the actual vesting of the property in the trustee, it does not follow that the trustee may take the property which is so vested in him except subject always to the jurisdiction which has accrued before the bankruptcy to the judge in lunacy under the inquisition. I think that that is a good answer to the argument so far as it goes.

Then counsel for the trustee said: "But this property is not the bankrupt's property at all, and you, the judge in lunacy, have nothing to do with it. It was the wife's property. It was settled on the wife, but under s. 47 of the Bankruptcy Act, 1883, it was set aside, and then it became vested in the trustee in bankruptcy." I think that that argument is unsound. In fact, it has been dealt with judicially, and condemned judicially, by CHITTY, J., in *Sanguinetti* v. *Stuckey's Banking Co.* (1). If the settlement is void, that does not mean that the property, the subject of the settlement, vests in the trustee by a title which overrides that of both the donor and the donee. The settlement being void, the property reverts to the donor; and it is as the donor's property that it vests in the trustee in bankruptcy, and must be distributed. That was the view taken by CHITTY, J., of this section in

Sanguinetti's Case (1), and I think that that is right. Therefore the trustee can only take the plate in this case if it is the property of the donor, that is to say, the lunatic. If it is the property of the lunatic, it is subject to the order, disposition, and jurisdiction of the judge in lunacy which had accrued before the adjudication.

That being so, we look and consider what is the proper mode of exercising the discretion which the court has as regards allowing the property of the lunatic to go to his creditors. It is the province of the court to look after the lunatic and his interests. We are told that in the present case, the state of affairs is such that it will be contrary to the benefit and interests of the lunatic if we allow this property to be distributed among his creditors. We are bound to protect him, and having seen our way to give a sufficient answer, and a proper answer, to all the arguments of the trustee, the conclusion we have arrived at is, that this summons ought to be dismissed.

LOPES, L.J.—I am of the same opinion. One question arises which no doubt is a very important one; that is, whether the lunatic can be adjudicated a bankrupt. At the present moment that it rather in the nature of an open question. There is certainly no direct decision in regard to that. It is a very important matter, and a matter with regard to which I should like to give a great deal more consideration than I have given to it at present before expressing any opinion with regard to it. I propose, therefore, to leave that an open question as it has been left hitherto. But I will, for the purposes of this case, assume that a lunatic can be adjudicated a bankrupt.

Then arises the point with regard to how far this plate has vested in the trustee in bankruptcy for the benefit of the creditors, or whether it is not subject to the disposition of the judge in lunacy. The first and most important question to consider is with regard to certain dates. Mr. Farnham was found a lunatic on Aug. 5, 1893. In November, 1893, judgment and execution were obtained against him. On May 19, 1894, he was adjudicated a bankrupt. But it must be recollected that this adjudication in bankruptcy was after the time when Mr. Farnham was found to be a lunatic, and the consideration arises whether or not the jurisdiction of the court in lunacy does not take effect. There is no doubt, I apprehend, that, subject to what I am about to say, the property of the bankrupt would have vested in the trustee in bankruptcy. But the trustee, in my judgment, took his title subject to the power contained in s. 117 of the Lunacy Act, 1890. The title of the trustee was acquired subsequently to the lunacy; and being acquired subsequently to the lunacy, in my judgment, it cannot be enforced in bankruptcy under s. 1 of the Act of 1890. That being so, in my judgment, this plate is subject to be dealt with by this court according to its discretion.

In favour of the trustee in bankruptcy another point was taken under s. 47 of the Bankruptcy Act, 1883. It was said that this property was the property of the wife, and that the gift, as it had been made within two years of the adjudication in bankruptcy, was void as against the trustee. But, if the gift was void, the property became re-vested in the donor, the donor being a lunatic. This point is completely answered by *Sanguinetti* v. *Stuckey's Banking Co.* (1). It is said that the trustee in bankruptcy is attempting to set up a settlement which he himself has set aside, that is a thing he cannot do, and, therefore, this property never vested in the trustee in the same way as the other property did, but under s. 117 of the Lunacy Act, 1890, is subject to be disposed of by the judge in lunacy. With that I agree. If that is so, how is it to be dealt with? There is abundance of authority—in point of fact it is, I may say, essential—that the matter that should first be considered in dealing with the property of the lunatic is: What is for his advantage? It appears here that there are very small funds indeed that can be applied to the lunatic's maintenance, and that, without the fund in court, in all probability he will become a pauper. Under those circumstances I am of opinion that it is the duty of this court to have this fund so disposed of that it shall be

applied towards the maintenance of the lunatic, therefore, that this application should be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. I am not myself satisfied that there can be an adjudication in bankruptcy against a lunatic otherwise than through the judge in lunacy directing the committee, in the name of the lunatic, to commit an act of bankruptcy. There are reasons which show that it is difficult to see how an adjudication in bankruptcy can operate however it is brought about. How can a lunatic commit an act of bankrupty? That is one question that has to be answered. Again, how can the jurisdiction of the Court of Bankruptcy be set up without the consent of the judge in lunacy, as against the jurisdiction and the administration of the judge in lunacy? By the prerogative of the Crown, which has been exercised for centuries through the Commissioners in Lunacy the care of the lunatic, and the disposition of his estate, is vested in the Commissioners in Lunacy. During the centuries in which that jurisdiction has been exercised certain rules have been laid down. Among them is a rule, which appears in the first instance harsh, that, notwithstanding the just claims of creditors, the lunatic must be taken care of first. In other words, the rule is to the effect that the lunatic must have proper maintenance provided for him before the creditors can take a single penny. That is the law as it has been administered by the Commissioners in Lunacy for a very long time indeed.

I do not determine whether there can be an adjudication in bankruptcy against a lunatic. It is a very important one. It has been in doubt, and it will remain in doubt until it is expressly raised in a case which requires its decision. It appears to me that without in the least purporting to decide that there can be an adjudication in bankruptcy against a lunatic, and that there has been such an adjudication in this case—assuming that he committed an act of bankruptcy by allowing goods of his to remain in the hands of the sheriff, and that everything has gone in due order—yet that adjudication cannot in any way oust the jurisdiction of the judge in lunacy, or interfere with any principle which has been established as regards that jurisdiction. So, if there be a reasonable case for doubting that the lunatic could be properly provided for except by applying some portion of this property for his maintenance, that would be a complete answer to this application, subject only to the argument brought forward on behalf of the trustee. I refer to the argument that the plate in question was not the property of the lunatic at all, but that it was the property of his wife, to whom he had given it before the lunacy, and before the bankruptcy, but within two years of the adjudication in bankruptcy. That gift, it has been urged, was perfectly good between husband and wife, but, although it was good as between them, the property of the wife was subject to the bankrupt's debts, and vested in the trustee in bankruptcy. That depends on the proper construction of s. 47 of the Bankruptcy Act, 1883. But the trustee can take nothing under a void settlement. What then is the alternative? It is plain that the Act intended that the property should come to the trustee, not as the property of the beneficiaries under the settlement, but as though the settlement never had existed—that is to say, it passes as the property of the bankrupt, the lunatic. That being so, I think it is perfectly plain that the jurisdiction of the judges in lunacy over all this property exists, and cannot be ousted by an adjudication in bankruptcy, even if it be properly made. Therefore, the ground of the application fails, and the application should be dismissed with costs.

Application dismissed.

Solicitors: *Field, Roscoe & Co. for Deane & Hands*, Loughborough; *Prior, Church & Adams.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

Re HALE. LILLEY *v.* FOAD

[Court of Appeal (Sir Nathaniel Lindley, M.R., Sir Francis Jeune, P., and Romer, L.J.), May 31, 1899]

[Reported [1899] 2 Ch. 107; 68 L.J.Ch. 517; 80 L.T. 827; 47 W.R. 579; 15 T.L.R. 389; 43 Sol. Jo. 528] B

Limitation of Action—Mortgage—Charge on business—Power of mortgagee to appoint receiver and manager—Receiver appointed on death of mortgagor—Part payment of debt incurred by mortgagor—Acknowledgment

H. created a charge on a business to secure payment of an annuity, and by a deed made in 1886 gave the annuitant the powers of a mortgagee under the Conveyancing Act, 1881, including the power to appoint a receiver of the business. The deed expressly provided that, in extension of the powers of a receiver under that Act, any receiver appointed, if so directed by the mortgagee, should be at liberty to manage and carry on the business as he thought fit. After the date of the deed H. incurred with the plaintiff a trade debt which he verbally agreed to pay off by monthly instalments. Down to his death in June, 1891, H. paid the instalments as arranged, but part of the debt remained unpaid at the date of his death. By his will H. appointed the defendant his executrix. By a document dated July 29, 1891, the mortgagee, pursuant to the deed of 1886, appointed J. receiver of the business "with full power to manage and carry on the same as he may think fit." On Aug. 6, 1891, while acting as receiver, J. paid the plaintiff a further monthly instalment of his debt. On July 3, 1897, more than six years after the last payment made by H., the plaintiff began proceedings to recover the remainder of the debt from H.'s estate. C D E

Held: having regard to the extension of the powers of the receiver to include the power to manage and carry on the business, J. (who was the agent of the mortgagor, and, therefore, of the defendant) had acted within the scope of his authority in paying the instalment; the payment, being unconditional, raised the inference of a fresh promise to pay the remainder of the debt which was binding on the defendant; and, therefore, the plaintiff's claim was not barred by the Statute of Limitations. F

Notes. As to extension of the limitation period in the case of acknowledgment or part payment of a debt, see now ss. 23 and 24 of the Limitation Act, 1939 (13 Halsbury's Statutes (2nd Edn.) 1184). As to a mortgagee's power to appoint a receiver, and the powers and duties of a receiver see, respectively, s. 101 and s. 109 of the Law of Property Act, 1925 (20 Halsbury's Statutes (2nd Edn.) 655, 673), which re-enacts provisions formerly in the Conveyancing Act, 1881. G

As to acknowledgment and part payment, see 24 Halsbury's Laws (3rd Edn.) 297 et seq. As to appointment of a receiver, see 27 Halsbury's Laws (3rd Edn.) 311 et seq. For cases see, respectively, 32 Digest 379 et seq., and 35 Digest 520 et seq. H

Case referred to:

(1) *Chinnery* v. *Evans* (1864), 11 H.L.Cas. 115; 4 New Rep. 520; 11 L.T. 68; 10 Jur.N.S. 855; 13 W.R. 20; 11 E.R. 1274, H.L.; 32 Digest 413, *912*. I

Also referred to in argument:

Gosling v. *Gaskell*, ante p. 300; [1897] A.C. 575; 66 L.J.Q.B. 848; 77 L.T. 314; 46 W.R. 208; 13 T.L.R. 544, H.L.; 10 Digest (Repl.) 822, *5367*.

Stamford, Spalding and Boston Banking Co. v. *Smith*, [1892] 1 Q.B. 765; 61 L.J.Q.B. 405; 66 L.T. 306; 56 J.P. 229; 40 W.R. 355; 8 T.L.R. 336; 36 Sol. Jo. 270, C.A.; 32 Digest 390, *716*.

Morgan v. *Rowlands* (1872), L.R. 7 Q.B. 493; 41 L.J.Q.B. 187; 26 L.T. 855; 20 W.R. 726; 32 Digest 380, *627*.

Hollis v. *Palmer* (1836), 2 Bing. N.C. 713; 3 Scott, 265; 2 Hodg. 55; 5 L.J.C.P. 264; 132 E.R. 275; 32 Digest 542, *1948*.

Wainman v. *Kynman* (1847), 1 Exch. 118; 16 L.J.Ex. 232; 154 E.R. 49; 32 Digest 380, *625*.

Harlock v. *Ashberry* (1882), 19 Ch.D. 539; 51 L.J.Ch. 394; 46 L.T. 356; 30 W.R. 327, C.A.; 32 Digest 473, *1379*.

Appeal from an order of BYRNE, J., on an originating summons taken out by the plaintiff, J. E. Lilley, against the executrix of F. W. Hale, deceased, claiming to be a creditor of the deceased and asking on behalf of himself and all other creditors for administration of the testator's real and personal estate.

The summons was adjourned from chambers into the witness list for the trial of two issues: (i) Whether there was a debt due to the plaintiff; (ii) if there was a debt, whether it was barred by the Statute of Limitations.

The facts were as follows:—By virtue of an indenture dated Dec. 13, 1886, F. W. Hale was interested in a business of manufacturing and vending proprietary herbal remedies or patent medicines. The deed recited that Jennette von Swartwout was the owner for her separate use of a life interest in the business, and that N. E. Hale was the owner for her separate use of the reversionary interest in the same business after the death of Mrs. von Swartwout. The parties to the deed agreed that the business should thereafter be considered as belonging to F. W. Hale during the lifetime of Mrs. von Swartwout, and after her death to N. E. Hale, subject and charged

> "With an annual sum of £520, payable without any deduction, except property tax (if any), during a period of five years from the date of these presents to the said Jennette von Swartwout, her executors, administrators, or assigns (whether she shall survive for that period or not), by equal weekly payments of £10. . . ."

By cl. 7 of the deed it was provided that:

> "In case at any time the said annuity shall fall into arrear to the amount of four weeks' instalments, or in case the said F. W. Hale or N. E. Hale shall sell, dispose of, or incumber the business or any portion thereof (except as hereinafter provided), it shall be lawful for the said Jennette von Swartwout, her agents or attorney, to enter into possession of the business, and henceforth hold, manage, and carry on the same for her own benefit, and the said F. W. Hale and N. E. Hale, their respective executors, administrators, and assigns, shall therefrom, at his, her, or their own cost, assign the business to the said J. von Swartwout, subject nevertheless to the proviso for redemption hereinafter contained. . . ."

By cl. 9 it was provided that:

> "In case the said J. von Swartwout shall at any time become entitled to enter into possession of the business as aforesaid, the powers conferred by the Conveyancing and Law of Property Act, 1881, upon a mortgagee when the mortgage money has become due shall, so far as the same are applicable to the terms and conditions of these present, thereupon become exercisable, and it shall be lawful for the said Jennette von Swartwout, either herself or by her agents or attorney, in lieu of taking possession or before or after taking possession of the business, to exercise the power of appointing a receiver conferred by the said Act, and by way of extension of the provisions of the said Act it is hereby also agreed that any receiver appointed under the said power in that behalf shall be at liberty, if so directed in writing by the said Jennette von Swartwout, her agents or attorney, to manage and carry on the business as he may think fit, and that any moneys he or the said Jennette von Swartwout, her agents or attorney, may pay or expend for that purpose, and whether before or

subsequent to redemption by the said Frederick Walter Hale or other the person or persons entitled to the business as aforesaid, shall be considered a charge upon the business with interest thereon at the rate of 5 per centum per annum."

After the date of this deed F. W. Hale continued to carry on the business, and became indebted to the plaintiff Lilley for the cost of printing almanacs circulated in connection with the business. In October, 1888, the amount of the debt being £1,000, Hale entered into a verbal arrangement with Lilley for payment of the amount by monthly instalments of £25. Hale died on June 16, 1891, having reduced the debt to £444. By his will he appointed Miss Foad, the defendant, and Mr. Richardson (the manager of his business) executrix and executor, and gave all his property to Miss Foad absolutely.

On July 1, 1891, Miss Foad alone proved the will, Richardson renouncing probate. On July 29, 1891, Mrs. von Swartwout, whose annuity had been in arrear for more than two years, elected to exercise her power of appointing a receiver, and, by a document under her hand referring to the deed of Dec. 13, 1886, appointed one in these terms:

"I hereby in virtue of the powers vested in me for that purpose by the said agreement appoint Frederick Johnson . . . a receiver of the said business, with full power to manage and carry on the same as he may think fit, but subject to the provisions and restrictions contained in the said agreement, and I further direct that the said F. Johnson shall be entitled to be paid at the rate of 5 per cent. on the gross amount of all moneys to be received by him as such receiver as aforesaid until I may think fit to vary such remuneration."

In pursuance of this appointment Johnson assumed the management of the business. On Aug. 6, 1891, Johnson paid by cheque the instalment of Lilley's debt. Further instalments were paid by Lewis (who was employed by Johnson in the management of the business) on Sept. 1 and Oct. 2 following.

In October the annuitant appointed a fresh receiver in place of Johnson, and no further instalments of Lilley's debt were paid.

On Mar. 12, 1898, an order was made for the administration of Hale's personal estate on an originating summons which had been taken out on Jan. 17, 1892, by an admitted creditor of Hale. It was agreed between the parties at the trial of the issues that Lilley's claim should be treated as made in that administration. More than six years had elapsed between the dates of the last payment of an instalment by Hale and of the plaintiff's summons, but it was admitted that the payments made since Hale's death might take the debt out of the statute.

Byrne, J., held that the powers of the receiver under the indenture of Dec. 13, 1886, being greater than those conferred by the Conveyancing Act, 1881, in protecting the assets of the business, he had properly paid the instalment to Lilley; that in making the payment he was acting as the agent of the executrix; that as there were no circumstances in the case to prevent the ordinary presumption which arises from an unconditional payment, viz., that a new promise to pay is implied, the Statute of Limitations only commenced to run against Lilley from the date of such payment, and that the debt of Lilley was not statute-barred. From that decision the executor appealed.

Astbury, Q.C., and *Montague Lush* for the executor.
Eve, Q.C., and *Younger* for the plaintiff, were not called on to argue.

SIR NATHANIEL LINDLEY, M.R.—This case has been extremely well argued, and the difficulty, such as it is, has been put forward clearly. The question has some novelty in it, and it requires careful consideration. It is whether payments made by Johnson, the receiver and manager to the plaintiff, who was an undoubted creditor of Hale, of monthly instalments of £25 on account of his debt are sufficient

to enable the plaintiff, who would otherwise be barred under the statute of James I, to prove for the balance of his debt against Hale's estate.

It is all important to ascertain Johnson's authority. That was conferred by Hale under the deed of Dec. 13, 1886. Hale owed the plaintiff a trade debt. This debt was unsecured, and it was agreed that Hale should pay off that debt by instalments of £25 a month, and down to June, 1891, he did pay the instalments as arranged. In that month he died, and the defendant, Miss Foad, became his executrix. She was in this position: She could, of course, pay off the debt owing under the deed of Dec. 13, 1886, but if she did not pay it off, she was bound by the stipulations which Hale had made in that deed, and, whether she liked it or not, the receiver appointed by the mortgagee would become her agent to the extent of the assets of her testator at the time. That would be her true legal position. Hale's death did not operate as a revocation of the power to appoint a receiver conferred on the mortgagee. She could not help herself if she followed the obligations of the testator. Let us see what happened.

We must turn now to the power to appoint a receiver. To my mind, the authority of the receiver is all important. It is at the root of the whole case. I very much doubt whether it would be right to decide this case in favour of the plaintiff if no power was given to the receiver to act, except in accordance with the power given by s. 24 of the Conveyancing Act, 1881 [see now the Law of Property Act, 1925, s. 109] because, although it is quite true that a receiver under that Act is the agent of the mortgagor and not of the mortgagee, the Act provides in that section what he is to do with moneys coming to his hands, and among the matters enumerated there is not any power to pay off a debt which does not affect the mortgaged property. I very much doubt whether a receiver under the Act could pay off an unsecured debt. He could keep down the interest on the mortgage debt, and so on, but I should feel a difficulty with regard to this unsecured debt if the deed contained nothing more than a power for the mortgagee to appoint a receiver under the Act. But the deed of December, 1886, does not stop there. It extends that, and the receiver appointed under the power is to be at liberty, if so directed by the mortgagee, "to manage and carry on the business as he may think fit." He is not only to be receiver under the Act of 1881, but also to manage and carry on the business as he thinks fit. The mortgagee, having the power in her hands of appointing a receiver and manager, did, by the document of July 29, 1891, appoint Johnson receiver of the business, "with full power to manage and carry on the same as he may think fit."

I think that Byrne, J., was perfectly warranted in calling attention to that extension of the power of the receiver, and this extension is all important. Johnson's position was this. Hale had died, and Miss Foad was his executrix, but that did not affect the powers of the mortgage deed, for Miss Foad could not help herself, and Johnson was appointed by the mortgagee to be receiver, and to manage this business. What does he do? He is informed of this business debt, an old one, and still outstanding, and one for the payment of which Hale had in his lifetime made some promise, and he goes on paying it in the manner arranged. Can it be said that in doing that Johnson was exceeding his authority? I do not think he was exceeding it. He had authority to go on paying the debt by instalments as he did, and he was to do that by the authority of the executrix. She did not herself give that authority, but her testator had given it, and that bound her. There was, I think, ample authority for Johnson to pay the debt by instalments.

Then comes the question, what was the legal effect of his making these payments? In respect of what were they payments? He made them knowing perfectly well that there was a balance still owing of the original debt, and he paid the instalments in respect of that. Can it be said that he had no authority even to make a promise that the assets of the testator should be liable in future for the instalments, and that the balance of the debt should be paid out of those assets? I think that he had. It seems to me no stretch of his authority at all. In my opinion, an agent

has authority to make a promise to pay part of a debt, and if he makes a payment on account of it, and nothing more is said or done, that payment is good, and any jury would draw from it the inference of a promise to pay the remainder of the debt. The authority to promise, in my opinion, exists, and it appears to me to have been pursued in this case. That is the key to the whole matter. If the case turned only on the powers under s. 24 of the Conveyancing Act, 1881, I might have felt great doubt about it, but as it turns upon the larger powers conferred by the deed, I feel none. In my opinion BYRNE, J., was quite right, and the appeal must be dismissed with costs.

SIR FRANCIS JEUNE, P.—I agree with the judgment that has just been delivered, and I agree that the whole question in the case, and the only one, is what was the authority of Johnson? A promise need not be made by the debtor himself; it is enough if it is made by an agent or a person representing him. To take the common case of an executor, if he makes a promise of this kind by making part payment, either personally or by his agent, there is no doubt that he binds the estate to pay the remainder of the debt, because it is his duty to pay his testator's debts. In the same way, in the case of a receiver. *Chinnery* v. *Evans* (1) does appear to me to go so far as to show that a receiver acting within the scope of his authority and dealing with a matter within the mortgage, can bar the operation of the statute by part payment of interest on the mortgage debt. The reason is that he is acting within the scope of his authority. The question, therefore, comes back to this, whether the receiver in the present case was acting within the scope of his authority.

I agree with what the Master of the Rolls has said as to the importance of the terms of the power under which the receiver was appointed. I also agree that there is a difficulty in seeing how, having regard to the provisions of sub-s. (8) of s. 24 of the Conveyancing Act, 1881, and the mode in which money coming to the hands of a receiver is to be dealt with, a payment of this kind could be properly made by him. It is difficult, I will only say, to see how any receiver appointed under that Act could conduct a business and deal with the assets in the way in which the receiver has done here, because the sub-sections of s. 24 seem to refer to the different duties of a person appointed to receive money, not of a person appointed to carry on a business, while here there is a person who has been expressly empowered to carry on a business, and whose duty it is to carry it on. If we get as far as that, we find, in my opinion, that it was the duty of the receiver to do what this receiver has done. He had power to pay debts connected with the business, and it is not shown that this was not a debt connected with Hale's business. At any rate, it was clearly one which Hale was paying off by instalments, and the receiver thought it was part of his duty to pay it off in the same way. There was good reason for its being paid in that way, and I am far from saying that it was not in the interest of Hale's business that the debt should be so paid, because the payment by monthly instalments of £25 each prevented the creditor from coming down on the assets for the whole sum at once, which might have been disastrous. It was, in my opinion, in accordance with the duty of the receiver in managing the business to pay this debt as he did.

Under these circumstances it seems to me that BYRNE, J., was perfectly right in finding, as he did, that this receiver in making these payments was acting properly —i.e., within the scope of his authority. Thus the difficulty in the case vanishes. We cannot distinguish between a payment and a payment from which a promise is to be inferred, as it is a legal inference. Payment of part of a debt is an acknowledgment that it is part of a debt which has to be paid, and it seems to me to be quite impossible to draw any distinction between the payment as a payment and the payment as an act from which the legal inference of a promise to pay the whole debt flows, when once we have got the fact that the payment was within the duty of the receiver. I think, therefore, that the appeal fails.

ROMER, L.J.—I also think that by virtue of the powers conferred by the deed under which the receiver was appointed he had power on behalf of his principal, the mortgagor, to pay the instalment of £25 on Aug. 6, 1891, as also the two subsequent instalments which he seems to have also paid in the same way, and the legal result of that payment is the same as if it had been made by the executrix herself. He was, in my opinion, authorised to make these payments in such a way as to acknowledge that the balance of the debt was due from Hale's estate and should be paid. Therefore the payments that he made were duly and properly made, and take the case out of the Statute of Limitations.

Appeal dismissed

Solicitors: *Graham Gordon; J. B. & F. Purchase.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-law.*]

DUNN *v.* REGEM

[COURT OF APPEAL (Lord Esher, M.R., Lord Herschell, and Kay, L.J.), December 13, 1895]

[Reported [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 44 W.R. 243; 12 T.L.R. 101; 40 Sol. Jo. 129]

Crown—Crown servant—Dismissal—Persons employed in public service of the Crown, whether in military or civil capacity, hold appointment at pleasure of Crown—Civil servant appointed for three years certain dismissed before expiry of three years—Crown not bound by terms of appointment and dismissal valid.

All persons employed in the public service of the Crown, whether in a military or civil capacity, hold their appointments at the pleasure of the Crown, unless there is some statutory provision to the contrary.

The petitioner was appointed a vice-consul in the Niger Protectorate under a contract, made with the consul-general for the protectorate, providing that the petitioner was to be engaged for three years certain. Before the three years had expired the consul-general gave the petitioner notice determining his services.

Held: the Crown was entitled to dismiss the petitioner at pleasure notwithstanding the terms of the contract, and the appointment had, therefore, been properly determined.

Principle laid down by LORD WATSON in *De Dohse* v. *R.* (1) (1886), 66 L.J.Q.B. at p. 423, applied.

Notes. Followed: *Hales* v. *R.* (1918), 34 T.L.R. 589; *Denning* v. *Secretary of State for India in Council* (1920), 37 T.L.R. 138. Applied: *Leaman* v. *R.*, [1920] All E.R. Rep. 614. Considered: *China Navigation Co.* v. *A.-G.*, [1932] All E.R. Rep. 626; *Terrell v. Secretary of State for the Colonies*, [1953] 2 All E.R. 490. Referred to: *Gould* v. *Stuart*, [1896] A.C. 575; *Dunn* v. *Macdonald*, post; *The Raphael* v. *Brandy* (1911), 80 L.J.K.B. 1067; *Hollinshead* v. *Hazleton*, [1914-15] All E.R. Rep. 1117; *Fisher* v. *Steward* (1920), 36 T.L.R. 395; *Brown* v. *Dagenham U.D.C.*, [1929] 1 K.B. 737; *Nixon* v. *A.-G.*, [1930] 1 Ch. 566; *Kynaston* v. *A.-G.* (1933), 49 T.L.R. 300; *Lucas* v. *Lucas and High Comr. for India*, [1943] 2 All E.R. 110; *I.R. Comrs.* v. *Hambrook*, [1956] 1 All E.R. 807.

As to Crown contracts for service, and as to tenure of executive offices, see 7 HALSBURY'S LAWS (3rd Edn.) 252 and 340 respectively; and for cases see 11 DIGEST (Repl.) 570 et seq.

Cases referred to: A

(1) *De Dohse* v. *R.* (1886), 66 L.J.Q.B. 422, n.; 3 T.L.R. 114, H.L.; 11 Digest (Repl.) 571, *82*.

(2) *Shenton* v. *Smith*, [1895] A.C. 229; 64 L.J.P.C. 119; 72 L.T. 130; 43 W.R. 637; 11 R. 375, P.C.; 11 Digest (Repl.) 570, *79*.

Also referred to in argument: B

Thomas v. *R.* (1874), L.R. 10 Q.B. 31; 44 L.J.Q.B. 9; 31 L.T. 439; 39 J.P. 21; 23 W.R. 176; 16 Digest (Repl.) 264, *330*.

Re Tufnell (1876), 3 Ch.D. 164; 45 L.J.Ch. 731; 34 L.T. 838; 24 W.R. 915; 11 Digest (Repl.) 571, *89*.

Grant v. *Secretary of State for India* (1877), 2 C.P.D. 445; 46 L.J.Q.B. 681; 37 L.T. 188; 25 W.R. 848; 11 Digest (Repl.) 572, *90*. C

Cooper v. *R.* (1880), 14 Ch.D. 311; 49 L.J.Ch. 490; 42 L.T. 617; 28 W.R. 611; 16 Digest (Repl.) 270, *377*.

Mitchell v. *R.* (1890), [1896] 1 Q.B. 121, n.; 6 T.L.R. 332, C.A.; 16 Digest (Repl.) 267, *374*.

Appeal from the verdict and judgment at the trial of a petition of right before DAY, J., with a jury who found, on the ground that a person in the public service D of the Crown could be dismissed at the will of the Crown, that the petitioner's appointment as a civil servant had been properly determined.

The facts as stated in the petition were that on Jan. 29, 1892, the petitioner entered the service of Her Majesty's Niger Coast Protectorate under a contract made with him by the commissioner and consul-general for the protectorate, Sir Claude Macdonald. The contract provided that the petitioner was to be engaged E for a period of three years certain at a salary of £200 in the first year, increasing by £50 a year to £300. The petitioner served in the protectorate from Jan. 29, 1892, until June, 1893, when he came home on leave of absence duly given, and he alleged that during that period he performed his duties under the contract diligently and faithfully. On Oct. 9, 1893, he received a notice purporting to determine his contract in the following terms: "I am directed by Sir Claude Macdonald . . . to F inform you that your services are no longer required. You will receive pay up to and for Dec. 16, the date your leave terminates. . . ." The petitioner contended that the notice was given in breach of the contract, and that he remained ready and willing to perform the contract.

W. H. Stevenson for the petitioner. G

The Solicitor-General (*Sir Robert Finlay*, *Q.C.*) and *E. Sutton* for the Crown.

LORD ESHER, M.R.—The question which has been suggested as to an order given for the supply of goods for the public service we will reserve for consideration when that question arises for decision. In this case a relationship was instituted between the petitioner and the Crown in respect of the public service, and that H relationship was that the petitioner should become a servant of the Crown and be paid a salary. He became a servant of the Crown in the public service. In this case that has happened which I thought would one day have to be decided upon by the courts. These are the words which I used in *De Dohse* v. *R.* (1):

". . . the petition of right is founded on the assumption that the suppliant I was engaged by persons who had authority to engage him on behalf of her Majesty to serve her Majesty for seven years, that the persons who made the engagement had authority to do so, and that he was dismissed from the engagement. . . It was admitted in argument that if the engagement was for military service, whether as an officer or as a private soldier, for seven years, it would be contrary to public policy—that the Crown could not make a contract for seven years for military service; but it was contended that the engagement in the present case was not an engagement for military service. It is not

A necessary in the present case to determine whether the doctrine with regard to engagements by the Crown is confined to military service or not. For myself I take leave to say that I do not accept at all that the doctrine is confined to military service under the Crown. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine applies to all B public service under the Crown, because all such service is for the public benefit, and therefore it may be that the Crown has despotic authority to get rid of servants who are employed for public purposes and for the benefit and advantage of the public. But it is not necessary to decide this on the present occasion, because to my mind it is clear on the petition of the suppliant that what was proposed to him, if anything, was military service."

C That is what I said would probably be the decision of the court. Now it is only necessary to say positively that that is the doctrine of law. That proposition was before the House of Lords, on the appeal in that case, and Lord Watson seems to have said that it was the correct opinion, and that it must be so decided. Lord Watson said (66 L.J.Q.B. at p. 423):

D "In the first place, it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place, I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a E violation of the public policy of the country, and could not derogate from the power of the Crown."

That is conclusive, and I take that to be the rule laid down by the House of Lords, in consonance with the opinion expressed by myself. I think also that *Shenton* v. *Smith* (2), in the Privy Council, is equally decisive, though the rule is not so clearly laid down as by Lord Watson in *De Dohse* v. *R.* (1). I think, however, that the F Privy Council meant to express the same doctrine as Lord Watson. Both authority and principle support the doctrine laid down by Lord Watson. This appeal, therefore, fails and must be dismissed.

LORD HERSCHELL.—I am of the same opinion. The petitioner was appointed by Sir Claude Macdonald as a vice-consular officer in the Niger Protectorate, and G as such to be a servant of the Crown. The question is, whether he can maintain a petition of right because his appointment was determined. It is said that he was engaged for three years certain, and that there was no right to determine his services before the expiration of three years. Persons employed in the public service of the Crown are, unless there is some statutory provision for a higher tenure, ordinarily engaged to hold office during the pleasure of the Crown. When, H therefore, the petitioner was appointed by Sir Claude Macdonald, even if he was expressly appointed for three years, yet there was the implied right of the Crown, as in all cases, to end the appointment at pleasure. Here there is no evidence that Sir Claude Macdonald had any authority to employ the petitioner on any other than the usual terms, even if that question were material. Considerations of public interest led to such being the terms of employment in the public service. It has I been pointed out in the cases that the appointments are made for the public good, and that it is essential for the public good to be able to determine the appointments at pleasure, except in cases where, for the public good, it has been determined that some other tenure is better. This appeal must be dismissed.

KAY, L.J.—The petitioner asserts that he was engaged for three years. The question is, whether that prevents the Crown from exercising its ordinary right to dismiss at pleasure. The appointment of Sir Claude Macdonald was to hold at the pleasure of the Crown, and it would be strange if he had power to bind the

Crown by an appointment for three years. The general principle is satisfactorily established by the cases. Some of the cases relate to military service, and it has been argued that different considerations apply in such cases, it being in such cases for the advantage of the Crown to have such power, but that such considerations do not apply in the case of a civil servant. I do not agree with that argument. It might be even more detrimental to the interests of the country if the Crown had not that power in the case of a civil servant. The same reasons are quite as strong in the one case as in the other. The authorities are clear upon the question. Besides there is *De Dohse* v. *R.* (1), in the House of Lords, where the rule was not confined to the military service. There is also *Shenton* v. *Smith* (2), in the Privy Council, which was the case of a civil servant, and it was held that his appointment was at the pleasure of the Crown, and that he was subject to dismissal at the will of the Crown. In my opinion, no person in the position of Sir Claude Macdonald can have power to bind the Crown by engaging any person in the public service for a fixed period.

Appeal dismissed.

Solicitors: *Dunn & Hilliard; Solicitor to the Treasury.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

Re NEW ORIENTAL BANK CORPORATION. Ex parte HONG KONG LAND INVESTMENT AND AGENCY CO., LTD.

[Chancery Division (Vaughan Williams, J.), February 27, March 6, 13, 1895]

[Reported [1895] 1 Ch. 753; 64 L.J.Ch. 439; 72 L.T. 419; 43 W.R. 523; 11 T.L.R. 291; 39 Sol. Jo. 347; 2 Mans. 301; 13 R. 459]

Company—Winding-up—Lease—Leasehold premises retained by liquidator—Right of lessor to enter claim for company's obligations under unexpired term of lease.

A banking company were lessees under a lease for fourteen years which contained an option to the lessees to determine the lease at the end of the seventh year provided that they had paid the rent due down to the date of determination. Before the first seven years had expired the company was wound-up by the court. The Companies Acts, 1862 to 1883, did not provide for disclaimer of a lease by a liquidator, and the lessors refused to accept a surrender of the lease from him. Accordingly, the company, through the liquidator, remained in beneficial occupation of the demised premises.

Held: the lessors were entitled to prove in the winding-up, not only for the rent accrued due, but also to enter a claim for the whole of the company's obligations under the lease for the unexpired term of fourteen years.

Notes. As to application of bankruptcy rules in winding-up of insolvent companies, see now s. 317 of the Companies Act, 1948 (3 Halsbury's Statutes (2nd Edn.) 698).

Distinguished: *Re Panther Lead Co.*, [1896] 1 Ch. 978; *Re Dieckmann*, [1918] 1 Ch. 331. Considered: *Re House Property and Investment Co.*, [1953] 2 All E.R. 1525. Referred to: *Cohen* v. *Popular Restaurants*, [1916-17] All E.R. Rep. 1113; *Metropolis Estates Co., Ltd.* v. *Wilde*, [1940] 3 All E.R. 522.

As to rights of lessors under a winding-up by the court, see 6 Halsbury's Laws (3rd Edn.) 660; and for cases see 10 Digest (Repl.) 982 et seq.

Cases referred to:

(1) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351; 58 L.J.Q.B. 44; 59 L.T. 273; 53 J.P. 36; 37 W.R. 177; 4 T.L.R. 603, H.L.; 4 Digest (Repl.) 288, *2637.*

(2) *Re Haytor Granite Co.* (1865), 1 Ch. App. 77; 30 J.P. 100; 12 Jur.N.S. 1; 14 W.R. 186; sub nom. *Re Haytor Granite Co., Ex parte Bell*, 35 L.J.Ch. 154; sub nom. *Re Haytor Granite Co., Ex parte Scobell*, 13 L.T. 515, L.JJ.; 10 Digest (Repl.) 984, *6774.*

(3) *Re London and Colonial Co., Horsey's Claim* (1868), L.R. 5 Eq. 561; 37 L.J.Ch. 393; 18 L.T. 103; 16 W.R. 577; 10 Digest (Repl.) 984, *6775.*

(4) *Re Midland Coal, Coke and Iron Co., Craig's Claim*, [1895] 1 Ch. 267; 64 L.J.Ch. 279; 71 L.T. 705; 43 W.R. 244; 11 T.L.R. 100; 39 Sol. Jo. 112; 2 Mans. 75; 12 R. 62, C.A.; on appeal, sub nom. *Craig* v. *Midland Coal and Iron Co.* (1896), 74 L.T. 744, H.L.; 10 Digest (Repl.) 1131, *7874.*

Also referred to in argument:

Re Gartness Iron Co., Ex parte Lord Elphinstone (1870), L.R. 10 Eq. 412; 39 L.J.Ch. 884; 23 L.T. 389; 18 W.R. 1103; 10 Digest (Repl.) 984, *6779.*

Re McEwan, Ex parte Blake (1879), 11 Ch.D. 572; 40 L.T. 859; 43 J.P. 556; 27 W.R. 901, C.A.; 4 Digest (Repl.) 287, *2626.*

Summons taken out by Hong Kong Land Investment and Agency Co., Ltd. (hereafter called "the land company") asking for an order that the liquidator of the New Oriental Bank Corpn., Ltd. (hereafter called "the bank") be directed to pay out of the bank's assets 7,482 dollars being the amount of the land company's claim, admitted by the liquidator, in respect of rent of premises demised by the land company to the bank; alternatively, that the land company be admitted to rank as ordinary creditors of the bank for 74,212 dollars, being the full amount of the land company's claim under the lease of the premises, and that the liquidator be directed to pay the land company out of the bank's assets the equivalent of the dividends already declared and paid on the debts of the bank, and such future dividends as might be declared thereon.

The bank was incorporated under the Companies Acts, 1862 to 1883, with a registered office in England, and a branch office at Victoria in the colony of Hong Kong. By lease dated Oct. 25, 1890, made between the land company and the bank, the land company demised to the bank premises at Victoria, Hong Kong, for the term of fourteen years, from April 1, 1890, at the yearly rent of 6,600 dollars payable by equal monthly payments of 550 dollars. The lease contained a covenant by the bank to pay the rent as therein provided, and a proviso for re-entry in the event of the rent being in arrear for twenty-eight days or of the breach of any of the lessee's covenants therein contained and also a proviso that the bank might at the end of the seventh year of the term determine the lease on giving to the land company

> "at least six calendar months' notice in writing prior to the determination of the said seventh year of their intention so to do, and paying the rent, and performing and observing the covenants by the lessees therein contained up to the date of the term being so determined."

By a second lease of the same date, made between the bank and the land company, the bank sublet to the land company part of the premises comprised in the bank's lease for the term of five years from April 1, 1890, at the yearly rent of 1,800 dollars payable by equal monthly payments of 150 dollars. The bank and the land company entered into possession of the premises under their respective leases, and down to May, 1892, the bank paid to the land company in each month the sum of 452 dollars, being the difference between the rent, rates, and taxes payable by the bank and the land company under their respective leases. On June 23, 1892, the bank passed an extraordinary resolution for voluntary winding-up, and appointed a liquidator, and an order was subsequently made by Vaughan Williams, J., continuing the winding-up under the supervision of the court. The

liquidator remained in possession of the premises, and paid the monthly rent of 452 dollars down to October, 1893, and on Oct. 13 he gave up possession, and handed the keys of the premises to the secretary of the land company, which were received by him without prejudice to the rights of the land company.

The bank claimed to be paid the sum of 7,482 dollars in full as a condition precedent to the right of the bank to determine the lease on Mar. 31, 1897, the end of the seventh year, or (in the alternative) to rank as ordinary creditors of the bank for 74,212 dollars in respect of the loss of rental and taxes from Nov. 1, 1893, to Mar. 31, 1904 (the end of the term of the bank's lease).

Buckley, Q.C., and *W. E. Capron* for the land company.—Where at the commencement of a liquidation a company is lessee of premises for an unexpired term of years the lessor is entitled to the whole of the rent for the unexpired term. Here the lease is for an unexpired term of fourteen years, determinable at the end of the first seven years on payment of the full rent up to that time. It is a condition precedent, therefore, to the liquidator availing himself of that option, that he should pay the rent in full. If he does not do so, the bank will be liable for the rent for the whole period of fourteen years. The land company is, therefore, entitled to prove for the amount of the rent actually due, and to enter a claim for the value of the future rent and for possible breaches, and as each instalment of rent falls due the land company will be entitled to call on the liquidator to pay a dividend thereon equal to that paid by him to the other creditors. [VAUGHAN WILLIAMS, J.—If the rule in *Re Haytor Granite Co.* (2) be correct, it differs from the rule in bankruptcy. It is wrong that the rights of the parties should depend on the mode of administration.] The reason for the difference in the rules is, that in bankruptcy a lease vests in the trustee, whereas in the liquidation of a company the lease does not vest in the liquidator, but remains in the company. Here the liquidator, by remaining in possession of the premises, has taken advantage of the lease, and the lease is therefore binding on him.

R. J. Parker for the liquidator.—The only question in this case is as to the principle on which the damage in respect of future rent is to be estimated. The amount payable depends on the amount which the bank ought to be called on to pay for liberty to surrender the lease, and that cannot be affected by the proviso in the lease. In any case, I submit that amount cannot exceed seven years' rent. As regards future rents, a lessor is in a position analogous to that of a secured creditor. [VAUGHAN WILLIAMS, J.—My difficulty in this case is that the liquidator has not disclaimed the lease.] There is no provision in the Companies Acts enabling him to do so. The liquidator has sent back the keys and done all in his power to determine the lease. [VAUGHAN WILLIAMS, J.—I think I ought to allow proof without regard to the proviso for determination at the end of the seven years, because the liquidator is not in a position to avail himself of it.] Under the earlier cases it was decided that the claims of a lessor in respect of future rent were incapable of being estimated, and consequently could not be proved for. It has now, however, been held in *Hardy* v. *Fothergill* (1) that such claims can now be estimated and proved for, and the earlier cases can therefore no longer be regarded as law. The land company must therefore value their claims and prove for them. Assuming, therefore, that *Hardy* v. *Fothergill* (1) decides that the principle on which such claims are to be estimated is as shown by *Re McEwan, Ex parte Blake*. The damage for which the land company is entitled to prove is, I submit, the amount of rent the bank would have had to pay in order to enable them to determine the lease at the end of the seven years, viz., 7,480 dollars, and for this the land company is entitled to prove. They, however, contend, on the authority of *Re Haytor Granite Co.* (2) and *Re London and Colonial Co.* (3), that they are entitled to prove for the rent due and to enter a contingent claim for the full amount of the future rent. These cases, however, I submit, have been overruled by *Hardy* v. *Fothergill* (1), and this appears to have been the opinion of LINDLEY, L.J., in *Re Midland Coal*,

Coke and Iron Co., Craig's Claim (4), although the point was left open. It is true that s. 10 of the Judicature Act, 1875 [replaced by s. 317 of Companies Act, 1948] introduces the bankruptcy rules of proof in the case of insolvent companies only. But here there can be no doubt but that the company is insolvent, and *Hardy* v. *Fothergill* (1) consequently applies. Further, the company being insolvent, no order can be made for impounding the assets to answer claims or for restraining the dissolution of the company.

Buckley, Q.C., in reply.- Assuming that *Hardy* v. *Fothergill* (1) applies, the land company would be entitled to prove for the whole amount of the periodical payments extending over the fourteen years. *Re McEwan, Ex parte Blake*, does not apply because it was a bankruptcy case, and the trustee had, therefore, a right to disclaim. All that was decided in *Hardy* v. *Fothergill* (1) was that the future and contingent liability of an assignee of a lease under his covenant to indemnify was capable of valuation and proof. [VAUGHAN WILLIAMS, J.—That decision does not touch the case of a proof by a lessor on the bankruptcy of his lessee in respect of his claim under a subsisting lease. There the lease was at an end. It only decided that a lessee could make no claim against his bankrupt assignee for payments made by such lessee on the ground that, as such assignee had been bankrupt, the contingent claims of the lessee ought to have been proved for in such bankruptcy. A lessor must come in at once and prove in the bankruptcy or forgo his claim in a case where the lease is not a subsisting one. The case did not decide that, without more, there is a right to prove in the liquidation of a company for all the future rents at once. It was a decision in bankruptcy, where the question could have given no trouble. In the case, however, of a company a lease is never divested, but remains in the company.] The applicants are, I submit, entitled to have a claim entered for the full amount of the rent which will become due under the lease, and to prevent the bank from being dissolved without notice to them: (LINDLEY ON COMPANIES (5th Edn.) p. 731).

VAUGHAN WILLIAMS, J. In *Re Midland Coal, Coke and Iron Co., Craig's Claim* (4) LINDLEY, L.J., intimates that *Hardy* v. *Fothergill* (1) makes a difference in the right of proof in the case of companies. What is a lessor's right of proof in respect of an unexpired term of years at the date of the commencement of the liquidation? If the lease is still subsisting, how can he prove immediately? He cannot have both the rent and possession. What right can he have to re-enter and have the premises again? There must be a surrender or an accepted repudiation of the lease. Then it would be the same thing as in bankruptcy. In fact, unless there is a disclaimer, I do not see how *Hardy* v. *Fothergill* (1) can apply. As the liquidator will not accept the terms offered by the land company, I cannot make him do so. I must therefore deal with the matter on the basis of there being a subsisting lease. The land company's rights will be those under the old cases, which are rightly contended to be good law. I cannot make the bank say they will give up the premises at the end of the seven years. All that I can do is to allow a proof for breaches of the lease up to the present time. According to my view, if the company in liquidation remain in beneficial occupation of the lease and premises, that is, if they are occupying and get the benefit of the lease, or get the rents and thus get the benefit of the lease, I shall do my very best to make them pay rent and not a dividend. If people get the benefit of premises after the liquidation has commenced they must pay the rent. In my opinion, the principle of *Re Haytor Granite Co.* (2) and *Re London and Colonial Co., Horsey's Claim* (3) applies to this case, but if the bank are in beneficial occupation, I go further and say that the land company can enter a claim for the full rent. The reasonable thing is that the bank should surrender the lease at once and allow the land company to prove for the rent on the basis of that surrender. As, however, the land company decline to accept a surrender of the lease, I direct that they shall be at liberty to prove for the rent actually due and to enter a contingent claim for the

present value of the future rent and obligations in the lease, following *Re Haytor Granite Co.* (2) and *Re London and Colonial Co., Horsey's Claim* (3). The land company must bear their own costs, and the liquidator will take his out of the assets of the bank.

Solicitors: *Trinder & Capron; Hollams, Sons, Coward & Hawksley.*

[*Reported by* W. Ivimey Cook, Esq., *Barrister-at-Law.*]

R. *v.* HUGGINS AND ANOTHER, JUSTICES. Ex parte CLANCY

[Queen's Bench Division (Wills and Wright, JJ.), January 29, 1895]

[Reported [1895] 1 Q.B. 563; 64 L.J.M.C. 149; 72 L.T. 193; 59 J.P. 104; 11 T.L.R. 205; 43 W.R. 329; 39 Sol. Jo. 234; 7 Asp.M.L.C. 566; 18 Cox, C.C. 94; 15 R. 203]

Magistrates—Bias—Justice belonging to class for whose benefit proceedings taken —Summons against unlicensed river pilot heard and determined by justice who was licensed pilot.

C., an unlicensed pilot, was convicted by a court of summary jurisdiction under s. 361 of the Merchant Shipping Act, 1854 [now s. 30 (3) of the Pilotage Act, 1913], of having continued in charge of a ship after a qualified pilot had offered to take charge of her. M., one of the six justices who sat to hear and determine the case, was a duly qualified pilot and licensed for the same pilotage district, but for more than forty years he had been a "choice" pilot, that is, a pilot chosen and engaged beforehand by shipowners, and for the last nineteen years he had been, and was at the date of the conviction, in the service of a large steamship company who were entitled to his exclusive services and never employed unlicensed pilots.

Held: as M. belonged to a small class of privileged persons for whose protection against unlicensed pilots the proceedings were taken, there was a reasonable apprehension of bias which disqualified him from sitting, and, therefore, the conviction was bad.

Notes. Section 361 of the Merchant Shipping Act, 1854, has been repealed and replaced by s. 30 (3) of the Pilotage Act, 1913 (23 Halsbury's Statutes (2nd Edn.) 855).

Distinguished: *R.* v. *Burton, Ex parte Young*, [1897] 2 Q.B. 468; *R.* v. *Suffolk Justices, Ex parte Manners* (1906), 2 Konst. Rat. App. 480.

As to disqualification for acting as a justice, see 25 Halsbury's Laws (3rd Edn.) 131 et seq.; and for cases see 33 Digest 288 et seq.

Cases referred to in argument:

R. v. *Handsley* (1881), 8 Q.B.D. 383; 30 W.R. 368; sub nom. *R.* v. *Handsley, etc., Burnley Justices, Ex parte King*, 51 L.J.M.C. 137; 46 J.P. 119, D.C.; 33 Digest 297, *125*.

R. v. *Meyer* (1875), 1 Q.B.D. 173; 34 L.T. 247; 40 J.P. 645; sub nom. *R.* v. *Harrison*, 24 W.R. 392; 33 Digest 294, *100*.

R. v. *Allan* (1864), 4 B. & S. 915; 33 L.J.M.C. 98; 10 Jur.N.S. 796; 122 E.R. 702; sub nom. *R.* v. *Hodgson*, 3 New Rep. 503; 9 L.T. 761; 28 J.P. 484; 12 W.R. 423; 33 Digest 298, *128*.

R. v. *Pettitmangin* (1864), 9 L.T. 683; 10 Jur.N.S. 797, n.; sub nom. *Ex parte Pettitmangin*, 28 J.P. 87; 33 Digest 294, *99*.

Leeson v. *General Council of Medical Education and Registration* (1889), 43 Ch.D. 366; 59 L.J.Ch. 233; 61 L.T. 849; 38 W.R. 303, C.A.; 34 Digest 544, *30*.

R. v. *L.C.C., Ex parte Akkersdyk, Ex parte Fermenia*, [1892] 1 Q.B. 190; 61 L.J.M.C. 75; 66 L.T. 168; 56 J.P. 8; 40 W.R. 285; 8 T.L.R. 175, D.C.; 33 Digest 103, *698*.

Rule Nisi for a writ of certiorari to bring up to be quashed a conviction by justices for the borough of Gravesend on the ground that one of them, Thomas Martin, had an interest in the subject-matter of the conviction.

On Oct. 10, 1894, the applicant for the rule, Thomas James Clancy, appeared before the justices on a summons taken out by one William Larkins alleging that Clancy, being an unlicensed pilot, unlawfully assumed and continued in charge of a ship on the river Thames after Larkins, a qualified pilot, had, to Clancy's knowledge, offered to take charge of the ship, contrary to s. 361 of the Merchant Shipping Act, 1854 [now s. 30 (3) of the Pilotage Act, 1913]. Clancy was convicted. After his conviction it came to his knowledge that one of the six justices who heard and determined the case was Thomas Martin, a Trinity House pilot licensed to take ships down the Thames to Gravesend, and that at the time of the hearing and determination Martin was actively engaged as a pilot at Gravesend and in the London pilotage district. Clancy obtained a rule for certiorari on the ground that Martin, being a licensed pilot, was in competition with unlicensed pilots, and, therefore, had a pecuniary interest in the result of the conviction and a substantial bias against the accused so as to disqualify him for sitting to hear and determine the summons.

Martin filed an affidavit stating that he never had, and had not now any interest whatever in the conviction of Clancy; that although he was a duly licensed Trinity House pilot, he did not in any way compete with Clancy, or any other unlicensed pilot; that the only licensed pilots who in any way competed with Clancy were those licensed pilots who took "turns" at a pilot station, and that he did not and never had taken any part in the "turn" system; that for forty-three years he had been a licensed "choice" pilot (that is, a pilot chosen and regularly engaged beforehand by shipowners to pilot their ships); that for nineteen years last past he had acted as a "choice" pilot for the Peninsular and Oriental Steam Navigation Co. only; that for five years last past he had acted as pilot on the outward voyages only of the ships of the said company; that he went on board the said ships at Gravesend on the days appointed for sailing, and his licence entitled him to pilot the ships as far as the Isle of Wight; that the ships of the said company never employed unlicensed pilots, but employed "choice" licensed pilots only, and that Mr. Clancy could not, therefore, have competed with him in his employment as pilot of the ships of the company; that under the terms of his engagement with the company, the company were exclusively entitled to his services as pilot, and that he was not entitled to offer his services as pilot to any other employer so long as his engagement continues, and that, therefore, he could not compete with Mr. Clancy in acting as pilot of ships other than those of the company; that in becoming party to the conviction he was not in any way influenced by favour or prejudice for or against the accused or the class of pilots of which he was one, but acted solely on the evidence before him, and that the justices were unanimous in convicting Mr. Clancy.

Poland, Q.C., and *R. D. Muir* for Larkins, showed cause.

R. W. Burnie in support of the rule.

WILLS, J.—This is a case of some difficulty, because, as in all such cases, it is difficult to keep separate the different questions of interest, bias, and the risk of bias. Undoubtedly in some of the decisions on this subject there has been confusion in the terms used in cases where the disqualification is pecuniary interest, and in

cases where the disqualification is bias. Again, there are other cases where the objection was not so much on the ground of bias, as on the ground that the same person cannot act as prosecutor and judge. There have been other cases in which the tribunal giving the decision was not properly speaking a judicial body, but was acting in such a way that, although it was not a judicial body, its proceedings were contrary to natural justice, and upon that ground the decision was not allowed to stand. In each one of these qualifying circumstances the considerations are not identical, and unless this is clearly kept in mind we may be led astray by expressions perfectly right with regard to certain states of facts, but incorrect with regard to such a case as this.

In the present case the facts which seem to be important are those relating to the question of bias, because the point as to pecuniary interest is out of the question. The point, then, we have to decide is whether there was bias, that is, actual bias, or a reasonable risk of bias—such a reasonable apprehension of bias as a man might justly entertain; and we have also to consider what the result would be in the future if similar things were allowed to be done in similar circumstances. I do not myself for a moment attribute to Mr. Martin that he was subject to actual bias. There are no facts stated in the affidavits upon which we could come to that conclusion. But at the same time he does belong to a small class of privileged persons for whose protection against unlicensed pilots these proceedings were taken. That seems to me to be the important point here, namely, that Mr. Martin belongs to a small class of privileged persons whose privileges were being interfered with by Clancy. I cannot help thinking that under such circumstances the result is not satisfactory, and in the interests of the administration of justice this conviction ought not to be allowed to stand.

It is important in the administration of justice by magistrates, who now have so many jurisdictions to exercise, that such administration should be free not only from any interference by motives which ought not to influence judicial tribunals, but also from any appearance of conduct which might give reasonable apprehension of such motives. If such reasonable apprehension became general it might seriously interfere with the administration of justice, and impair the confidence which the public ought to have in such administration. Suppose, as has been very properly put by my brother WRIGHT during the argument, that all the justices had been licensed pilots, or that all had been unlicensed pilots, could anyone say that it would have been a proper tribunal to try such a case as this. There can be only one answer to that question, and the same principle applies here where one only of the justices was a licensed pilot. Without attributing to Mr. Martin anything approaching to misconduct, or anything more than a mistake which was natural under the circumstances, as no objection was made to him, I think there is enough in this case to justify us in saying that the constitution of the bench was not such as it ought to have been, and the key-note of my judgment therefore is that this gentleman belonged to a small class for whose benefit these proceedings were taken.

WRIGHT, J.—I am of the same opinion, and for the same reasons. Counsel showing cause has referred to cases where this court has been asked to interfere on somewhat similar grounds with the proceedings of administrative bodies—not courts of justice, but administrative bodies such as the county council, or the college of physicians. But there is a real difference between the two cases. We ought to be very slow indeed to interfere with those outside bodies, unless something really wrong has been done; but not so with regard to inferior courts. With regard to them we ought to act on slighter grounds than in the case of administrative bodies.

Rule absolute.

Solicitors: *E. H. Bedford; Sismey & Sismey*, for *Tolhurst, Lovell & Clinch*, Gravesend.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

A

HUDSON *v.* CRIPPS

[Chancery Division (North, J.), December 13, 1895]

[Reported [1896] 1 Ch. 265; 65 L.J.Ch. 328; 73 L.T. 741;
B 60 J.P. 393; 44 W.R. 200; 12 T.L.R. 102; 40 Sol. Jo. 131]

Landlord and Tenant—Covenant—Quiet enjoyment—Flats—Implied letting scheme—Flat in building used for residential flats let to plaintiff—Letting agreement on printed form applicable to other flats—Regulations annexed to agreement containing scheme of management of flats—Nuisance by landlord—Conversion begun of building into club.

C By an agreement made in February, 1895, the defendant let to the plaintiff five rooms comprising a flat in a building which at the date of the agreement was used for residential flats and had been so used since it was erected. The agreement was on a printed form which did not apply to the plaintiff's flat alone, and on which the names of the parties, the number of the flat, and the date were left blank. The agreement provided that the plaintiff would use the flat as dwelling
D room only, and would observe and perform the regulations annexed to the agreement which provided for such matters as the removal of dust, supply of coal, and use of the lift, showing that they constituted a scheme for the general management of the building as residential flats for the convenience of all the tenants. The agreement also contained a covenant by the defendant for the quiet enjoyment of the flat. In November, 1895, the defendant began extensive
E alterations to the building for the purpose of converting it into a residential club, and the plaintiff moved for an injunction restraining the execution of the alterations and the defendant from causing a nuisance.

Held: (i) there had been no interference with the covenant for quiet enjoyment, for, though such a covenant entitled the plaintiff to freedom from disturbance by adverse claimants to the flat, it did not entitle her to freedom from
F the nuisance of a noise in the neighbourhood; (ii) the defendant was, however, in breach of the implied agreement that the building was subject to a scheme for letting it as residential flats, and the plaintiff was, therefore, entitled to an injunction restraining the defendant from using it otherwise than for residential flats and from making alterations otherwise than for such user.

G *Spicer* v. *Martin* (1) (1888), 14 App. Cas. 12, applied.

Notes. Considered: *Alexander* v. *Mansions Proprietary Co.* (1900), 16 T.L.R. 431. Approved: *Jaeger* v. *Mansions Consolidated, Ltd.* (1903), 87 L.T. 690. Considered: *Newman* v. *Real Estate Debenture Corpn., Ltd., and Flower Decorations, Ltd.*, [1940] 1 All E.R. 131; *Kelly* v. *Battershell*, [1949] 2 All E.R. 830. Referred to: *Reid* v. *Bickerstaff*, [1909] 2 Ch. 305.

H As to covenant for quiet enjoyment, and as to a landlord's obligation to observe a letting scheme, see 23 Halsbury's Laws (3rd Edn.) 601 et seq. and 608, para. 1305. For cases see 31 Digest (Repl.) 128 et seq. and 183.

Case referred to:

(1) *Spicer* v. *Martin* (1888), 14 App. Cas. 12; 58 L.J.Ch. 309; 60 L.T. 546; 53
I J.P. 516; 37 W.R. 689, H.L.; 31 Digest (Repl.) 180, *3127*.

Also referred to in argument:

Davis v. *Leicester Corpn.*, [1894] 2 Ch. 208; 63 L.J.Ch. 440; 70 L.T. 599; 42 W.R. 610; 10 T.L.R. 385; 38 Sol. Jo. 362; 7 R. 609, C.A.; 28 Digest (Repl.) 841, *792*.

Ryan v. *Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116; 62 L.J.Ch. 252; 67 L.T. 820; 41 W.R. 146; 9 T.L.R. 72; 37 Sol. Jo. 45; 2 R. 156, C.A.; 31 Digest (Repl.) 98, *2459*.

Jenkins v. *Jackson* (1888), 40 Ch.D. 71; 58 L.J.Ch. 124; 60 L.T. 105; 37 W.R. 253; 4 T.L.R. 747; 31 Digest (Repl.) 141, *2804*. A

Grosvenor Hotel Co. v. *Hamilton*, [1894] 2 Q.B. 836; 63 L.J.Q.B. 661; 71 L.T. 362; 42 W.R. 626; 10 T.L.R. 506; 9 R. 819; 31 Digest (Repl.) 143, *2821*.

Tucker v. *Vowles*, [1893] 1 Ch. 195; 62 L.J.Ch. 172; 67 L.T. 763; 41 W.R. 156; 3 R. 107; 40 Digest (Repl.) 334, *2734*. B

Action brought by the plaintiff, the tenant of a flat in a building known as Oxford Mansions, against the defendant her landlord for specific performance of the agreement under which she held the flat, and to restrain him from making alterations in the building alleged to be inconsistent with the agreement and from causing a nuisance to the plaintiff.

The agreement, which was dated Feb. 22, 1895, was to take all those five rooms C known as Flat 21, Oxford Mansions, in the parish of St. Marylebone, for twelve months certain from Mar. 1, 1895, and thenceforth from month to month, terminable by one month's notice on either side, but with a proviso that the landlord should not give such notice unless for nonpayment of rent or breach of covenant for three years. The tenant agreed not to carry on or permit or suffer to be carried on on the premises any trade or business whatever nor to do any act which might D be or grow to be a nuisance, disturbance, or annoyance to the landlord or his tenants, or to use the premises or any part thereof for any purpose other than dwelling-rooms, and to observe and perform all the annexed regulations and conditions. The landlord agreed to keep the entrance, staircase, and verandahs cleaned, lighted, and repaired, and that the tenant, paying the rent and observing and performing the covenants and conditions, should have quiet enjoyment of the premises. E The regulations and conditions annexed to the agreement provided for the time during which the street door should be open, for the supply of keys to the tenants of each flat, the removal of dust and supply of coals, use of the lift, and other similar matters, showing, as the judge held, that the building was intended to be used for residential flats under conditions arranged for the benefit and convenience of all the occupants. F

The landlord in November, 1895, commenced very extensive alterations in the building for the purpose of using it as a fashionable club. The defendant contended that only the ground and first floor were being altered, but the judge held that the alterations were intended to extend to the second floor, on which the plaintiff's flat was situated. The plaintiff now moved for an injunction restraining the defendant, G the landlord, from interfering with the plaintiff's quiet enjoyment of the premises, and from doing anything upon the premises inconsistent with the agreement, and also for a mandatory injunction to compel the defendant to light and clean the passages leading to the plaintiff's flat.

Swinfen Eady, *Q.C.*, and *Job Bradford* for the plaintiff.—The plaintiff asks for an injunction to restrain the nuisance inflicted by the defendant's altering the whole H character of the building. The defendant submits that he has not covenanted not to alter that character. That is not necessary. It is enough that the defendant has let the plaintiff her flat under restrictions and conditions which applied to all the flats, and were evidently intended for the benefit of all the residents.

Buckmaster for the defendant.—As to alleged breach of the covenant for quiet enjoyment, there has been no interference with the plaintiff's possession. What is I proposed to be done is merely to put a glass roof over the quadrangle at the height of the first floor and to alter the ground and first floors. Nothing is to be done to the second floor, and the access to the plaintiff's flat will not be interfered with. As to the nuisance caused by the alterations, it is not suggested they are being made in an improper way, and if the defendant has a right to make them, the plaintiff must put up with the necessary inconvenience, which is only temporary, and any claim on this account is one for damages only. As to the alleged implied contract not to alter the character of the building, the defendant had never covenanted not to alter

it. In *Spicer* v. *Martin* (1) and the other cases relied on by the plaintiff, there was some representation to the plaintiff, either by published plan or a building scheme or otherwise, that all the houses in question were subject to the same covenants as those entered into by the plaintiff. Here there was no representation. The fact that an agreement is on a printed form does not entitle a tenant to assume that other flats or houses are subject to the same covenant.

NORTH, J.—In this case I think the plaintiff is entitled to an injunction in a form I will mention directly, though I think that the injunction asked for is one that could not be granted. The injunction asked for proceeds first of all upon the footing of an interference with the quiet enjoyment of the plaintiff, but I do not understand the covenant for quiet enjoyment to be a covenant which means that the plaintiff is to enjoy the premises without the nuisance of a noise in the neighbourhood. It is a covenant for freedom from disturbance by adverse claimants to the property. But I think the plaintiff is entitled to relief to a limited extent by reason of the implied obligation entered into by the parties to the agreement that was signed between them. The premises were built several years ago, and from the time they were built, subject to a certain exception I will mention presently, they have been used as residential flats, to use a well-known phrase of the present day. The plaintiff herself had lived there for some time under a similar agreement, and at that time the premises were all used as private residences in the same way as they were when she entered into this agreement on Feb. 22, 1895.

What is the agreement? I think that it is an agreement which shows on its face that it was made with respect to a certain flat forming part of a larger building all used for this particular purpose. Looking at this agreement itself, it is evidently not intended to apply to this particular flat alone. It is a printed agreement, and the names of the parties, the number of the flat, and the dates are left blank. That is filled in in this case by the date and the names of the parties, and it runs: "The landlord agrees to let and the tenant agrees to take all those five rooms known as flat No. 21, Oxford Mansions." So that there is a clear reference here to five rooms making up together a certain flat in a building, which everyone knew at the time was used as flats, and which was shown by this agreement to contain twenty-one flats at least, how many more I do not know. There are covenants not to do various things, and to use the rooms for private dwelling-rooms only. Then there is a further covenant to observe and conform in all respects to the annexed regulations and conditions. These regulations are most important. No one can read them without seeing that they contain a scheme for the general management of this building composed of several flats in such a way as to be suitable to the convenience of all the persons who are tenants of the building. It would be idle to suppose that these requirements were made except for the purpose of the convenience of all the tenants there, and when the landlord enters into this arrangement with each tenant it is obviously intended to be for the benefit of all the tenants. Whether these buildings were built originally with any such scheme in view, I do not know, and it seems to me entirely unimportant. They were at any rate existing as a series of flats all held in common occupation under a common management, though let to different tenants. It seems to me it is a case which comes exactly within the principles laid down by LORD MACNAGHTEN in *Spicer* v. *Martin* (1), which the other learned peers all agreed to definitely, though LORD FITZGERALD did suggest that on one ground he might possibly have been adverse. It is a very clear judgment, which has always been accepted as settling the law from that time onwards.

What has the defendant done here which is inconsistent with that? He is proceeding to convert the building into a club. According to his own case the ground floor and the first floor are all to be converted for that purpose. The inner quadrangle is to be covered over. As regards the upper floors, I think they are to be treated in the same way. It is clear that certain alterations are going on there now which apparently are inconsistent with the use of these upper floors as flats. For instance,

all the kitchen ranges are being taken away from the flats on the ground that kitchens are no longer necessary there, and that something else is to be substituted. As regards this point the plaintiff swears that she has seen a prospectus in which it is said that it is proposed to have 100 bedrooms in connection with the club, and she says that is just about the number of rooms the upper floors would provide. It is quite true this statement has been made in an affidavit in reply, but I have not been asked to allow the matter to stand over in order that this statement might be disputed. Under these circumstances what is proposed is really to convert this building, consisting of private residences and flats, one of them occupied by the lady who is the plaintiff in the action, into a large club, to be occupied by members day and night. This lady's residence, instead of being isolated, is to be a residence in the middle of and surrounded by a building occupied by what is intended to be a fashionable club. I think that is such a departure from the arrangement made with the landlord by the agreement that she is entitled to have a judgment to restrain it.

I think the proper form of order will be to restrain the defendant from using, or permitting the premises to be used as a club or otherwise than as residential flats, or making or permitting to be made any alterations therein with a view to such user thereof as is hereby restrained. I mentioned that there was an exception to the use of this building as residential flats. It appears from the evidence that some parts of the ground floor have been used as offices. I do not mean to interfere with that, and words must be added to the effect that this order is not to prevent the use of the offices existing on the ground floor as heretofore. The injunction, of course, must not continue after the determination of the plaintiff's tenancy.

Injunction accordingly.

Solicitors: *Walter Webb & Co.; A. Toovey.*

[*Reported by* J. R. Brooke, Esq., *Barrister-at-Law.*]

Re BOWLING AND WELBY'S CONTRACT

[Court of Appeal (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), March 14, 1895]

[Reported [1895] 1 Ch. 663; 64 L.J.Ch. 427; 72 L.T. 411; 39 Sol. Jo. 345; 43 W.R. 417; 2 Mans. 257; 13 R. 125]

Company—Winding-up—Unregistered company—Need of at least eight members —"Members"—Actual members—Exclusion of past members (contributories), personal representatives of deceased member, and trustee of bankrupt member—Effect of invalid order.

To give the court jurisdiction to wind-up an unregistered company under the Companies Acts the company must at the date of the presentation of the petition consist of more than seven persons who are actually members: Companies Act, 1862, s. 199 [see now Companies Act, 1948, s. 398 (e)]. The word "members" in this connection is not synonymous with contributories, and does not include persons liable to be put upon the list of contributories as past members, or the legal personal representatives of a deceased member, or a trustee in bankruptcy of a bankrupt member. An order winding-up a company of less than eight persons and so not complying with the statutory requirements, while binding on the company and on those claiming under it, would not be binding on persons who have rights outside it. Such an order can only be disputed on appeal.

Notes. Applied: *James* v. *Buena Ventura Nitrate Grounds Syndicate, Ltd.* (1895), 11 T.L.R. 568. Followed: *Re New York and Continental Line* (1909), 54 Sol. Jo. 117. Considered: *Llewellyn* v. *Kasintoe Rubber Estates, Ltd.*, [1914] 2 Ch. 670.

As to winding-up of unregistered companies, see 6 HALSBURY'S LAWS (3rd Edn.) 799-806; and for cases see 10 DIGEST (Repl.) 1180 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *Re South London Fish Market Co.* (1889), 39 Ch.D. 324; 60 L.T. 68; 37 W.R. 3; sub nom. *Re South London Fish Market Co., Ex parte St. Mary, Newington, Vestry*, 4 T.L.R. 764; sub nom. *Re South London Fish Market Co., Plimsoll's Case*, 1 Meg. 92, C.A.; 10 Digest (Repl.) 1182, *8237*.

(2) *Re Bolton Benefit Loan Society, Coop* v. *Booth* (1879), 12 Ch.D. 679; 49 L.J.Ch. 39; 28 W.R. 164; 10 Digest (Repl.) 1182, *8239*.

(3) *Re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch.D. 137; 45 L.T. 774; 30 W.R. 326; sub nom. *Re Padstow Total Loss and Collision Assurance Association, Ex parte Bryant*, 51 L.J.Ch. 344, C.A.; 10 Digest (Repl.) 1178, *8211*.

Also referred to in argument:

Re Arthur Average Association for British, Foreign and Colonial Ships, Ex parte Hargrove & Co. (1875), 10 Ch.D. 542; sub nom. *Re Arthur Average Association, Ex parte Cory and Hawkesley*, 44 L.J.Ch. 569; 32 L.T. 713; 23 W.R. 939; 2 Asp.M.L.C. 570, L.JJ.; 10 Digest (Repl.) 1160, *8074*.

New Zealand Gold Extraction Co. (Newbery-Vautin Process) v. *Peacock*, [1894] 1 Q.B. 622; 63 L.J.Q.B. 227; 70 L.T. 110; 9 R. 669, C.A.; 9 Digest (Repl.) 333, *2133*.

Re Doncaster Permanent Building Society (1866), L.R. 3 Eq. 158; 15 L.T. 270; 31 J.P. 310; 15 W.R. 102; 7 Digest (Repl.) 540, *388*.

Re Sheffield and South Yorkshire Permanent Building Society (1889), 22 Q.B.D. 470; 58 L.J.Q.B. 265; 60 L.T. 186; 53 J.P. 375; 5 T.L.R. 192, D.C.; 10 Digest (Repl.) 1183, *8248*.

Re Blackburn and District Benefit Building Society (1883), 24 Ch.D. 421; 52 L.J.Ch. 894; 49 L.T. 730; 32 W.R. 159, C.A.; affirmed sub nom. *Walton* v. *Edge* (1884), 10 App. Cas. 33; 54 L.J.Ch. 362; 52 L.T. 666; 49 J.P. 468; 33 W.R. 417; 1 T.L.R. 96, H.L.; 7 Digest (Repl.) 542, *401*.

Re Bank of London Assurance Association, Part's Case (1870), L.R. 10 Eq. 622; 23 L.T. 305; 18 W.R. 977; 10 Digest (Repl.) 1098, *7586*.

Re Northern Coal Mining Co., Ex parte Blakeley's Executors (1852), 3 Mac. & G. 726; 18 L.T.O.S. 311; 16 Jur. 299; 42 E.R. 439, L.C.; 9 Digest (Repl.) 425, *2748*.

Alexander v. *Mills* (1870), 6 Ch. App. 124; 40 L.J.Ch. 73; 24 L.T. 206; 19 W.R. 310, L.JJ.; 42 Digest 492, *595*.

Re West Riding of Yorkshire Permanent Benefit Building Society, Ex parte Pullman, Ex parte Charnock, Ex parte Johnson and Greenwood (1890), 45 Ch.D. 463; 59 L.J.Ch. 823; 63 L.T. 483; 39 W.R. 74; 7 Digest (Repl.) 539, *384*.

Appeal from a decision of STIRLING, J., under a vendor and purchaser summons.

The Leeds and Yorkshire Permanent Benefit Building Society was established in 1851 under the Building Societies Act, 1836, but was not incorporated under the Building Societies Act, 1874 [by which the Act of 1836 was repealed]. Rule 33 of the society's rules provided:

"Upon the death of any member of the society holding shares upon which no advance shall have been made, his legal personal representative shall, within

one month thereof, give notice in writing to the manager . . . in order that such shares may be registered in the name of such legal personal representative, or of such other person or persons entitled thereto as he or she shall by such notice direct; and shall also at the same time produce to the manager the probate of the will or letters of administration of such deceased member . . . or in default thereof he shall pay a fine of 1s. per share to the society, and upon such notice being given the shares of such deceased members shall be transferred into the name of such legal personal representative, or into the name of such other person or persons entitled thereto as such representative shall direct. . . . Provided always that, if no probate of will or letters of administration be so produced within two months after the decease of the shareholder, and the amount due to him does not exceed £20, then the trustees shall be at liberty, at or after the expiration of such two months, to pay or distribute the subscriptions paid in by the said shareholder, to his widow or children, or next of kin, as the trustees shall think fit, subject to any condition for the security of this society as the solicitor may think proper to require from the parties receiving the money."

On July 4, 1893, a petition was presented to the Leeds County Court for the compulsory winding-up of the society under the provisions of the Companies Acts, 1862 to 1890. The petition was opposed by the sole trustee of the society on the ground that the society did not consist of more than seven members, and that the court had, therefore, no jurisdiction to make a winding-up order under s. 199 of the Companies Act, 1862 [see now the Companies Act, 1948, s. 398]. The county court judge nevertheless, on July 27, 1893, made the order, and J. Bowling, the official receiver to the court, became the liquidator of the society. On Nov. 30, 1893, the court made an order vesting in the liquidator all the property of the society. On Oct. 17, 1893, the liquidator put up for sale certain freehold premises belonging to the society, which were purchased by C. H. Welby subject to certain conditions of sale, not material for the purposes of this report. The title was investigated by the purchaser's solicitors, and ultimately he declined to complete on the ground that the liquidator could not make a good title to the property, as there were not more than seven members of the society at the date of the presentation of the petition, and consequently there was no jurisdiction to make the winding-up order. A summons was taken out by the liquidator under the Vendor and Purchaser Act, 1874, to determine the validity of the objection. It was admitted that at the date of the presentation of the petition there were only four members on the register of the society. The liquidator, however, filed an affidavit in which he set out a schedule of alleged members which, by including as members the executors of certain deceased members and the trustee of a bankrupt member, showed a total of more than seven members. The summons came before STIRLING, J., who held that the objection was a valid one, and dismissed the summons. From this decision the liquidator appealed. A further affidavit was filed by the liquidator to support the contention that the society consisted of more than seven members at the date of the winding-up order, in which he gave the names of several members who had withdrawn from the society some time before the date of the winding-up order, and had been paid off, but were liable to be put on the list of contributories in respect of certain debts of the society incurred while they were members, and still unpaid.

Buckley, Q.C., and *P. F. Wheeler* for the liquidator.
Warrington, Q.C., and *Dibdin* for the purchaser.

LORD HALSBURY.—I am of opinion that this appeal ought to be dismissed with costs. Section 199 of the Companies Act, 1862, enacts that, in order to start the machinery of winding-up an unregistered company, there must be a certain number of members, namely, more than seven, and I am of opinion they must be persons who are actually members. I think that the language is susceptible of

no other construction. I cannot read it as meaning either actual members or persons who, once having been members, are liable to be contributories, and those are the words which must be put into the section in order to give it the construction contended for by the receiver. The statute itself draws a distinction between past members, though such past members are liable as contributories, and actual members. I cannot give a construction to the statute which would alter the language from "consisting of" into "members who are either now or have at one time been members." It is, therefore, to my mind impossible to give the construction contended for to the section.

That leads me to consider what is the effect of the order that has been made for winding-up this society, and which, in some sense, may be said to be res judicata. Probably that order is binding on the association as an association, and on everybody claiming under it, or taking a title under it; but I cannot agree that it is binding or incapable of being challenged by persons who have rights outside it. Therefore, I think it cannot be considered a judgment in rem for all time, and as against all persons, to establish the fact that that order was properly made. If it can be challenged by an outside person it is conclusive against the present application. That is enough to decide this case; but I do not desire to be understood to say that, if I had come to a different conclusion, all the difficulty would be removed. I do not wish to conclude myself by an abstract proposition on the subject, but in a case of this sort, bristling with difficulties in every direction, bristling with difficulties of fact to be determined, and then questions of law to be determined upon those questions of fact when they have been determined, I should be very sorry to be a party to a decision which would force upon an unwilling or reluctant purchaser any such title as this is. I ask myself, what would happen when he wanted to raise money on any property with such a title as this? I know full well the answer of a man of business would be that he would not look at a piece of property with such a title. Therefore, I am of opinion that the judgment of Stirling, J., is right, and that this appeal ought to be dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. This case has raised questions of some importance. In form the question is whether the liquidator of this company can make a good title to some land which is purported to be vested in him under s. 203 of the Companies Act, 1862 [now the Companies Act, 1948, s. 244]. That will depend on whether this company is one which could be properly wound-up under s. 199 of the 1862 Act. The liquidator's case is, that the company has been ordered to be wound-up, and he has been appointed its liquidator; an order has been made under s. 203 vesting in him the property of the company which is held by trustees for the company, and he wants to sell a part of the property under the direction of the court, and, he having put it up for sale the purchaser declines to complete because he is not satisfied that he will get a good title. I am not satisfied that he will get a good title; indeed, I think he will get a bad one. The question turns on the validity of the winding-up order. If that is right, no one quarrels with the appointment of the liquidator, or with the vesting order made under s. 203. In order to investigate the question with reference to the winding-up order, the jurisdiction to make it must be considered.

The company came into existence in 1851 under the provisions of the Building Societies Act, 1836. That Act was repealed by an Act passed in 1874; but the repeal need not be further alluded to. The society never was registered under the Companies Act, 1862, or any part of it. It was not registered with a view of its being wound-up; but a petition to wind-up was presented under s. 199 of the Companies Act, 1862. It is that section which gave the county court (the county court being the proper court in cases of building societies) jurisdiction to make a winding-up order. Section 199 runs thus:

> "Subject as hereinafter mentioned any partnership, association, or company, except railway companies incorporated by Act of Parliament, consisting of

more than seven members, and not registered under this Act, and hereinafter included under the term unregistered company, may be wound-up under this Act."

What are the conditions which must be complied with in order to give the court jurisdiction to wind-up what is there called an unregistered company? It must be an association or company "consisting of more than seven members." What does "consisting of more than seven members" mean? It seems to me that the only interpretation of those words is consisting of more than seven members "at the time of the winding-up." I threw out a suggestion that it might have a wider meaning; but I do not think, for a reason I will give presently, that that can be so.

What is the meaning of "members"? It must mean members of all partnerships or associations, except railway companies, which are not registered under this Act. What is meant by "members"? No definite meaning is given by the statute to the word "members," and, as COTTON, L.J., held in *Re South London Fish Market Co.* (1), it does not necessarily mean "shareholders." In each case the constitution and rules of the particular company must be considered. The Building Societies Act, 1836, does not throw any light upon it. The rules of this building society are not very intelligible, and it is not very easy to find out what constitutes a member of it, but I think under these rules a member is a person who subscribes to the funds of the association and is admitted a member on the payment of a certain fee, and every member who pays his fees is entitled to a share. Did this society consist of seven members when this winding-up order was made? It seems to me that the answer to that is unquestionably: "No." It had a few members, but very few. It had had a great many past members, and it had some deceased members, and, as the evidence stood before STIRLING, J., it appeared that there were some living and some deceased members, and a bankrupt member. It is contended that that will not do, that the executor of a deceased member will not do. That is perfectly correct. You cannot look upon the executors or administrators of a deceased member as being "members" unless they become such. They may be sued for all sorts of liabilities, but executors and administrators will not become members without they know the extent of the liabilities attaching to them as such. Then is the trustee of a bankrupt member a member? Not at all. That contention is altogether wrong in point of law, and it would be most disastrous if it were not so.

A supplemental affidavit has been filed to suggest that there were seven members, because there are four existing members and a good many past members. Where are the past members? It was the consideration of that question which induced me to suggest the possibility of these being members for the purpose of winding-up. Counsel for the purchaser has answered the point I put by showing the inconvenience there would be about it. The machinery provided is simple. You have to find out whether there are more than seven members. Anyone who presents a petition to wind-up must find that out if he is proceeding under Part 8 of the Act of 1862, but, if he must embark in an investigation of how many deceased members there are, and how many other members there are, it is a thing which he cannot follow out. The construction at which I have arrived is that which was entertained by SIR GEORGE JESSEL, M.R., in *Re Bolton Benefit Loan Society* (2) and by the Court of Appeal in *Re South London Fish Market Co.* (1). Then what jurisdiction was there to make the order? I see none.

That raises another question. Is the order a binding order on everyone as long as it lasts? I do not think it is. There are some expressions of BRETT, L.J., in *Re Padstow Total Loss and Collision Assurance Association* (3), where he said (20 Ch.D. at p. 145):

> "In this case an order has been made to wind-up an association or company as such. That order was the order of a Superior Court, which Superior Court has jurisdiction, in a certain given state of facts, to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the

A particular case, and not the assumption of a jurisdiction which the court had not. I am inclined therefore to say that this order could never so long as it existed be treated either by the court that made it or by any other court as a nullity, and the only way of getting rid of it was by appeal."

I have read that passage because I think that is the strongest expression of opinion B that can be found in the books to the effect that a winding-up order can only be disputed on appeal. The court in deciding that case was dealing with an appeal from a winding-up order, and it was an appeal by a contributory. It was a case of one of those illegal companies which, being illegal, there was no jurisdiction to wind-up, but a winding-up order was made, and what I think BRETT, L.J., must have meant was that until the order was set aside on an appeal the company could not be pre- C judiced, nor could any person who paid under it. I do not think he could have intended to go the length of saying that any person who was no party to the litigation and was not claiming through the company was bound by a winding-up order being made which there was no jurisdiction to make. A purchaser cannot be bound at all unless it is a judgment in rem, and I do not think that BRETT, L.J., thought that that judgment was one. I allude to that because it is very important.

D If the liquidator made out that this order was unimpeachable, he would make out a perfectly good title; but a purchaser is entitled to look into it, and see whether it is so. If he can show that this order has been made by a court which had no jurisdiction to make it, it cuts away the title of the liquidator who claims under it. The consequence is, that this appeal must be dismissed. It is unfortunate, because I can see very well the consequences if this winding-up order is not a valid order; it E will not be quarrelled with I dare say, but it does disclose a blot upon the statute, which I confess I had not seen before, of the case of a large society reduced to a few members to which the Act will not apply. In this case you have a large society with less members than eight. What is the consequence? The society cannot be wound-up, and you must do the best you can, and those persons who are compelled to pay must take what steps they can to get contribution from others, and no doubt F the scheme of the Act was intended to get rid of the very great inconvenience of such a course. I think the true construction of s. 199 is what I have mentioned, that this order is invalid and can be impeached by a purchaser, and that no title to the property can be made by the liquidator.

A. L. SMITH, L.J.—The question depends upon the true construction of s. 199 of G the Act of 1862. The section provides that

"any partnership, association, or company . . . consisting of more than seven members and not registered under this Act . . . may be wound-up under this Act."

What is the meaning of that? Does it mean any partnership, association, or H company consisting of more than seven persons who may at one time have been shareholders, but have withdrawn, and are still liable as contributories; or does it mean any company consisting of seven members who are actually members at the time when the winding-up order is sought to be obtained? If that section stood alone, I am not saying that I should have thought it plain that it meant a society consisting of more than seven members who at one time might be contributories, I but meant seven persons at the date of the winding-up. This section does not, in my judgment, stand alone on this point, because it appears to me that ss. 48 and 79 and 199 of the Companies Act, 1862, one and all point to the fact as regards ss. 48 and 79 of there being less than seven members, that is actual members, at the time to which the section refers, and in s. 199 to there being more than seven members at the time which is there suggested. It seems to me, therefore, that, as regards the construction of this section, the matter is tolerably clear.

Then there is the question with reference to executors, and administrators, and trustees in bankruptcy. In my judgment, for the reasons which have been given,

I am clearly of opinion that this order was made by the learned county court judge without jurisdiction, and that, on the true construction of s. 199, there were not more than seven members, especially looking at s. 48, because, if the construction which is put by the liquidator is to include trustees and executors, the words in s. 48 must be construed in some other way than that in which they must be construed in s. 199. But then it is said that a winding-up order is a judgment against all the world. It may be that it is a judgment binding on those who were members of the company and the company itself, but it is not a judgment binding on a stranger on whom the vendor is attempting to force a title through an order which the court holds to be invalid and made without jurisdiction. In my opinion, it does not bind the purchaser. He is entitled to take the objection which he does, and, therefore, the judgment of STIRLING, J., should be affirmed.

Solicitors: *A. Scott Lawson*, for *E. M. Jones, Son & Tannett; Vincent & Vincent*, for *Middleton & Sons*, Leeds.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

COPPEN *v.* MOORE

[QUEEN'S BENCH DIVISION (Lord Russell of Killowen, C.J., Sir Francis Jeune, P., Chitty, L.J., Wright, Darling and Channell, JJ.), March 25, April 4, May 14, 1898]

[Reported [1898] 2 Q.B. 300, 306; 67 L.J.Q.B. 689; 78 L.T. 520; 62 J.P. 453; 46 W.R. 620; 14 T.L.R. 323, 414; 42 Sol. Jo. 397, 539; 19 Cox, C.C. 45]

Merchandise Marks—False trade description—"Trade description"—Description on invoice—Verbal description—Liability of master for act of servant—Defence—Proof of good faith—Onus—Merchandise Marks Act, 1887 (50 & 51 *Vict.*, *s.* 28), *s.* 2 (2).

The respondent called at one of the appellant's shops and asked for an English ham. The salesman pointed to several hams, said that they were Scotch, and were 8½d. a pound. The respondent said that he would take one, and the salesman passed it inside to another salesman and said: "Weigh up Scotch ham, 8½d." The respondent before paying asked for an invoice with "Scotch ham" on it. It was first given to him without those words, but they were subsequently added. The salesman then admitted that it was an American ham. The appellant had sent out to the managers of all his shops the following notice: "Most important.—Please instruct your assisants most explicitly that the hams described in the list as 'breakfast hams' must not be sold under any specific name of place or origin—that is to say, they must not be described as Bristol, Bath, Wiltshire, or any such title, but simply as 'breakfast hams.'" The magistrates were of opinion that the appellant was guilty of an offence against s. 2 (2) of the Merchandise Marks Act, 1887, in that he unlawfully sold to the respondent an American ham to which a false trade description, "Scotch ham," had been applied, and that he had not taken all reasonable precautions against committing an offence against the Act.

Held: (i) there was a sufficient trade description in the invoice to satisfy the Act; (ii) whether or not the appellant had taken all means to stop these representations was a matter of fact for the magistrates; and (iii) the effect of the

Act was to make the master or principal liable criminally for the acts of his servants or agents where the conduct constituting the offence was pursued by them within the scope or in the course of their employment, except that the master could be relieved where he could prove that he had acted in good faith and had done all that was reasonably possible to prevent offences against the Act.

Notes. In *Slatcher* v. *George Mence Smith, Ltd.*, [1951] 2 All E.R. 388, the King's Bench Divisional Court did not follow the construction put by LORD RUSSELL OF KILLOWEN, at p. 930, post, on the words in s. 2 (2) "otherwise he had acted innocently" as meaning acting in good faith and doing all that was reasonably possible to prevent the commission of offences against the Act, but construed them as meaning acting inadvertently or under a misapprehension or mistake of fact.

A new subsection was substituted for s. 2 (2) of the Merchandise Marks Act, 1887, by s. 4 of the Merchandise Marks Act, 1953 (33 HALSBURY'S STATUTES (2nd Edn.) 920, which did not alter the law, but clarified s. 2 (2) of the 1887 Act. Section 2 (2) (c) of the 1887 Act is now s. 2 (2) (b).

Applied: *Cameron* v. *Wiggins* (1900), 70 L.J.Q.B. 15; *Christie, Manson and Wood* v. *Cooper*, [1900] 2 Q.B. 522; *Trade and Customs Comr.* v. *Bell*, [1902] A.C. 563; *Buckingham* v. *Duck* (1918), 120 L.T. 84. Considered: *Slatcher* v. *George Mence Smith, Ltd.*, [1951] 2 All E.R. 388; *Mear* v. *Baker* (1954), 118 J.P. 483. Referred to: *Langley* v. *Bombay Tea Co.*, [1900-3] All E.R. Rep. 989; *R.* v. *Butcher* (1908), 99 L.T. 622; *Armitage* v. *Nicholson* (1913), 108 L.T. 993; *Mousell Bros.* v. *London and North Western Rail. Co.*, [1916-17] All E.R. Rep. 1101; *Burns* v. *Scholfield*, [1922] All E.R. Rep. 554; *Allen* v. *Whitehead*, [1929] All E.R. Rep. 13; *G. T. Stoodley* v. *H. D. Thomas & Sons, Ltd. and G. Cooksey*, [1945] 2 All E.R. 89.

As to the sale of goods with forged marks and the application of a trade mark, see 10 HALSBURY'S LAWS (3rd Edn.) 691, 692; and for cases see 43 DIGEST 241, 244. As to the liability of a master, see 10 HALSBURY'S LAWS (3rd Edn.) 278, 696; and for cases see 14 DIGEST (Repl.) 47. For the Merchandise Marks Act, 1887, see 25 HALSBURY'S STATUTES (2nd Edn.) 1113.

Cases referred to:

(1) *Budd* v. *Lucas*, [1891] 1 Q.B. 408; 60 L.J.M.C. 95; 64 L.T. 292; 55 J.P. 550; 39 W.R. 350; 7 T.L.R. 242; 17 Cox, C.C. 248, D.C.; 43 Digest 244, *876*.

(2) *Collman* v. *Mills*, [1897] 1 Q.B. 396; 66 L.J.Q.B. 170; 75 L.T. 590; 61 J.P. 102; 13 T.L.R. 122; 18 Cox, C.C. 481, D.C.; 14 Digest (Repl.) 47, *142*.

(3) *Starey* v. *Chilworth Gunpowder Co.* (1889), 24 Q.B.D. 90; 59 L.J.M.C. 13; 62 L.T. 73; 54 J.P. 436; 38 W.R. 204; 6 T.L.R. 95; 17 Cox, C.C. 55, D.C.; 43 Digest 240, *847*.

(4) *Newman* v. *Jones* (1886), 17 Q.B.D. 132; 55 L.J.M.C. 113; 55 L.T. 327; 50 J.P. 373; sub nom. *Newman* v. *Leach*, 2 T.L.R. 600, D.C.; 14 Digest (Repl.) 44, *130*.

(5) *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702; 7 B. & S. 710; 35 L.J.Q.B. 251; 14 L.T. 593; 30 J.P. 822; 12 T.L.R. 961; 14 W.R. 859; 10 Cox, C.C. 340; 14 Digest (Repl.) 47, *139*.

(6) *Mullins* v. *Collins* (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 207; 14 Digest (Repl.) 49, *161*.

(7) *Bond* v. *Evans* (1888), 21 Q.B.D. 249; 57 L.J.M.C. 105; 59 L.T. 411; 52 J.P. 613; 36 W.R. 767; 4 T.L.R. 614; 16 Cox, C.C. 461, D.C.; 14 Digest (Repl.) 50, *164*.

Also referred to in argument:

Somerset v. *Hart* (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 32 W.R. 594, D.C.; 14 Digest (Repl.) 46, *136*.

Somerset v. *Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 42 W.R. 399; 10 T.L.R. 313; 10 R. 105, D.C.; 14 Digest (Repl.) 39, *89*.

R. v. *Holbrook* (1878), 4 Q.B.D. 42; 48 L.J.Q.B. 113; 39 L.T. 536; 43 J.P. 38; 27 W.R. 313; 14 Cox, C.C. 185, D.C.; 14 Digest (Repl.) 43, *113.*

Chisholm v. *Doulton* (1889), 22 Q.B.D. 736; 58 L.J.M.C. 133; 60 L.T. 966; 53 J.P. 550; 37 W.R. 749; 5 T.L.R. 437; 16 Cox, C.C. 675, D.C.; 14 Digest (Repl.) 31, *34.*

Roberts v. *Woodward* (1890), 25 Q.B.D. 412; 59 L.J.M.C. 129; 63 L.T. 200; 55 J.P. 116; 38 W.R. 770; 17 Cox, C.C. 139, D.C.; 14 Digest (Repl.) 44, *122.*

Massey v. *Morriss*, [1894] 2 Q.B. 412; 63 L.J.M.C. 185; 70 L.T. 873; 58 J.P. 673; 42 W.R. 638; 38 Sol. Jo. 547; 7 Asp.M.L.C. 586; 10 R. 342, D.C.; 14 Digest (Repl.) 44, *125.*

Sherras v. *De Rutzen*, post; [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 43 W.R. 526; 11 T.L.R. 369; 39 Sol. Jo. 451; 18 Cox, C.C. 157; 15 R. 388, D.C.; 14 Digest (Repl.) 39, *90.*

Derbyshire v. *Houliston*, [1897] 1 Q.B. 772; 66 L.J.Q.B. 569; 76 L.T. 624; 61 J.P. 374; 45 W.R. 527; 13 T.L.R. 377; 41 Sol. Jo. 491; 18 Cox, C.C. 609, D.C.; 14 Digest (Repl.) 36, *60.*

Brown v. *Foot* (1892), 61 L.J.M.C. 110; 66 L.T. 649; 56 J.P. 581; 8 T.L.R. 268; 17 Cox, C.C. 509, D.C.; 14 Digest (Repl.) 47, *149.*

Kearley v. *Tonge* (1891), 60 L.J.M.C. 159; sub nom. *Kearley* v. *Tylor*, 65 L.T. 261; 56 J.P. 72; 17 Cox, C.C. 328, D.C.; 14 Digest (Repl.) 44, *124.*

Police Comrs. v. *Cartman*, [1896] 1 Q.B. 655; 74 L.T. 726; 60 J.P. 357; 44 W.R. 637; 18 Cox, C.C. 341, D.C.; 14 Digest (Repl.) 49, *159.*

Case Stated by justices for the borough of Richmond.

The appellant was summoned for that he did unlawfully sell certain goods to which a false trade description was applied, and was convicted. The following facts were proved: John Moore, the respondent, an inspector of the Bacon Curers' Association of Great Britain and Ireland, went on Sept. 4, 1897, to the London Supply Stores, 42, George Street, Richmond, the place of business in Richmond of H. W. Coppen, the appellant, accompanied by one Ward, and met a salesman, Meslin, at the door and asked him for a small English ham. Meslin pointed to a number of American hams on a shelf outside the shop window of which the ham produced in court was one. Meslin said, "These are Scotch hams," and being asked the price by Moore said 8½d. Moore said to Meslin, "I'll have that one," and Meslin passed the ham through the open shop window to Wheeler, another shop assistant of the appellant, and said, "Weigh up Scotch ham, 8½d." Wheeler weighed it and said it came to 5s. 5½d. Moore then asked Wheeler to make him out an account and put on it "Scotch ham," as he bought it as such. Wheeler handed Moore an invoice (produced). As it had not the word "Scotch" on it then, Moore did not take it, and told Wheeler to put the word "Scotch," as he had "bought it as such." Wheeler then did so and handed Moore the account. Moore then paid for it. The invoice was as follows:

"The London Supply Stores, High Street, Putney. Coppen Bros., sole proprietors.—7.11 Ham 8½d., Scotch, 5s. 5½d.—Paid, E. W."

Moore then told Wheeler who he was and asked if he still said it was a Scotch ham. Wheeler paused and then said, "No, it's an American." Moore then called in Meslin who sold him the ham and told him who he was and asked him if he still said it was a Scotch ham. Meslin at once said it was an American ham. Moore reminded him that he sold it to him as a Scotch ham outside the door. Meslin said, "Yes, I did." Moore then asked to see the proprietor or manager of the shop. The manager was called and gave Moore his name as Bedford. Moore then told Bedford, in the presence of the two shopmen, the whole circumstances of the sale. The manager then said it was a long-cut American. He also said something to the effect that they (Meslin and Wheeler) had no right to do anything of the kind. They made no reply.

On the part of the respondent it was contended that the giving of the invoice by appellant's servant was applying a false trade description: *Budd* v. *Lucas* (1). That the appellant was responsible for the acts of his servants in making the sale accompanied with the invoice: *Collman* v. *Mills* (2). That there need not be any intention to defraud: *Starey* v. *Chilworth Gunpowder Co.* (3). That the appellant was the vendor, and warranted the sale of the ham as a Scotch ham, no writing to the contrary being given pursuant to s. 17 of the Merchandise Marks Act, 1887. That the appellant was liable for the acts of his servants, as he had not taken all reasonable precautions against committing an offence against the Act, nor was he brought within any of the exceptions of the Act. That in any event the appellant was liable to pay the costs of the prosecution, as he had given no notice under the Act.

On the part of the appellant it was contended (i) That a verbal statement such as that made by Meslin did not constitute the application of a false trade description within the Act; (ii) that the word "Scotch" being put upon the invoice at the purchaser's request, no fraud was intended or committed by Wheeler in so putting on such word, and that therefore no offence was committed by him; (iii) that, if an offence had been committed by Meslin and Wheeler, the appellant was not liable, as such offence was committed by his servants, in his absence, without his knowledge, and against his express instructions; (iv) that the appellant had taken all reasonable precautions against committing any offence against the Act. The Food and Drugs Act, 1875, was quoted, and *Newman* v. *Jones* (4) was cited.

The appellant proved that he was a member of the firm of Coppen Bros., and that they had six shops and had been in business twenty years; that they had a wholesale warehouse also; that he occasionally visited the branch shops, but was not at Richmond on the Saturday and had not been there all the week. He produced a duplicate of a notice, sent out by him to the Richmond and other shops with the manager's initials on it acknowledging its receipt, which read:

> "Marsham Street, Feb. 25, 1897.—Most important.—Please instruct your assistants most explicitly that the hams described in list as "breakfast hams" must not be sold under any specific name of place or origin. That is to say, they must not be described as Bristol, Bath, Wiltshire, or any such title, but simply as breakfast hams.—To Mr. Bedford, Richmond.—Please sign and return.—H. W. Coppen."

At the foot were the initials E. B., the initials of Bedford, the manager. The appellant stated that he had no reason to believe that his instructions were not being carried out.

The justices were of opinion that the appellant was guilty of an offence against the Merchandise Marks Act, 1887, in that he unlawfully sold to the respondent an American ham to which a false trade description, "Scotch ham," was applied, and that he had not taken all reasonable precautions against committing an offence against the Act. The question on which the opinion of the court was desired was whether the justices, on the above statement, came to a correct determination and decision in point of law.

By the Merchandise Marks Act, 1887, s. 2 (2):

> "Every person who sells . . . any goods . . . to which . . . any false trade description is applied . . . shall, unless he proves (a) that, having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the . . . trade description; and (b) on demand . . . he gave all the information in his power . . . ; or (c) that otherwise he had acted innocently; be guilty of an offence against this Act."

Bonsey for the appellant.

Buszard, Q.C., and *A. J. David* for the respondent.

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WRIGHT, J.—In my opinion the Merchandise Marks Act, 1887, does not apply to trade descriptions purely and entirely verbal. The whole of the Act, with the exception of s. 20, shows this. It applies to marks and other signs apart from oral descriptions. It applies to marks, and marks only. If it had been a case of merely a verbal description, I do not see why proceedings should not have been taken under the Food and Drugs Act. But in this case the description was in writing by the invoice. The marking was in this invoice; that is sufficient trade description to satisfy the Act. *Budd* v. *Lucas* (1) is a strong authority to that effect. As to the second question, whether the appellant is exempted on the ground that all means were taken to stop these representations, there is, I think, a finding of fact by the justices, and that point is not open to us. With regard to question three, whether an employer can be liable for the unauthorised acts of his servant, it would, I think, be a strong thing to hold that the employer would be liable to an indictment for that. However, this question, and this question only, must go before the special court.

DARLING, J., concurred.

April 4, 1898. **Argument** on point reserved.

Asquith, Q.C., and *Bonsey* for the appellant.
Jelf, Q.C., and *A. J. David* for the respondent. *Cur. adv. vult.*

May 14, 1898. **LORD RUSSELL OF KILLOWEN, C.J.,** read the following judgment of the court, in which, after stating the facts, and that the ham in question would come within the category of breakfast hams, he continued: It is now necessary to consider the statute in question and its application to the facts proved. Section 2 is the important section; s. 2 (1) deals with the forging of any trade mark and with the false application to goods of any such mark or of any false trade description, and enacts that, subject to the provisions of the Act, an offence shall have been committed by such forging or application unless the party charged proves that he acted without intent to defraud; s. 2 (2) enacts (omitting words immaterial in this case) that every person who sells any goods to which any false trade description is applied shall be guilty of an offence against the Act unless he proves—(a) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade description; and (b) that on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods; or (c) that otherwise he acted innocently. By s. 3 it is enacted that "trade description" shall mean any description, statement, or other indication, direct or indirect, as to (among other things) the place or country in which any goods were made or produced. Later in the section it is enacted that the expression "false trade description" shall mean a trade description false in any material respect as regards the goods to which it is applied. By s. 5 (1) it is enacted that a person shall be deemed to have applied a trade description to goods who applies it to the goods themselves or uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

In *Budd* v. *Lucas* (1) it was decided that where certain casks of beer were delivered accompanied by an invoice in which the casks were falsely described as "barrels" (which word had acquired the character of a trade description) it was held that an offence under s. 2 (1), of the Act had been committed, although the invoice containing the false trade description was not physically attached to the casks. I think this case was well decided; in other words, I think that it is not necessary to constitute the offence that there shall be any physical connection between the false trade description and the goods to which it is applied. It was admitted that the description "Scotch ham" was a trade description and it was found that it was applied to the ham sold by the appellant's employees and it was admittedly false. It was not contended that it was not material. In these circumstances it is clear

A that an offence against the Act was committed by the salesman and by the assistant of the appellant.

But the question which the court is now called upon to decide is whether the appellant also is not personally liable to be convicted. This was the question argued before us. The appellant's contention was that the charge here preferred was a criminal charge and that the general principle of law applied—nemo reus est B nisi mens sit rea. There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception. Apart from statute, exceptions have been engrafted upon the rule; for example, in *R.* v. *Stephens* (5), the defendant was held liable on indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by the defendant but managed by his son, although it was proved that C the men employed at the quarry had been by order prohibited from doing the acts complained of. No doubt in that case the fact that the proceedings were only in form criminal was adverted to by the judges who decided it, but the fact remains that the defendant was criminally indicted. But by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the D acts of their servants.

Among such cases are *Mullins* v. *Collins* (6), where a licensed victualler was convicted of an offence under s. 16 of the Licensing Act, 1872, for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of his master. Again, in *Bond* v. *Evans* (7), where a licensed victualler was convicted of an offence against s. 17 of the same Act where gaming had been allowed in E the licensed premises by the servant in charge of the premises, although without the knowledge of his master. The decisions in these and in other like cases were based upon the construction of the statutes in question. The court, in fact, came to the conclusion that, having regard to the language, scope, and object of those Acts, the legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not F authorised by the master, and may even have been expressly prohibited by him.

The question then in this case comes to be narrowed to the simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servant in contravention of the Act, where such acts were done, as in this case, within the scope or in the course G of their employment. In my judgment, it was clearly the intention of the legislature to make the master criminally liable for such acts, unless he was able to rebut the prima facie presumption of guilt by one or other of the methods pointed out in the Act. Take the facts here and apply the Act to them. To begin with, it cannot be doubted that the appellant sold the ham in question although the transaction was carried out by his servants. In other words, he was the seller although not the H actual salesman. It is clear also, as already stated, that the ham was sold with a "false trade description" which was material. If so, there is evidence establishing a prima facie case of an offence against the Act having been committed by the appellant. But it is only a prima facie case. The burden of proof is shifted upon the appellant, and he might meet successfully that prima facie case if he is able, where the charge is under the first sub-section of s. 2, to prove that he acted without I intent to defraud; or, where the charge is under s. 2 (2) if he is able to prove (a) that he had taken all reasonable precautions against committing an offence against the Act and had no reason to suspect the genuineness of the trade description in question, and (b) that on demand he had given full information, or (c) if he is able to prove that otherwise he acted innocently.

It seems clear that paras. (a) and (b) of s. 2 (2) apply to cases where the goods in question are in the possession of the accused for sale or are sold with the forged trade mark or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present, where the false trade description

is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon para. (c)—namely, by showing that he had acted innocently. In the present case there was ample evidence to justify the conclusion of the magistrates that the appellant was prima facie guilty of the offence charged, and that prima facie case has not been met in the manner required by the Act. The magistrates, indeed, have affirmatively found—in the terms of para. (a)—that the appellant had not, in fact, taken all reasonable precautions against committing an offence against the Act, but I have already pointed out that that clause does not directly apply to the facts of this case. This finding is, therefore, not strictly relevant, although it suggests an important element in determining whether the accused is innocent; but what is material to note is that the magistrates do not appear to have been asked to find, and certainly they do not in fact find, that the appellant acted innocently within the meaning of para. (c). There was evidence before them that the American hams in question were dressed so as to deceive the public; and this probably explains the reason of the affirmative finding to which I have adverted and the absence of the finding that the appellant had acted innocently within the meaning of para. (c).

In answer, then, to the question which alone is put to us, namely, whether, upon the facts stated, the decision of the magistrates convicting the appellant was in point of law correct, my answer is that, in my judgment, it was. When the scope and object of the Act are borne in mind, any other conclusion would, to a large extent, render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would, to a large extent, be nugatory. I conceive the effect of the Act to be to make the master or principal liable criminally (as he is already by law civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing, where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this—that the master or principal may be relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. The result, therefore, is that the conviction will be affirmed, and with costs.

I wish to add that the form in which this Case is stated is not satisfactory. It does not throughout clearly distinguish between what was merely evidence and what was proved to the satisfaction of the magistrates. It is important that it should be borne in mind that when a Case is submitted to the court it ought to state clearly what the facts proved were, and not merely what the evidence was.

Appeal dismissed.

Solicitors : *Neve & Beck; Mosely*, for *Weekes & Co.*, Birmingham.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

CORY BROS. & CO., LTD. *v.* TURKISH STEAMSHIP MECCA (OWNERS). THE MECCA

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten and Lord Morris), March 23, 1896, April 8, 1897]

[Reported [1897] A.C. 286; 66 L.J.P. 86; 76 L.T. 579; 45 W.R. 667; 13 T.L.R. 339; 8 Asp.M.L.C. 266]

Contract—Payment—Money paid on account—Appropriation—No current account between parties—Appropriation by creditor—Intention of creditor.

When a debtor pays money on account to his creditor and makes no appropriation to particular items, the creditor has the right of appropriation and may exercise it up to the last moment by action or otherwise. The application of the money is governed by the expressed, implied, or presumed intention of the creditor, and not by any rigid rule of law. The rule in *Clayton's Case* (1) (1816), 1 Mer. at p. 585, does not apply where there is no account current between the parties, nor where, from an account rendered or other circumstances, it appears that the creditor intended to reserve the right of appropriation.

The appellants supplied necessaries to the respondents' ship, but the bills drawn by the captain were dishonoured. The appellants accepted the respondents' offer to pay them a sum due to the respondents from a third party if the appellants would surrender dishonoured bills to the same amount, and in consideration of the payment the appellants agreed not to arrest any of the respondents' ships for three months. The appellants later delivered an account of money due to them from the respondents on various transactions, giving credit for the amount received from the third party. Two of the items on this account were of the same date and the first in order was in respect of the ship. The account was not paid and the appellants arrested the ship for the balance due.

Held: the delivery of the account did not constitute an appropriation of the sum received from the third party to any particular part of the indebtedness, and the appellants were, therefore, justified in their arrest of the ship for the balance.

Per Lord Halsbury, L.C.: The principle of *Clayton's Case* (1) cannot apply to two transactions of the same date.

Notes. Considered: *Smith* v. *Law Guarantee and Trust Society*, [1904] 1 Ch. 500; *Seymour* v. *Pickett*, [1905] 1 K.B. 715; *Deeley* v. *Lloyds Bank*, [1912] A.C. 756; *Re British Red Cross Balkan Fund, British Red Cross Society* v. *Johnson*, [1914-15] All E.R. Rep. 459. Applied: *Albemarle Supply Co.* v. *Hind* (1927), 43 T.L.R. 652. Referred to: *Mutton* v. *Peat* (1900), 82 L.T. 440; *Smith* v. *Betty*, [1903] 2 K.B. 317; *Galula* v. *Pintus* (1911), 104 L.T. 574; *Pocahontas Fuel Co.* v. *Ambatielos* (1922), 27 Com. Cas. 148; *Albermarle Supply Co.* v. *Hind & Co.*, [1927] All E.R. Rep. 401; *Stepney Corpn.* v. *Osofsky*, [1936] 3 All E.R. 494.

As to appropriation of payments, see 8 Halsbury's Laws (3rd Edn.) 214-216; and for cases see 12 Digest (Repl.) 536 et seq.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 529, 572; 35 E.R. 767, 781; 12 Digest (Repl.) 547, *4156*.

(2) *Field* v. *Carr* (1828), 5 Bing. 13; 2 Moo. & P. 46; 6 L.J.O.S.C.P. 203; 130 E.R. 964; 12 Digest (Repl.) 550, *4174*.

(3) *City Discount Co.* v. *McLean* (1874), L.R. 9 C.P. 692; 43 L.J.C.P. 344; 30 L.T. 883, Ex. Ch.; 12 Digest (Repl.) 552, *4185*.

(4) *Bodenham* v. *Purchas* (1818), 2 B. & Ald. 39; 106 E.R. 281; 12 Digest (Repl.) 523, *3937*.

(5) *Henniker* v. *Wigg* (1843), 4 Q.B. 792; 1 Dav. & Mer. 160; 7 Jur. 1058; 114 E.R. 1095; 12 Digest (Repl.) 552, *4184.* A

(6) *Re Hallett's Estate, Knatchbull* v. *Hallett* (1880), 13 Ch.D. 696; 49 L.J.Ch. 415; 42 L.T. 421; 28 W.R. 732, C.A.; 12 Digest (Repl.) 554, *4195.*

Also referred to in argument:

Simson v. *Ingham* (1823), 2 B. & C. 65; 3 Dow. & Ry. K.B. 249; 1 L.J.O.S.K.B. 234; 107 E.R. 307; 12 Digest (Repl.) 537, *4072.* B

Philpott v. *Jones* (1834), 2 Ad. & El. 41; 4 Nev. & M.K.B. 14; 4 L.J.K.B. 65; 111 E.R. 16; 12 Digest (Repl.) 539, *4092.*

Hooper v. *Keay* (1875), 1 Q.B.D. 178; 34 L.T. 574; 24 W.R. 485; 12 Digest (Repl.) 550, *4172.*

Ashby v. *James* (1843), 11 M. & W. 542; 12 L.J.Ex. 295; 152 E.R. 920; sub nom. *Ashley* v. *James*, 1 L.T.O.S. 170; 12 Digest (Repl.) 656, *5089.* C

Re Sherry, London and County Banking Co. v. *Terry* (1884), 25 Ch.D. 692; 53 L.J.Ch. 404; 50 L.T. 227; 32 W.R. 394, C.A.; 12 Digest (Repl.) 557, *4216.*

Merriman v. *Ward* (1860), 1 John. & H. 371.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), delivered in July, 1895, affirming a decision of Bruce, J., sitting as judge of the Admiralty Division, in March, 1895. D

The action was brought by the appellants, Cory Bros. & Co., Ltd., against the respondents, the owners of the steamship *Mecca*, for necessaries supplied to the vessel. The point raised for the determination of the court was whether certain payments made by the respondents to the appellants in respect of such necessaries had been appropriated to the discharge of certain items in the account. E

The facts are fully set out in the speeches of Lord Halsbury, L.C., and Lord Herschell.

Sir Walter Phillimore, Bucknill, Q.C., and *G. Ince* for the appellants.

Pyke, Q.C., Nelson, and *Henriques* for the respondents.

Their Lordships took time for consideration. F

April 8, 1897. The following opinions were read.

LORD HALSBURY, L.C.—This is an action against the owners of the steamship *Mecca* (formerly the *State of Nevada*) for necessaries supplied to that vessel in Alexandria on two occasions in March, 1894. The owners of the *Mecca* were also the owners of a vessel called the *Medina* (formerly the *State of Pennsylvania*), to which G necessaries had also been supplied by the appellants. Bills were drawn by the captains of the vessels on the owners and accepted, but dishonoured, and after some correspondence the owners offered to pay £900 which was due to them from some underwriters, if the appellants were prepared to hand over the bills to an equivalent amount. The appellants agreed to give a receipt on account of the bills owing, though they could not hand over the bills themselves as they were in Egypt, but H they gave a receipt in the following form:

> "Received from Messrs. H. E. Moss & Co., £900 (nine hundred pounds) on account of moneys owing us by the Hamidieh Steamship Co. of Constantinople. The drafts embodying this amount being in Egypt we cannot now return them, but herewith agree to take no further action in connection therewith during the period agreed upon between us. Per proc. Cory Bros. & Co., Ltd., Aug. 15, I 1894.—W. Ganslandt."

The correspondence and account raise the question which we are called upon to determine. The *Mecca* was arrested for the amount alleged to be due, and in this action if the amount for necessaries supplied to the *Mecca* has been paid, the appellants must fail, notwithstanding that the amount of £401 2s 9d. is still due to them. The question, of course, is whether there has been an appropriation of the sum of £900 by the parties, or whether by law there is any rule by which we can

A determine in respect of what indebtedness that £900 was paid. The correspondence and the account, so far as they are material to the case, are as follows :

"June 22, 1894. Messrs. Theodoridi & Co., Constantinople.—Dear Sirs,—In reply to your favour of 15th instant we now beg to inform you that we have arranged with Messrs. H. E. Moss & Co. to withhold from arresting any of
B your steamers for the next three months, provided that the full amount due to ourselves and our friends be paid us out of the moneys Messrs. H. E. Moss & Co. hope to get from the underwriters.—Yours truly, Cory Bros. & Co., Ltd. —W. Ganslandt."

"August 22, 1894.—C. A. Theodoridi, Esq., Constantinople.—Dear Mr. Theodoridi,—We were pleased at receiving the £900 from Messrs. H. E. Moss &
C Co. on account of the money due to us from the Hamidieh Steamship Co., and thank you for your good offices in the matter. We hope it is the company's intention to at once remit us the balance due, namely, £401 2s. 9d., as per statement herewith, for I think you will agree with me that when the company is finding some thousands a month for financing the *Mecca*, paying canal dues, coals in cash, etc., it is absurd to let the above amount be outstanding, and I
D hope therefore you will at once make a settlement with us, and thus obviate the necessity of our taking further steps to secure it.—Yours faithfully, E. Moxey."

The statement which accompanied the letter of Aug. 22 was headed :

"3, Fenchurch Avenue, London, E.C.—Aug. 22, 1894.—Messrs. The
E Hamidieh Steamship Co., Constantinople.—In account with Cory Bros. & Co., Ltd."

[Then followed particulars of four bills with legal expenses added. The bills were entered in order of date, but a *Medina* bill for £630 came after a *Mecca* bill of the same date. A charge of £7 2s. 5d. for telegrams on Aug. 22 and of interest to date of £20 6s. 4d. brought the total to £1,301 2s. 9d.; then a line was
F drawn and the sum of £900 was deducted from the £1,301 2s. 9d., leaving the balance of £401 2s. 9d.]

It is said that the account brings the question within the authority of *Clayton's Case* (1), and in order to see whether this is so, it is necessary to consider what *Clayton's Case* (1) was, and the reasons given by SIR WILLIAM GRANT, M.R., who
G decided it. He says (1 Mer. at p. 608) that where an account current is kept between parties as a banking account,

"there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in which is first drawn out.
H It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very fact of setting the two items against each other."

This rule, so formulated, has been adopted in all the courts in Westminster Hall (see *Field* v. *Carr* (2)). It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; but
I the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule, and if it were necessary to decide it, I confess I should have great doubt whether the transactions I have described would not themselves negative the application of such a rule. The letter of June 22 shows that the parties intended that the right of arresting the ship should be preserved, and that it was only to be suspended for the three months, and I cannot think that, knowing perfectly well what they were about, either of the parties could have supposed that the payment was to be so appropriated as to release the *Mecca* from the liability to arrest.

But, in truth, I think this case is not within the rule at all. This is not an account current; there is no setting one item against another; credit is given for the £900 at the end of all the items. They are all separate transactions, and, although on one piece of paper, seem to represent only historically the transactions as they occurred. How the principle of SIR WILLIAM GRANT'S decision can apply to two transactions of identically the same date, I cannot understand. There is in respect of these items no earlier date, it is the mere fact that one precedes the other in its place on the paper. I think it would be extremely inconvenient in business to draw inferences from the shape or order of accounts, and I think it would be an altogether novel application of a principle which has been established so long that I should feel great reluctance to engraft a new application upon it. In this case it appears to me that the letter and account negative any appropriation of the £900 to any particular part of the indebtedness, and as the appellants were entitled to appropriate, I think they have done so by this action; and I, therefore, move your Lordships that the judgment be reversed, and judgment be entered for the appellants for £401 2s. 9d.

LORD HERSCHELL.—This action was brought in the Admiralty Division in rem by the appellants against the owners of the steamship *Mecca* as defendants. The action was brought to recover the amount of certain bills of exchange. The defence was payment. It is admitted that, unless and except in so far as this defence can be established, the action is an undefended one.

The steamship *Mecca* was formerly called the *State of Nevada*. The master of the vessel in March, 1894, drew a bill upon his owners for £176 5s., the price of coals and other necessaries supplied at Alexandria by the agents of the appellants. In the same month he drew another bill for £194 8s., the price of necessaries supplied at Port Said. Both these bills, which were at thirty days' sight and payable to the order of the appellants, were accepted by the owners, but were dishonoured. The owners of the *State of Nevada* were the Hamidieh Co., who were also the owners of another vessel then called the *State of Pennsylvania*, now the *Medina*. Necessaries had been supplied by the appellants for this vessel, and the bills drawn in respect thereof had likewise been dishonoured. A sum of money being due from certain underwriters in London to the Hamidieh Co., which was to be collected by Messrs. Moss & Co., it was arranged that a certain portion of this money should be paid over by them to the appellants when collected on account of their claim in respect of the unpaid bills. The sum of £900 was accordingly handed over to the appellants on Aug. 15, 1894. Prior to making this payment Messrs. Moss asked the appellants if, on payment of that sum, they would be prepared to hand in exchange acceptances of the Hamidieh Co. to a like amount. The appellants wrote in reply that, as the bills were in Egypt, they would be unable to do this, but would give a receipt for the money on account of the bills owing. The receipt given was in the following terms: [HIS LORDSHIP read the receipt.] On Aug. 22, the appellants wrote a letter to the agent of the Hamidieh Co., in which, after referring to the receipt of the £900, they added: "We hope it is the company's intention to at once remit us the balance due, namely, £401 2s. 9d. as per statement herewith." The statement enclosed was headed: "Messrs. The Hamidieh Steamship Co., Constantinople, in account with Cory Bros. & Co., Ltd." The case turns so largely on this account that it is necessary to give it somewhat in detail. [HIS LORDSHIP read the account.]

It was held by the court below that the first three items in the account must be treated as discharged by the payment made, and that there was consequently nothing due in respect of the *Mecca* at the time this action was commenced. It is contended by the appellants that, inasmuch as the payment was not appropriated by the debtors, it was open to them to make any appropriation of it they pleased, and that, not having prior to bringing the action made any other appropriation, they were entitled to treat the payment as made on account of the *Medina* items, and

A thus to maintain the action against the *Mecca*. The case was treated in the Court of Appeal as governed by *Clayton's Case* (1). No appropriation of the payment having been made at the time, it was held, that it must be attributed as a matter of law to the first three items of the account, and that the items relating to the *Mecca* must, therefore, be treated as paid.

I do not think the present case is governed by *Clayton's Case* (1). It was there B decided that, where there is a current account between parties, and payments are made without appropriation of them, they are to be attributed in point of law to the earliest items in the account. In the present case, at the time the payment was made, no account had been delivered by the appellants to the respondents. The debts in respect of the two vessels arose from transactions which were entirely distinct, they had never been brought into a common account. An account com- C prising all the items was for the first time made out and transmitted by the appellants to the respondents after payment was made. In the account thus made out credit was given for the £900 which had been received. At the time of the payment, therefore, there was no account to the items of which the payment could by operation of law be appropriated.

The question to be determined is: What was the effect of the transmission to D the respondents of the statement of account of Aug. 22. It is clear that, if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. E What, then, was the effect of bringing the items of debt into a single account, and transmitting it to their debtors in the manner they did? I have had some doubt whether it might not be regarded as indicating to the debtors an appropriation of the sum paid to the earlier items in the order in which they appear in the account. But, upon a consideration of all the circumstances, including the correspondence between the parties, I have come to the conclusion that the appellants F did not intend to make any such appropriation, and that the respondents were not entitled so to regard it.

LORD MACNAGHTEN stated the facts, and continued: The period of grace having expired, the present action was brought against the *Mecca*, which was G found at Cardiff in the beginning of October, 1894. The action was brought to recover the moneys due in respect of the necessaries supplied to the *Mecca*, and an account was delivered appropriating the £900 to the *Medina* bills and legal expenses in connection with that vessel. In addition to other defences which have failed, the respondents pleaded that part of the money paid to the plaintiffs by H. E. Moss & Co. "was in respect of the whole amount sought to be recovered by the plaintiffs" H in the action. At the trial the defendants' counsel relied on the statement of account of Aug. 22, 1894, as an appropriation by the plaintiffs of the £900 towards the payment of the four bills in the order in which they were entered in the account, and contended that by such appropriation the *Mecca* bills had been paid. BRUCE, J., held that the payment was, by law, appropriated to the earlier items in the account, and gave judgment for the defendants. The judgment was affirmed on I appeal.

I have some difficulty in following the reasoning of the Court of Appeal. There seems to be an error in the shorthand notes, because the Master of the Rolls is made to say that the account came in the first instance from the company. But, if I understand his meaning aright, he does say that the account passing between the parties did not of itself operate as an appropriation or afford any indication of an intention to appropriate; it was as if each party in turn had said, "Here is the account. I do not appropriate." KAY, L.J., treats the case as governed by *Clayton's Case* (1), to which the Master of the Rolls also refers. "I cannot see any

reason," KAY, L.J., says, "why *Clayton's Case* (1) does not apply to the facts before us." Later on, after stating the facts as they appeared to him, "That is," he observes, "the very case to which *Clayton's Case* (1) would apply." A. L. SMITH, L.J., seems to take the same view as the Master of the Rolls. "Neither party," he says, "appropriated the payments to anything." Then he adds, "the £900, by the law, goes to the earlier items." If what occurred in August did not amount to an appropriation it is difficult to see why the appellants were not at liberty to make their election in October when they found the *Mecca* at Cardiff, and certainly I am at a loss to understand what bearing the doctrine of *Clayton's Case* (1) can have upon the question.

There can be no doubt what the law of England is on this subject. When a debtor is making a payment to his creditor he may appropriate the money as he pleases, and the creditor must apply it accordingly. If the debtor does not make any appropriation at the time when he makes the payment, the right of application devolves on the creditor. In 1813, when *Clayton's Case* (1) was decided, there seems to have been an authority for saying that the creditor was bound to make his election at once according to the rules of the civil law, or at any rate within a reasonable time, whatever that expression in such a connection may be taken to mean. But it has long been held, and it is now quite settled, that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action, or in any other way that makes his meaning and intention plain. Where the election is with the creditor it is always his intention expressed or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law such as the rule of the civil law, reasonable as it is, that if the debts are equal the payment received is to be attributed to the debt first contracted.

Clayton's Case (1) was this. Clayton had a current account with a firm of bankers. One of the firm died. Some time afterwards the bank failed. The customer's account was kept from first to last as one unbroken account. At the date of the death of the deceased partner the customer had a large balance to his credit. Afterwards he drew out sums which in the aggregate exceeded that balance. On the other hand, moneys were paid in from time to time to his credit, and at the date of the failure the balance in his favour was rather larger than it was at the date of the death. He claimed a right to attribute his drawings after the death to subsequent payments in; but SIR WILLIAM GRANT said not and he distinguished the case from authorities which had been cited in favour of the claimant by saying (1 Mer. at p. 608):

> "They were all cases of distinct insulated debts between which a plain line of separation could be drawn. But this is the case of a banking account where all the sums paid in form one blended fund, parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts."

The facts of the present case are very different. There is no current account between the parties here; there was no account between them at all until the bills were dishonoured; the debts were distinct. But it is, I think, important to observe that, even in cases prima facie falling within the doctrine of *Clayton's Case* (1), the account between the parties, however it may be kept and rendered, is not conclusive on the question of appropriation. In a case in the Exchequer Chamber, in 1874 (*City Discount Co.* v. *McLean* (3)), where there was a current and unbroken account between the parties, *Clayton's Case* (1) was pressed upon the court. Bramwell, B., said (L.R. 9 C.P. at p. 698):

> "I quite agree with the principle of the cases cited, such as *Clayton's Case* (1) and *Bodenham* v. *Purchas* (4), and I think we ought to follow them where applicable. But we must decide every case according to its own circumstances."

Blackburn, J., added (ibid. at p. 701):

> "The true rule is that laid down in *Henniker* v. *Wigg* (5), which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary."

The rule in *Clayton's Case* (1) was very much considered in *Re Hallett's Estate* (6) in 1880, by the Court of Appeal (Sir George Jessel, M.R., and Baggallay and Thesiger, L.JJ.). Sir George Jessel, M.R., said (13 Ch.D. at p. 728):

> "It is a very convenient rule, and I have nothing to say against it unless there is evidence either of agreement to the contrary or of circumstances from which a contrary intention must be presumed, and then, of course, that which is a mere presumption of law gives way to those other considerations."

Baggallay, L.J., observed (ibid. at pp. 738, 739):

> "*Clayton's Case* (1) was decided upon the principle that, in the absence of any express intention to the contrary, or of special circumstances from which such an intention could be implied, the appropriation of drawings out to the payments in, as adopted in that case, represented what must be presumed to have been the intention of the parties concerned, and, so viewed, the decision is quite consistent with the like presumption being rebutted or modified in another case in which the circumstances were such as to negative any intention to make such an appropriation of the drawings out to the payments in."

If the rule in *Clayton's Case* (1), which certainly at one time was considered to be a rule of such force and stringency as to interfere even with the equity of the following trust money into the bank account of a fraudulent trustee, is to be accepted with this qualification, and if an account stated between the parties is only evidence of appropriation of payments, it seems to me that, in order to determine the question at issue on this appeal, it is necessary to consider the circumstances of the case more closely than they were considered in the courts below. If you look at the position of the parties when the payment of the £900 was made, and the purpose for which the statement of account of Aug. 22, 1894, was sent, and examine the terms of the account itself, and the letter which accompanied it, it is, I think, impossible to suppose that the appellants could have intended to appropriate the £900 in a manner inconsistent with the rights which they asserted when they arrested the *Mecca*. It is, I think, equally impossible to suppose that they could have intended to renounce or waive their privilege of election. It is quite clear that when the bills were dishonoured the appellants were alive to their rights. They intimated very distinctly that they were prepared to seize both the vessels which were then lying at Suez. It was this threat that brought the company to terms. For some time the appellants could not obtain any satisfactory assurance from H. E. Moss & Co. The Hamidieh Co. put them off with empty

promises. But at last the company got frightened, and on June 15, 1894, they wrote to H. E. Moss & Co., referring to the steamers and saying,

> "As Messrs. Cory Bros. & Co. threaten to take proceedings against both the above named steamers if they do not promptly receive from us a satisfactory assurance that they will soon be paid, we beg you will not delay to give them such an assurance, otherwise the results will be very detrimental to the Hamidieh Co. and to our Mr. Constantine A. Theodoridi."

So on June 22, Messrs. H. E. Moss & Co. gave the required assurance, on an undertaking by the appellants that they would not, for three months from that date, arrest any of the property of the Hamidieh Co., either in this country or abroad, unless meantime the amounts to be received from the salvage claims on underwriters should fall short of the amount of the bills held by them.

After that I rather doubt whether it would have been right for the company to try to steal a march upon their creditors by attempting to appropriate the money so as to release any part of their property. However that may be, the receipt which was given on Aug. 15, seem to show that the intention of the parties was that at the expiration of the period of grace the appellants should be remitted to their original rights, giving credit in general account for any sums received. Again, it seems to me that the letter of Aug. 22, conveyed a distinct intimation that the appellants would exercise their rights unless the balance were paid. It was for the purpose of showing what the balance was, and for no other purpose whatever, that the account was made up. It is impossible to suppose that the appellants, while looking forward to exercising their rights in case of default, would have made up an account with the intention of releasing one of the two vessels when they could not tell upon which of the two they might be able to lay their hands.

Then it seems to me that the very frame of the account affords some indication that it was not intended to apply the payment in discharge of the first three bills, for the interest on those bills is the very last item in the account. If the intention had been to discharge bills which carried interest, it surely would have been intended at the same time to discharge the accrued interest on which no interest would be payable. If the company thought that the appellants intended to discharge the *Mecca* bills, why did they not, when they received the account, ask for their return? I cannot help thinking that, if they had made such a request, they would have received a very indignant reply. The result might have been the return of the cheque and immediate seizure of the two vessels, which would hardly have answered the company's purpose. In the result I am of opinion that it was competent for the appellants to arrest the *Mecca* in October, 1894, and at that time to appropriate the money which they had received from H. E. Moss & Co. to the *Medina* bills. I think that the appeal ought to be allowed.

LORD MORRIS.—I am of the same opinion.

Appeal allowed.

Solicitors: *Ince, Colt & Ince; Lowless & Co.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

MOWBRAY AND ANOTHER *v.* MERRYWEATHER

[Court of Appeal (Lord Esher, M.R., Kay and Rigby, L.JJ.), October 29, 1895]

B [Reported [1895] 2 Q.B. 640; 65 L.J.Q.B. 50; 73 L.T. 459; 59 J.P. 804; 44 W.R. 49; 12 T.L.R. 14; 40 Sol. Jo. 9; 14 R. 767]

Warranty—Damages—Remoteness of damage—Defective chain supplied to plaintiffs by defendant—Compensation paid by plaintiffs to injured workman—Right of plaintiffs to recover amount paid from defendants.

C The defendant supplied the plaintiffs with a chain, to be used by them as stevedores in discharging a cargo, as being reasonably fit for that purpose. In fact the chain was defective with the result that it broke in use and caused a workman of the plaintiffs to be injured. The defect might have been discovered by the plaintiffs by the exercise of reasonable care. The plaintiffs paid £125 which was a reasonable and proper amount in settlement of their workman's claim for compensation and then claimed that sum from the defendant as

D damages for breach of warranty.

Held: the injury to the workman and the plaintiffs' liability for such injury was a natural consequence of the defendant's breach of warranty and one which it was reasonable to suppose would be within the contemplation of the parties, and, therefore, the damage not being too remote, the plaintiffs were entitled to recover £125 from the defendant.

E

Notes. The Employers' Liability Act, 1880 (9 Halsbury's Statutes (2nd Edn.) 30) has been repealed by the Law Reform (Personal Injuries) Act, 1948: see 25 Halsbury's Statutes (2nd Edn.) 364.

Followed: *Vogan* v. *Oulton* (1899), 81 L.T. 435. Applied: *Bentley* v. *Metcalfe* (1906), 75 L.J.K.B. 891. Considered: *The Kate*, [1935] All E.R. Rep. 912. F Referred to: *Hawkins* v. *Smith* (1896), 12 T.L.R. 532; *Scott* v. *Foley, Aikman & Co.* (1899), 5 Com. Cas. 53; *Britannia Hygienic Laundry Co.* v. *Thornycroft* (1926), 135 L.T. 83; *C. G. Dobell & Co., Ltd.* v. *Barber and Garratt* (1930), 47 T.L.R. 66; *Cammell Laird & Co.* v. *Manganese Bronze and Brass Co.*, [1933] 2 K.B. 141.

As to remoteness of damage in contract, see 11 Halsbury's Laws (3rd Edn.) 274; and for cases see 17 Digest (Repl.) 128 et seq.

G

Cases referred to:

(1) *Burrows* v. *March Gas and Coke Co.* (1870), L.R. 5 Exch. 67; 39 L.J.Ex. 33; 22 L.T. 24; 18 W.R. 348; affirmed (1872), L.R. 7 Exch. 96; 41 L.J.Ex. 46; 26 L.T. 318; 36 J.P. 517; 20 W.R. 493, Ex. Ch.; 36 Digest (Repl.) 34, *156.*

(2) *Orington* v. *M'Vicar* (1864), 2 Macph. (Ct. of Sess.) 1066; 34 Digest 197, *n.*

H (3) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10.*

(4) *Wrightup* v. *Chamberlain* (1839), 2 Arn. 28; 7 Scott, 598; 2 Digest (Repl.) 360, *421.*

(5) *Kiddle* v. *Lovett* (1885), 16 Q.B.D. 605; 34 W.R. 518; 17 Digest (Repl.) 138, *420.*

I

Appeal by the defendant from a decision of Charles, J., reported [1895] 1 Q.B. 857, at the trial without a jury, at Leeds, in an action by the plaintiffs to recover £125 as damages for breach of warranty.

The plaintiffs were stevedores at West Hartlepool, and the defendant was the owner of the steamship *Wenby*. In August, 1894, the plaintiffs undertook to discharge a cargo of deals from the *Wenby*, and, in accordance with the custom of the port, the defendant promised to provide all necessary and proper derricks, cranes, chains, winches, and other gearing reasonably fit for the purpose of

discharging the cargo. The defendant supplied a chain which was so defective that, while it was being used in discharging the cargo, it broke and injured a workman employed by the plaintiffs. The injured workman thereupon commenced an action against the plaintiffs, claiming damages, under s. 1 and s. 2 of the Employers' Liability Act, 1880, on the ground that there was a defect in the condition of the chain which the plaintiffs might have discovered by the exercise of reasonable care. The plaintiffs did not defend the action, and paid the workman £125 as compensation. It was admitted by the defendant that there had been a breach by him of the implied warranty that the chain should be reasonably fit for the purpose for which it was supplied; and, by the plaintiffs, that they might, by the exercise of reasonable care, have discovered the defect in the chain. The defendant admitted that the settlement of the action by the workman against the plaintiffs was reasonable and proper.

Tindal Atkinson, *Q.C.*, and *H. Gawan Taylor* for the defendant.
Robson, *Q.C.*, and *Meynell* for the plaintiffs.

LORD ESHER, M.R.—We have no doubt whatever about this case. This action was brought by the plaintiffs against the defendant for damages for breach of a warranty given by the defendant to the plaintiffs. It was admitted that the warranty had been given. It was an implied warranty, but that makes no difference; it was a warranty. The plaintiffs say that the defendant warranted that a chain would be sound and efficient for the work which it had to do, and for the purpose for which it was to be used, and that the defendant knew the purpose for which it was to be used. The defendant admits that there has been a breach of that warranty. That is sufficient to support the action. There was a contract, and a breach of that contract, and the plaintiffs are entitled to nominal damages at least. The plaintiffs say that, in this case, they have suffered more than nominal damage. They say that the defendant warranted this chain, which was to be used in their business as stevedores, knowing the way in which it would be used by their, the plaintiffs', workmen, and knowing that, if an inefficient chain were supplied, it would give way, and that the natural consequence would be that the workmen would be injured. Therefore, the almost certain result of a breach of such a warranty would be that the plaintiffs' workmen would be hurt and would be entitled to sue the plaintiffs for damages. The plaintiffs took the chain from the defendant with that warranty, and used it for the intended purpose by means of their workmen. The chain broke because of the breach of that warranty. Then the natural and inevitable result of the breaking of the chain was that a workman was injured. The result to the plaintiffs was that the workman would sue them and recover damages if there had been any want of care on their part in allowing the chain to be used. The plaintiffs did not examine the chain before using it, because of the warranty given by the defendant upon which they had a right to rely. For that reason the plaintiffs were guilty of want of care. That was the natural result of the warranty which had been given by the defendant, and of the breach thereof.

What is the rule as to damages? There has been a contract of warranty, and a breach of that contract, and the plaintiffs sue in respect of that breach. In this case the result has been a peculiar kind of damage, and the question is whether that damage is too remote. What is the test of that? It is given by CHARLES, J., in his judgment, where he says:

> "The only question which I have to determine is whether the damage done to the workman, and which he could only recover from the plaintiffs by showing want of care in them, may nevertheless be regarded as the natural consequence of the defendant's breach of contract; or, in other words, a consequence which might reasonably be supposed to have been within the contemplation of the parties."

If they had considered the matter with any care, they ought to have contemplated such a consequence. If, therefore, the parties in this case had so considered the matter, is it not reasonable to suppose that it would be within their contemplation that, if injury resulted to the plaintiff's workmen, the defendant would have to pay? I prefer the opinion of Martin, B., expressed in *Burrows* v. *March Gas and Coke Co.* (1), to that of the Scottish judges in *Ovington* v. *M'Vicar* (2). I think that the view of Martin, B., was correct, and I adopt it. I am of opinion, therefore, that it is clear, in this case, that the damage for which the plaintiffs are suing is not too remote from the breach of warranty by the defendant. The plaintiffs owed no duty to the defendant, but to their own workmen only, and the defendant cannot rely upon the plaintiffs' negligence. I think that the judgment of Charles, J., was right, and that this appeal must be dismissed.

Kay, L.J.—This was an action brought to recover damages for a breach of warranty. The warranty, and the breach thereof, are not denied. The defendant supplied to the plaintiffs a chain to be used by them as stevedores in the work of unloading ships. The chain was defective; it broke while it was being used; and it injured a workman of the plaintiffs who was using it. The stevedores relied upon the defendant's warranty, and did not examine the chain before using it. The workman, therefore, had a remedy against two persons. He might have sued the defendant, according to *Heaven* v. *Pender* (3); or he might have sued his employers because the chain was defective and they were negligent in not discovering that fact. The workman commenced an action against the stevedores, and they compromised the action by paying £125. It is admitted, and must be assumed, that £125 was a proper sum to pay as compensation, and, if the action had been brought against the present defendant, the workman would have recovered the same amount. The stevedores then brought this action against the defendant. They say that there was a breach of his warranty that the chain would be efficient for the purpose for which it was supplied; and that the damages are not nominal, because, by reason of the defect in the chain and their want of care in not examining it, they have had to pay £125 to their workman. The defence is that the plaintiffs would not have had to pay that money if they had not been negligent in not discovering the defect, and that they became liable to their workman, not solely on account of the defect in the chain, but also on account of their negligence in not discovering the defect. If the damages recovered from the plaintiffs by their workman were more than the workman could have recovered from the defendant if he had sued him, perhaps the measure of damages in this case would not be the same.

In my opinion it is a most important fact, that the amount is the same. Suppose that this accident had not happened to a workman but to the plaintiffs themselves. Could they not have recovered against the defendant? It is clear that they could, and could have recovered the same damages. I do not lay down, or assent to, the proposition that the damages recovered against an employer are the measure of the damages recoverable against the defendant in cases of this kind. But here it is admitted that the amount would be the proper measure of damages if the action by the workman had been brought against the defendant, and it is, therefore, the proper measure in this action. The plaintiffs are not to be defeated in this action because they relied on the defendant's warranty. There was no negligence as between the plaintiffs and the defendant; there was no duty to examine the chain, for there was a warranty. I think that this was, within the well-known rule, a damage which fairly resulted from the defendant's breach of warranty, and one which must have been within the contemplation of both parties, viz., that if the chain was not efficient, injury might accrue to the plaintiffs' workmen.

As to the cases which have been cited, they are all distinguishable except two. In *Wrightup* v. *Chamberlain* (4) it was held that the costs of improperly defending an action were not recoverable. In this case such costs could not have been recovered if the plaintiffs had defended the action by their workman. In *Kiddle* v.

Lovett (5) the employer paid money to his workman when there had been no negligence; that was a gift, because there was no liability. In *Burrows* v. *March Gas and Coke Co.* (1) MARTIN, B., distinctly expressed an opinion that, in a case like this, the damages recovered by the workman were the proper measure of damages. The only other authority is *Ovington* v. *M'Vicar* (2), in which the Scottish judges expressed a different opinion. I prefer the opinion of MARTIN, B. I think that the judgment of CHARLES, J., was perfectly right, and I concur in the reasoning of that decision. This appeal, therefore, fails and must be dismissed.

RIGBY, L.J.—I am of the same opinion. This was an action for damages for breach of warranty. It is admitted that, under the circumstances, there was a warranty that reasonable care should be taken to supply plant fit and proper for the purpose for which it was supplied. It is clear that no such care was taken. The plaintiffs were, therefore, entitled, as between themselves and the defendant, to rely upon the warranty as to the efficiency of the chain. It is true that, under the Employers' Liability Act, 1880, the employers would be liable to their workmen if they were negligent. In an action by a workman against his employers it would be no answer to say that they had a warranty from the person who supplied the plant. Negligence is the absence of due diligence. The defendant is trying to set up the absence of due diligence on the part of the plaintiffs. That was an abuse of due diligence towards their workmen and not towards the defendant. The defendant had warranted the efficiency of the chain. The question in this case is whether the damages claimed were reasonably within the contemplation of the parties when the warranty was given. That is clear, because the workman of the plaintiffs had a right to sue the defendant himself if he chose to do so. As to the authorities, I am not satisfied that, in *Ovington* v. *M'Vicar* (2), the Scottish judges intended to lay down any different rule. If they did so, I do not agree with their view, but with the view of MARTIN, B., expressed in *Burrows* v. *March Gas and Coke Co.* (1). I think that the decision of CHARLES, J., was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *W. A. Crump & Son*, for *Turnbull & Tilly*, West Hartlepool; *Baker, Lees & Postlethwaite*, for *Higson Simpson*, West Hartlepool.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

THOMAS *v.* LULHAM

[COURT OF APPEAL (Lord Esher, M.R., Kay and A. L. Smith, L. JJ.), July 12, 30, 1895]

B

[Reported [1895] 2 Q.B. 400; 64 L.J.Q.B. 720; 73 L.T. 146; 59 J.P. 709; 43 W.R. 689; 11 T.L.R. 558; 39 Sol. Jo. 687; 14 R. 692]

Landlord and Tenant—Lease—Forfeiture—Waiver—Distress for rent—Action for ejectment—Competency—Common Law Procedure Act, 1852 (15 & 16 *Vict.*, c. 76), s. 210.

C

The levying of a distress by a landlord for arrears of rent is not such a waiver of his right for forfeiture as to prevent him from bringing an action of ejectment under s. 210 of the Common Law Procedure Act, 1852.

Notes. Considered and Doubted: *Rickett* v. *Green*, [1910] 1 K.B. 253.

D

As to waiver of forfeiture and what amounts to waiver, see 23 HALSBURY'S LAWS (3rd Edn.) 671; and for cases see 31 DIGEST (Repl.) 128 et seq. For s. 210 of the Common Law Procedure Act, 1852, see 18 HALSBURY'S STATUTES (2nd Edn.) 412.

Cases referred to:

(1) *Brewer d. Lord Onslow* v. *Eaton* (1783), 3 Doug. K.B. 230; 99 E.R. 627; 31 Digest (Repl.) 562, *6832*.

E

(2) *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103; 30 L.J.C.P. 220; 4 L.T. 214; 25 J.P. 582; 7 Jur.N.S. 803; 9 W.R. 436; 142 E.R. 389; 31 Digest (Repl.) 533, *6582*.

Appeal by the plaintiff, the landlord, in an action for possession of a house and for £80 14s. 4d. arrears of rent, from a decision of MATHEW, J., at the trial of the

F

action without a jury in which the landlord obtained judgment for the arrears of rent but the tenant was given judgment on the claim for possession on the ground that by distraining the landlord had waived his right of re-entry.

By a lease dated Jan. 14, 1884, the landlord leased a house at No. 19, New Oxford Street, to the tenant for the term of twenty-one years, at the yearly rent of £130, payable on the usual quarter days. The lease contained a covenant by the tenant

G

to pay the agreed rent, and there was a proviso for re-entry if the rent should remain unpaid for twenty-one days after it had become due, whether demanded or not. The quarter's rents which became due at Ladyday, at Midsummer, and at Michaelmas, 1894, remained unpaid, and on Nov. 22, 1894, the plaintiff put in a distress upon the demised premises. This distress, after payment of charges, realised only a very small sum, and a balance still remained due to the landlord in respect

H

of the three quarters' rent of £80 14s. 4d.; viz., more than half a year's rent still remained due. On Nov. 26 the landlord issued the writ in this action, claiming possession of the premises and arrears of rent.

Cavanagh for the plaintiff.

Æneas Mackintosh for the defendant.

Cur. adv. vult.

I

July 30, 1895. The following judgments were read.

KAY, L.J.—Section 210 of the Common Law Procedure Act, 1852, seems to me to mean that a landlord who has power to re-enter for nonpayment of rent may recover in ejectment, notwithstanding that he has distrained for such rent if such distress did not produce sufficient to pay such rent, but left half a year's rent still due. In this case the landlord had a right of re-entry, if any quarter's rent should be in arrear for twenty-one days. Three quarters' rent were due; the landlord

distrained. The distress was not sufficient to pay one quarter, therefore, when he brought the action half a year's rent was due, and the statute applies and enables him to recover notwithstanding the distress. This was the construction put upon the Landlord and Tenant Act, 1730, in *Brewer d. Lord Onslow* v. *Eaton* (1).

It was argued that putting in the distress waived the right of re-entry at common law, and that the Common Law Procedure Act, 1852, does not apply where a distress has actually been levied. The material words of s. 210 are

> "if it shall be . . . proved upon the trial . . . that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due."

How could it be said that no sufficient distress was to be found without distraining? Goods on the premises are not a distress until they are distrained, and the landlord cannot tell what is to be found on the premises without putting in a distress. He has no right to enter merely to see what goods are there. The statute evidently contemplates an actual distress, and expressly authorises the ejectment under the power for re-entry, notwithstanding such distress, if half a year's rent remains due. But reliance was placed upon the language used by VAUGHAN WILLIAMS, J., in his judgment in *Cotesworth* v. *Spokes* (2). In that case a lessor having a power of re-entry distrained for three quarters' rent, and after realising the distress less than half a year's rent remained due. He then brought ejectment, but it was held that, as half a year's rent was not due, the case was not within the statute, and the action was not maintainable. The power of re-entry by the terms of the lease was, if a quarter's rent should be in arrear for twenty-one days. The three quarters' rent were due at Michaelmas, 1860, i.e., September 29. The distress was put in on Oct. 2, that is within twenty-one days from that date. Ejectment was brought on Nov. 2, after the expiration of twenty-one days, but part having been paid by the distress there was not a right of re-entry for half a year's rent at the end of the twenty-one days after Michaelmas, and VAUGHAN WILLIAMS, J., said that the distress was a waiver because it was for the rent up to Michaelmas, as to the last quarter of which there was no right of re-entry at the time of the distress, because the twenty-one days had not expired. But if the distress had been confined to the rent due at Midsummer there would have been no waiver, because as to that the forfeiture had actually occurred.

In the present case it is unnecessary to express any opinion as to this part of the judgment which was not the ground of the decision before us. Two quarters' rent and part of a third were due on Sept. 29, and the distress was put in on Nov. 22, more than twenty-one days after the last of the three quarters' rent became due. Therefore, that point does not arise.

A. L. SMITH, L.J.—This is an action of ejectment by a landlord against his tenant, and the circumstances are these. In 1884 the landlord demised to the tenant, 19, New Oxford Street, for the term of twenty-one years, at the rent of £130 payable on the usual quarter days, with a proviso for re-entry if the rent remained unpaid for twenty-one days after it became due, whether demanded or not. On Mar. 25, 1894, the quarter's rent became due and remained unpaid, and at Midsummer and at Michaelmas, 1894, two further quarters' rent also became due and remained unpaid. On Nov. 22, 1894, the landlord distrained, but was only able to realise such an amount as left more than half a year's rent still due; and he thereupon on Nov. 26, 1894, issued a writ in ejectment against the tenant. MATHEW, J., has held that by distraining upon Nov. 22, 1894, the landlord had waived the forfeiture, and he has given judgment for the tenant. It is conceded by the landlord that at common law the distress operated as a waiver of the forfeiture which occurred on the nonpayment of the rent, and the question is whether, notwithstanding this distress, the landlord, by reason of the provisions of s. 210 of the Common Law Procedure Act, 1852, is entitled to maintain this action.

This section, which is a re-enactment of the Landlord and Tenant Act, 1730, s. 2, enacts:

> "In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear and the landlord . . . hath right by law to re-enter for the nonpayment thereof, such landlord . . . may without any formal demand or re-entry, serve a writ in ejectment . . . and . . . if it . . . be proved upon the trial . . . that half a year's rent was due before the writ was served and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made. . . ."

To bring himself within the section the landlord must prove (i) the relationship of landlord and tenant; (ii) that he has by law the right to re-enter for nonpayment of rent; (iii) that having distrained he has been thereby unable to satisfy the rent due; and (iv) that there was half a year's rent due when he served the writ of ejectment. Upon proof of these by the landlord, then in my judgment the section enacts that he may proceed against his tenant and recover in ejectment, whether he had legally demanded the rent or not. But to avail himself of the section the above-mentioned four requisitions must be proved.

That this is the true reading of the section appears from *Brewer d. Lord Onslow* v. *Eaton* (1) in 1783, where LORD MANSFIELD and the Court of King's Bench upon the Landlord and Tenant Act, 1730, s. 2 (an equivalent section to s. 210 of the Common Law Procedure Act, 1852), held that, though at common law the distress would have operated as a waiver of the forfeiture incurred by the nonpayment of the rent, yet in a case which came within the statute it was not so, for the statute required the landlord to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrear due, and that a distress which it was necessary for the landlord to make in order to complete the title given him by the statute was no waiver. It is said, however, that this case was overruled by the Court of Common Pleas in *Cotesworth* v. *Spokes* (2); but this is not so. That case decided that, for a landlord to bring himself within the section, he must prove that half a year's rent was in arrear at the time of the service of the writ. A passage at the end of the judgment (which was delivered by VAUGHAN WILLIAMS, J.) was pressed upon us to show that the forfeiture was waived in the present case by what the landlord had done; but in my judgment, though the passage is hard to understand, it does not decide this, and I must point out that it was not competent for the Court of Common Pleas to overrule the Court of King's Bench, and it is not correct to say that it has done so. It should be noted that in *Cotesworth* v. *Spokes* (2) the distress was within the twenty-one days, which is not so in the present case; but be this as it may, in my judgment the case leaves that of *Brewer d. Lord Onslow* v. *Eaton* (1) untouched upon the point now under consideration. The Court of King's Bench put the true construction upon the section, which has apparently been acted upon for over one hundred years, and as the landlord has proved the requirements of s. 210, he is entitled to judgment, and this appeal must be allowed and judgment given for the landlord with costs here and below.

LORD ESHER, M.R. —I agree with the judgments that have been read.

Appeal allowed.

Solicitors: *Alfred James Thomas; Arthur Mewburn Walker.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

Re LONDON AND GENERAL BANK, LTD.
Ex parte THEOBALD (No. 1)

[COURT OF APPEAL (Lindley, Lopes and Kay, L.JJ.), April 24, 25, 30, 1895]

[Reported [1895] 2 Ch. 166; 64 L.J.Ch. 866; 72 L.T. 611; 43 W.R. 481; 11 T.L.R. 374; 39 Sol. Jo. 450; 2 Mans. 282; 12 R. 263] B

Company—Auditor—Officer of company—Winding-up of banking company.

An auditor of a joint stock banking company **held** to be an officer of the company within the meaning of s. 10 of the Companies (Winding-Up) Act, 1890 [see now the Companies Act, 1948, s. 333 (1)], and so to be liable to be ordered to repay moneys misapplied owing to his misfeasance. C

Notes. Followed: *Re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6. Applied: *R. v. Shacter*, [1960] 1 All E.R. 61. Referred to: *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279; *Re Western Counties Steam Bakeries and Milling Co.*, [1897] 1 Ch. 617; *Re City Equitable Fire Insurance Co.*, [1925] Ch. 407.

As to misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 621-628, 754; and for cases see 10 DIGEST (Repl.) 943 et seq. For the Companies Act, 1948, see D 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Re Liberator Permanent Benefit Building Society* (1894), 71 L.T. 406; 10 T.L.R. 537; 2 Mans. 100; 15 R. 149, D.C.; 7 Digest (Repl.) 532, *344*.

Also referred to in argument: E

Re Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge (1870), L.R. 11 Eq. 478; 23 L.T. 515; 24 L.T. 255; 19 W.R. 223; sub nom. *Re Imperial Land Co. of Marseilles, Ex parte Debenture Holders*, 40 L.J.Ch. 93; 10 Digest (Repl.) 845, *5576*.

Re Great Western Forest of Dean Coal Consumers Co., Carters Case (1886), 31 Ch.D. 496; 55 L.J.Ch. 494; 54 L.T. 531; 34 W.R. 516; 2 T.L.R. 293; F 9 Digest (Repl.) 530, *3838*.

Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 9 Digest (Repl.) 473, *3094*.

Leeds Estate Building and Investment Co. v. *Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 36 W.R. 322; 3 T.L.R. 841; 9 Digest (Repl.) G 588, *3889*.

Appeal from a decision of VAUGHAN WILLIAMS, J., on a summons taken out in the winding-up of a company by the official receiver and liquidator, under s. 10 of the Companies (Winding-up) Act, 1890 [see now the Companies Act, 1948, s. 333 (1)], by which the learned judge held that certain directors and the auditors of the company were liable for moneys paid as dividends on the capital of the H company on the ground that they were not paid out of profits and were a misapplication of the company's funds. From that decision three of the directors (S. Walker, A. T. Layton, and S. R. Pattison) and one of the auditors (W. Theobald) appealed. On the opening of the appeal the preliminary question was raised whether the auditor could be proceeded against under s. 10 of the Companies (Winding-up) Act, 1890. I

Cohen, Q.C., and *Cozens-Hardy, Q.C.* (with them *C. T. Whinney*) for Theobald.

Finlay, Q.C., and *E. S. Ford* (with them *Muir Mackenzie*) for the official receiver and liquidator.

Sir Edward Clarke, Q.C., and *R. A. Germaine* for Walker.

Herbert Reed, Q.C., and *F. Low* for Layton.

Coldridge for Pattison.

Cur. adv. vult.

April 30, 1895.—The following judgments were read.

LINDLEY, L.J.—The question which has been submitted to us in this case is whether an auditor of this bank can be properly regarded as an officer within the meaning of s. 10 of the Companies Winding-up Act, 1890. That section runs thus:

> "Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained, or become liable or accountable for, any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just."

It is urged by counsel for Mr. Theobald that the auditor of a company is not an officer within the meaning of that section. It appears to me that, in order to decide that question, we must examine and consider what an auditor is, how he is appointed, by whom he is paid, and what his duties are. This company is a banking company, and the auditor is required to be appointed under the Companies Act, 1879. That Act is one of the group of Acts which are usually referred to as the Companies Acts, 1862 to 1890. Section 7 (1) of the Act of 1879 runs thus:

> "Once at least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

[HIS LORDSHIP also read the other sub-sections, and pointed out that they referred to the term "office" of any auditor.] Section 8 says that the auditor shall sign a balance-sheet and so on. Reading s. 7 alone it seems to me impossible to deny that for some purposes and to some extent an auditor is an officer of the company. He is appointed by the company, he is paid by the company, and his position is described in the section as that of an officer of the company. He is not a servant of the directors. On the contrary, he is appointed by the company to check the directors, and for some purposes and to some extent it seems to me quite impossible to say that he is not an officer of the company.

So much for the Act. If we pass to the articles of association of this company we find that there are some which are important. Article 2 (which is the definition clause) says that "auditors and secretary" mean those respective officers from time to time of the company. Article 73 runs thus:

> "Every director, auditor, manager, secretary, and other officer shall be indemnified by the company from all losses and expenses incurred by them respectively in or about the discharge of their respective duties except such as happen from their own respective wilful acts or defaults."

Article 107 (which relates to the auditing) says that the accounts of the company shall be from time to time examined, and so on. Then Article 108 runs thus:

> "No person shall be eligible as an auditor who is not a shareholder of the company, or who is interested otherwise than as a shareholder or customer in

any transaction of the company, and no director or officer of the company shall during his continuance in office be eligible as an auditor." A

Then:

"auditors shall be appointed at the ordinary meetings of the company each year by the shareholders present thereat, and shall only hold their offices until the ordinary meetings in every year after their appointment. Retiring auditors shall be eligible for re-election. No person not being a retiring auditor shall be eligible to the office of auditor unless notice of an intention to propose him at an ordinary meeting be given at least fourteen days, and not more than one month before the meeting, and a copy of such notice shall be posted up at the office during the five days next before the meeting. The remuneration of the auditors shall be determined, and may be from time to time varied, by general meetings." B C

By art. 121:

"Every director, manager, auditor, trustee, member of a committee, officer, servant, agent, accountant, or other person employed in the business of the company shall before entering upon his duties sign a declaration pledging himself to observe a strict secrecy. . . ." D

I do not know that those articles carry the matter very much further than the sections of the Act of 1879, to which I have alluded, and my observations upon the articles and that Act are those which I have already made, viz., that for some purposes and to some extent at all events an auditor is an officer appointed by the company, although in no sense a servant of the directors. E

Then it is said that for all that an auditor is not an officer of the company within the meaning of s. 10 of the Act of 1890. It is put in this way, that an officer within the meaning of s. 10 is an officer who in some way or other has control over the assets of the company. It is quite obvious that this section applies to something more than the misapplication of assets. Misapplication or retainer, or becoming liable or accountable for the assets, is provided for by the first part of the section. But, in addition to that there is mention made of misfeasance or breach of trust in relation to the company, and, with reference to that, provision is made for compensating the company, not by the words which authorise the court to compel the person guilty of misfeasance or breach of trust to repay any moneys or restore any property, but by the words F

"to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just." G

I know nothing about the charges against this auditor upon the facts. But I presume that an auditor, whose business it is to audit accounts and sign balance-sheets, knows perfectly well that the balance-sheets so signed by him will be acted upon, and that, if the balance-sheets show profits properly divisible as dividend, a dividend will be declared. Suppose that he purposely and fraudulently prepares and signs a balance-sheet showing profits divisible when there are none. It appears to me that that is a distinct misfeasance in that sense within the meaning of s. 10 of the Act of 1890, leading to and intended to lead to a misapplication of the assets. Such a misfeasance I have not the slightest doubt will be a misfeasance within the meaning of the section. Although that does not show that he is an officer of the company, yet, having regard to the articles of association of this company and the provisions I have just referred to, I do not see how it can be said that as a matter of law this auditor is not an officer of the company, and cannot be liable for misfeasance. In my opinion, he is an officer, and may be within the mischief contemplated by s. 10. H I

It is said that that is very hard upon persons who are auditors of companies, and that, if they are guilty of negligence, fraud, or misconduct, the proper way of

proceeding against them is by means of an action. But, suppose that an action were brought against an auditor upon the ground that the accounts had been fraudulently audited, how could that be possibly tried by a jury? It would demand and would necessitate a prolonged investigation of the accounts, and no one who has any experience of trial by jury would for a moment pretend that it could be so tried. Therefore, it must be referred to some other tribunal. The point made, that you are going to deprive an auditor of his constitutional right does not apply, and it appears to me that that objection fails. We are not prepared to say, and cannot say, that the auditor of a company in a case like this is not an officer of a company within s. 10 of the Companies (Winding-up) Act, 1890.

LOPES, L.J.—I am of the same opinion. The question is whether an auditor, such as the auditor in the present case, is an officer within the true meaning of s. 10 of the Companies (Winding-up) Act, 1890. I do not propose to read that section again, which has already been read. But it is to be observed, in respect of this section, that it does not create any new rights; it merely gives a very summary mode of procedure in enforcing rights already existing. If it were not for the word "misfeasance" in s. 10 I should not have thought that an auditor, such as the auditor in the present case, came within the meaning of that section. I should have thought that the section, if that word had been absent from it, was rather directed against those who had to carry out the business and purposes of the company; who had the control over the assets of the company; who had the conduct of the business; and who might have the assets or the property of the company in their hands which they might apply, retain, or restore. But I find the word "misfeasance," and, as I understand the word "misfeasance" in this section, it means a breach of duty. If it means a breach of duty, one can quite understand a breach of duty which might be committed by an auditor. For instance, he might, in collusion with his directors, prepare a false statement of accounts which would involve a misapplication of the assets. In such a case it seems to me that that would be one of the mischiefs which this section was intended to prevent. I come, therefore, to the conclusion that an auditor such as that of a banking company is an officer within the meaning of that section, and I am fortified in that view by the words of s. 7 (1) of the Companies Act, 1879, because it seems to me that that section recognises the auditor of a banking company as an officer. The sub-section says: "If any casual vacancy occurs in the office of auditor," and throughout the section seems to contemplate that the auditor is an officer of the company. That, I repeat, fortifies the view that I have formed with regard to s. 10, and I am also confirmed in that view by the fact that the articles of association of this very banking company recognise the auditor as an officer.

There was a case referred to, namely, *Re Liberator Permanent Benefit Building Society* (1) which came before CAVE and HENN COLLINS, JJ. That was not a case of an auditor. That was the case of a solicitor. It was not the case of a banking company, but of a building society. And it is true that CAVE, J., in the course of his judgment, says (71 L.T. at p. 407):

> "It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society."

I do not think that the attention of CAVE, J., was drawn to the word "misfeasance" in s. 10 of the Act of 1890. But, however that may have been, that, as I have pointed out already, was the case, not of an auditor, but of a solicitor. It may be again said that the section of the Act of 1879, which relates to the auditor of a banking company, would not relate in the same way to a solicitor. The articles of association in this case, moreover, recognise the auditor as an officer. I come,

therefore, to the conclusion that the auditor of this banking company was an officer within the true meaning of s. 10 of the Companies (Winding-up) Act, 1890.

KAY, L.J.—I come to the same conclusion. But I wish to guard myself against being understood to hold that in every case of a joint-stock company the auditor employed by the joint-stock company is an officer of the company. I do not at present hold that opinion. I can quite conceive that there may be one or two cases of a joint-stock company who call in an auditor to make a particular audit where the auditor called in could not be properly treated as an officer of the company. But we have got to deal in this case with a joint-stock banking limited company whose duties in respect of having their accounts audited are prescribed by the Companies Act, 1879. It will be observed, on looking at s. 7 of that Act, that the auditor is to be appointed by the company in general meeting. Section 7 (1) says that once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors who shall be elected annually by the company in general meeting. So that the election is not, like the election of the ordinary officers of the society, delegated to the directors of the company. It is prescribed by statute that there shall in this case be an auditor elected by the company in general meeting.

Then I find, turning to the articles of association of this company, that they recognise distinctly their duty, and by the interpretation clause of their articles they do define expressly that the auditor of this company shall be an officer of this company. The first of the articles says that the term "auditors and secretary" means those respective officers from time to time of the company. Again, we find in art. 73 a recognition of the fact that auditors duly appointed by the company are officers of the company. Then come the articles which speak of the duties of auditors (viz., arts. 107 and 108). Some comments were made with regard to the words, and the language of art. 108, which provides that no director or officer of the company shall during his continuance in office be eligible as auditor. It was said that that shows plainly that an auditor is to be, not an officer of the company, but somebody who is not an officer. I do not read it in that sense. That is a copy of the language of the Act of 1879, which provides in s. 7 (2), that "a director or officer of the company shall not be capable of being elected an auditor of such company." Here the auditor is treated as an officer of the company. The company provide also in their articles that the auditors shall not hold any other office in the company. At the same time, I take art. 108 not to contradict that which has been said in the earlier part of the articles, that an auditor of the company is an officer of the company, but merely to provide, as the statute provides, that while he is an auditor he shall not hold any other office in the company. The object of that provision is, that he might not hold some other office the duties of which might bias him in his conduct as an auditor. Therefore, to prevent the danger of that, it is provided by the statute, and repeated by the articles, that he cannot hold at the same time any other office of the company. That seems to me to reconcile these articles with the statute; and I come to the conclusion that in this case the company in its constitution recognised the necessity of having auditors duly appointed under the statute of 1879, and made these provisions that auditors so appointed should be treated by this company as being officers of the company.

In the face of that, it seems to me impossible to hold that the auditors are not officers of the company. Whether they are officers within s. 10 of the Companies (Winding-up) Act, 1890, or not, seems to be almost concluded when you find that this company did appoint its auditors as officers of the company. For, after all, all that the section provides is a convenient mode of dealing with, among other things, the misapplication of the funds of the company by its officers. On the other hand, it provides also for misfeasance (misfeasance other than misapplication of the funds or property of the company) which may lead to an injury and damage to the company, and is to be met, not by replacing the misappropriated funds, but, as the

section says, by compensation to the company. The words "misfeasance" and "compensation," as used in that section, seem to me to be clearly correlative, and when the section speaks of the misfeasance of an officer of the company it must mean—looking to the collocated words—misfeasance other than the misapplication or misappropriation of the funds or property of the company. To remedy that misfeasance the power which the section gives requires that persons convicted of misfeasance shall make compensation to the company. As has been said by LINDLEY, L.J., the possibility of misfeasance by an auditor might produce very considerable damage and injury to the company of which he was auditor. Therefore, it seems to me that he does come within the section, and that he can be made liable for misfeasance and be obliged to make compensation to the company. I, therefore, think that that must be our ruling.

Solicitors: *H. C. Morris; Layton, Sons & Lenden: E. C. Rawlings: Snow, Snow & Fox; Phelps, Sidgwick & Biddle.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

Re LONDON AND GENERAL BANK, LTD.
Ex parte THEOBALD (No. 2)

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), January 17, 18, 19, 20, 21, August 6, 1895]

[Reported [1895] 2 Ch. 673; 64 L.J.Ch. 866; 73 L.T. 304; 44 W.R. 80; 11 T.L.R. 573; 39 Sol. Jo. 706]

Company—Auditor—Duty—Ascertainment and statement to shareholders of true financial position of company—Exercise of reasonable care and skill.

It is no part of the duty of an auditor of a company to give advice, either to directors or shareholders, as to what they ought to do. He has nothing to do with the prudence or imprudence of making loans with or without security or whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders which is to ascertain and state the true financial position of the company at the time of the audit.

To ascertain the true position of the company the auditor must examine the books of the company, taking reasonable care to ascertain that they do show the true position. Assuming the books to be so kept as to show the true position, the auditor has to frame a balance sheet showing that position according to the books and to certify that the balance sheet presented is correct in that sense.

But an auditor is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer. He does not guarantee that the books do correctly show the true position of the company's affairs. He does not even guarantee that his balance sheet is accurate according to the books of the company, for that would render him responsible for error on his part even if he were deceived without any want of reasonable care on his part, e.g., by the fraudulent concealment from him of a book. Even in the case of suspicion he is not bound to exercise more than reasonable care and skill. What is reasonable care in any particular case must depend on the cir-

cumstances of that case. An auditor is justified in acting on the opinion of an expert where special knowledge is required.

Circumstances in which an auditor was **held** to have failed to discharge his duty to the shareholders in certifying and laying before them a true balance sheet, and, consequently, to have been guilty of misfeasance within s. 10 of the Companies (Winding-up) Act, 1890 [see now the Companies Act, 1948, s. 333 (1)] and ordered to pay damages.

Notes. Followed: *Re Kingston Cotton Mill Co. (No. 2)*, [1896] 2 Ch. 279. Applied: *Re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Re City Equitable Fire Assurance Co., Ltd.*, [1924] All E.R. Rep. 485.

As to the duties of an auditor and misfeasance proceedings, see 6 HALSBURY'S LAWS (3rd Edn.) 387, 388, 621-628, 754. For cases see 9 DIGEST (Repl.) 586-590 and 10 DIGEST (Repl.) 943 et seq. For the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Case referred to:

(1) *Leeds Estate Building and Investment Co.* v. *Shepherd* (1887), 36 Ch.D. 787; 57 L.J.Ch. 46; 57 L.T. 684; 36 W.R. 322; 3 T.L.R. 841; 9 Digest (Repl.) 588, *3889*.

Also referred to in argument:

Re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's Case (1880), 14 Ch.D. 660; 42 L.T. 559; 28 W.R. 775, C.A.; 9 Digest (Repl.) 473, *3094*.

Brinsmead v. *Harrison* (1872), L.R. 7 C.P. 547; 41 L.J.C.P. 190; 27 L.T. 99; 20 W.R. 784, Ex. Ch.; 21 Digest (Repl.) 296, *610*.

Smurthwaite v. *Hannay*, [1894] A.C. 494; 63 L.J.Q.B. 737; 71 L.T. 157; 43 W.R. 113; 10 T.L.R. 649; 7 Asp.M.L.C. 485; 6 R. 299, H.L.; 41 Digest 537, *3643*.

The Bernina (2) (1887), 12 P.D. 58; 56 L.J.P. 17; 56 L.T. 258; 35 W.R. 314; 6 Asp.M.L.C. 75, C.A.; affirmed sub nom. *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257, H.L.; 36 Digest (Repl.) 194, *1023*.

Thorogood v. *Bryan, Cattlin* v. *Hills* (1849), 8 C.B. 115; 18 L.J.C.P. 336; 13 L.T.O.S. 284; 137 E.R. 452; 36 Digest (Repl.) 193, *1020*.

Palmer v. *Wick and Pulteneytown Steam Shipping Co.*, [1894] 2 A.C. 318; 71 L.T. 163; 10 T.L.R. 511; 6 R. 245, H.L.; 42 Digest 980, *105*.

Appeal by the auditor from an order of VAUGHAN WILLIAMS, J., made on a summons taken out in the winding-up of the London & General Bank, Ltd., by the official receiver and liquidator under s. 10 of the Companies (Winding-up) Act, 1890 [see now the Companies Act, 1948, s. 333 (1)], seeking to make certain directors and the auditor of the company liable for moneys paid as dividends on the capital of the company, on the ground that they were not paid out of profits and were a misapplication of the company's funds. The summons also asked a similar declaration against the auditor of the company in respect of dividends declared on the ground that he was the auditor who certified and reported the balance-sheets which were laid before the company purporting to show profits in excess of the sum paid as dividends. The summons also claimed that the directors and the auditor were liable to make good to the assets of the company sums said to have been advanced without proper security. It was decided by VAUGHAN WILLIAMS, J., that the directors and auditor were liable.

The auditor appealed.

Cohen, Q.C., and *Cozens-Hardy, Q.C.*, for the auditor.

Finlay, Q.C., and *E. S. Ford* (*Muir Mackenzie* with them) for the official receiver and liquidator.

Cur. adv. vult.

Aug. 6, 1895. The following judgments were read.

LINDLEY, L.J.—This is an appeal by Mr. Theobald, one of the auditors of the London & General Bank, Ltd., which is being wound-up, against an order made by VAUGHAN WILLIAMS, J., under s. 10 of the Companies (Winding-up) Act, 1890. By this order Mr. Theobald and the directors of the bank are declared jointly and severally liable to pay to the official receiver, as liquidator of the company, two sums of £5,946 12s. and £8,486 11s., being respectively the amounts of dividends declared and paid by the bank for the years 1890 and 1891. The grounds on which this order was made on Mr. Theobald are that these dividends were paid out of capital, and that that payment was made pursuant to resolutions of the shareholders based upon recommendations of the directors of the bank and upon balance-sheets prepared and certified by Mr. Theobald, which did not truly represent the financial position of the company. Mr. Theobald's appeal was supported by arguments to this effect: (i) That Mr. Theobald was not an "officer" of the company within the meaning of s. 10 of the Act of 1890; (ii) that the balance-sheets and certificates given by Mr. Theobald were in accordance with the books of the bank, and that his duty as auditor was confined to framing balance-sheets which showed the position of the bank as disclosed by its books; (iii) that the dividends in question were not really paid out of capital, and that, however improvident and reckless it may have been to pay them, Mr. Theobald as auditor is not legally responsible for that payment; (iv) that, even if Mr. Theobald as auditor failed adequately to discharge his duty, and even if the dividends were paid out of capital, his failure to discharge his duty was the remote, and not the proximate, cause of the wrongful payment of the dividends, and that he consequently is not legally liable to make good the amount so paid; (v) that at any rate the order is wrong in declaring him jointly and severally liable with the directors to repay the dividends in question.

The first of these contentions was argued and decided last April, and this court then held that an auditor of a banking company governed by the Companies Act, 1879, and by such articles as regulated the present company, was an "officer" of the company within the meaning of s. 10 of the Companies (Winding-up) Act, 1890, and was liable to have proceedings taken against him under that section [see p. 948 ante]. This point having been then decided was, of course, not again raised, and nothing further need be said about it. It remains, however, to consider what the duties of an auditor are as respects banking companies governed by the Companies Act, 1879, and by such articles as regulated this particular company. It will be convenient to do this before examining the facts relied upon by the liquidator, as rendering Mr. Theobald liable to make good the dividends which he has been ordered to pay. The duties of the auditors in this case were governed by s. 7 of the Companies Act, 1879. By sub-s. (1) of that section:

> "Once at the least in every year the accounts of every banking company registered after the passing of this Act as a limited company shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

Sub-s. (2) provides that a director or officer of the company should not be capable of being elected auditor. By sub-s. (5):

> "Every auditor shall have a list delivered to him of all books kept by the company, and shall at all reasonable times have access to the books and accounts of the company; and any auditor may, in relation to such books and accounts examine the directors or any other officer of the company."

By sub-s. (6):

> "The auditor or auditors shall make a report to the members on the accounts examined by him or them and on every balance-sheet laid before the company

in general meeting during his or their tenure in office; and in every such report shall state whether, in his or their opinion, the balance-sheet referred to in the report is a full and fair balance-sheet properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shown by the books of the company." [See now Companies Act, 1948, s. 161 (2) (a), s. 162 (1) (3).]

The articles of association of the bank contained the following provisions. Clause 106:

"At every ordinary meeting the directors shall lay before the meeting a balance-sheet showing the financial state of the company for the previous financial year, duly audited, and every such balance-sheet shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus to the shareholders, after allowing for any interim dividend which the directors may have declared, and any sum which they may have set aside under art. 116 hereof."

Clause 109 provided that (with certain specified exceptions) all auditors should be appointed at the ordinary meeting of the company in each year by the shareholders present thereat. By cl. 107,

"The accounts of the company shall be from time to time examined, and the correctness of the statements shall be from time to time ascertained by two or more auditors, in accordance with these presents."

By cl. 114:

"The auditors shall be supplied with copies of the statement of accounts intended to be laid before the meeting, and it shall be their duty to examine the same, with the accounts and vouchers relating thereto."

These are the enactments and regulations which bear directly on the duties of the auditors, and although cll. 107 and 114 are in terms more explicit than s. 7 of the statute as regards the duty of the auditors to examine and ascertain the correctness of the statements laid before them, and of the accounts laid before the shareholders, yet it is tolerably plain from the language of s. 7 (5), that the articles add little, if anything, to the duty imposed on the auditors by the statute alone. In connection with these articles, and in order to save repetition, it should be stated that by the articles of this bank it is the duty of the directors, and not of the auditors, to recommend to the shareholders the amounts to be appropriated for dividends (cl. 98), and it is the duty of the directors to have proper accounts kept, so as to show the true state and condition of the company (cl. 103). Lastly, it is for the shareholders, but only on the recommendation of the directors, to declare a dividend (cl. 115).

It is impossible to read s. 7 of the Companies Act, 1879, without being struck with the importance of the enactment that the auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors [s. 159 (1) and s. 162 (1) of the Act of 1948]. The object of this enactment is obvious. It evidently is to secure to the shareholders independent and reliable information respecting the true financial position of the company at the time of the audit. The articles of this particular company are even more explicit on this point than the statute itself, and remove any possible ambiguity to which the language of the statute taken alone may be open if very narrowly criticised. It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to

A ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that.

But then comes the question: How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books B themselves show the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to show the true position of a company, the auditor has to frame a balance-sheet showing that position according to the books, and to certify that the balance-sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining C what they do show, but also for the purpose of satisfying himself that they show the true financial position of the company. This is quite in accordance with the decision of STIRLING, J., in *Leeds Estate Building and Investment Co.* v. *Shepherd* (1) (36 Ch.D. a p. 802). An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly show the true position D of the company's affairs; he does not even guarantee that his balance-sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest, i.e., he must not certify what he does not believe to be true, and E he must take reasonable care and skill before he believes what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient; and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an F auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required.

Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance-sheet. He did not content himself with making his balance-sheet from the books without G troubling himself about the truth of what they showed. He checked the cash, examined vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty it not too high for business H purposes, and is recognised as correct by business men. The balance-sheet and certificate of February, 1892 (i.e., for the year 1891) was accompanied by a report to the directors of the bank. Taking the balance-sheet, the certificate, and report together, Mr. Theobald stated to the directors the true financial position of the bank, and, if this report had been laid before the shareholders, Mr. Theobald would have completely discharged his duty to them. Unfortunately, however, this report was I not laid before the shareholders, and it becomes necessary to consider the legal consequences to Mr. Theobald of this circumstance.

A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms. Still, there may be circumstances under which information given in the shape of a printed document circulated among a large body of shareholders would, by its consequent publicity, be every injurious to their interests, and in such a case I am not prepared to say that an auditor would fail to discharge

his duty if, instead of publishing his report in such a way as to ensure publicity, he made a confidential report to the shareholders, and invited their attention to it and told them where they could see it. The auditor is to make a report to the shareholders, but the mode of doing so and the form of the report are not prescribed. If, therefore, Mr. Theobald had laid before the shareholders the balance-sheet and profit and loss account, accompanied by a certificate in the form in which he first prepared it, he would perhaps have done enough under the peculiar circumstances of this case. I feel, however, the great danger of acting on such a principle, and in order not to be misunderstood I will add that an auditor who gives shareholders means of information instead of information respecting a company's financial position does so at his peril, and runs the very serious risk of being held judicially to have failed to discharge his duty.

In this case I have no hesitation in saying that Mr. Theobald did fail to discharge his duty to the shareholders in certifying and laying before them the balance-sheet of February, 1892, without any reference to the report he laid before the directors, and with no other warning than is conveyed by the words, "The value of the assets as shown on the balance-sheet is dependent upon realisation." The most important asset on that balance-sheet is put down as "Loans to customers and other securities," £346,975, and on these a full and detailed report was made to the directors showing the very unsatisfactory state of these loans and securities, and it is impossible to read the oral evidence, the report of Balfour and Brock, dated Dec. 22, 1891, and the report of the auditor to the directors of Feb. 3, 1892, without coming to the conclusion that the entry of that large sum as a good asset without explanation was unjustifiable. It is a mere truism to say that the value of loans and securities depends on their realisation. We were told that a statement to that effect is so unusual in an auditor's certificate that the mere presence of those words was enough to excite suspicion. But, as already stated, the duty of an auditor is to convey information, not to arouse inquiry, and, although an auditor might infer from an unusual statement that something was seriously wrong, it by no means follows that ordinary people would have their suspicions aroused by a similar statement if, as in this case, its language expresses no more than any ordinary person would infer without it.

Mr. Theobald relies on the fact that he was induced to omit from his certificate all reference to the report which he made to the directors because Mr. Balfour, the chairman, promised to mention such report in his speech to the shareholders, and he did so. But, although Mr. Balfour twice alluded to the report, he did so in such a way as to avoid attracting attention to it. The second time he mentioned it was after a dividend had been declared and when a motion to re-appoint the auditors was before the meeting. The truth is, that not a word was said to convey to the shareholders the substance of the information contained in the report or to induce them to ask any question about it. The balance-sheet and profit and loss account were true and correct in this sense—that they were in accordance with the books. But they were, nevertheless, entirely misleading and misrepresented the real position of the company. Under these circumstances I am compelled to hold that Mr. Theobald failed to discharge his duty to the shareholders with respect to the balance-sheet and certificate of February, 1892. Possibly he did not realise the extent of his duty to the shareholders as distinguished from the directors, and he unfortunately consented to leave the chairman to explain the true state of the company to the shareholders instead of doing so himself. The fact, however, remains, and cannot be got over, that the balance-sheet and certificate of February, 1892, did not show the true position of the company at the end of 1891, and that this was owing to the omission by the auditor to lay before the shareholders the material information which he had obtained in the course of his employment as auditor of the company, and to which he called the attention of the directors.

But then it is contended that, even if this be so, there was after all no payment of dividend out of capital; and further that, even if there was, still that payment

was not the natural or immediate result of Mr. Theobald's certificate and of the accounts which he prepared. Whether payment was made out of capital or not is a question of fact. The payment was professedly made out of profits made by the bank, by charging its customers with interest and commission on loans and discount. The books showed such profits, but the question is: Where did the money come from with which the dividends were paid? The money came from cash at the bankers' or in hand, but this cash could not be properly treated as profit, and the directors and auditors knew this perfectly well. This part of the case has been most carefully investigated by the learned judge whose decision we are reviewing, and, after attending closely to the observations of counsel on the reasonings and conclusions contained in the judgment appealed from, I see no reason whatever for dissenting from them. On the contrary, I entirely agree with the learned judge in saying that the profits for the year 1891 never really existed, except on paper, and that, to use his words, "whatever may be the right line to draw as to when profit not received may be carried to profit for the purpose of the annual revenue account, it is plain that there was no justification for so doing in the present case."

The real truth is that the assets of the bank were put down in the balance-sheet at far too high a figure, and this entry, though not misleading if explained (as it was to the directors), was seriously misleading in the absence of explanation. Mr. Theobald says that he regarded the assets of the bank as only locked up, but his report and the schedule to it go far beyond this. The value of the principal asset depended on the probability of the Balfour group of companies and some of the other large borrowers repaying their loans. They were financing each other; their indebtedness to the bank had increased largely during the year; the securities held by the bank for these loans were, to say the least, to a great extent of very doubtful value; and yet the total amount due to the bank in respect of these loans is inserted in the balance-sheet as a good asset, without any deduction and without a word of explanation to the shareholders. We know now that those assets have realised a comparatively small sum, and we were very properly warned against the danger of doing injustice by being wise after the event. But, disregarding the result of realisation, and attending only to what was known to the auditors in February, 1892, the entry in the balance-sheet of the sum of £346,975 as a good asset was wholly unjustifiable, unless explained.

We are now in a position to understand the true meaning of the passage contained in the auditors' report to the directors of Feb. 3, 1892, and which runs thus: "We cannot conclude without expressing our opinion unhesitatingly that no dividend should be paid this year." I find it impossible to treat this as a statement by the auditors that there are profits divisible among the shareholders, but that the auditors cannot recommend a dividend. I can only regard the passage as meaning that there are no funds out of which a dividend can properly be paid, and therefore, no dividend ought to be paid this year. A dividend of 7 per cent. was, nevertheless, recommended by the directors, and was resolved upon by the shareholders at a meeting furnished with the balance-sheet and profit and loss account certified by the auditors, and at which meeting the auditors were present, but silent. Not a word was said to inform the shareholders of the true state of affairs. It is idle to say that these accounts are so remotely connected with the payment of the dividend as to render the auditors legally irresponsible for such payment. The balance-sheet and account certified by the auditors, and showing a profit available for dividend, were, in my judgment, not the remote, but the real operating, cause of the resolution for the payment of the dividend which the directors improperly recommended. The auditors' accounts and certificate gave weight to such recommendation, and rendered it acceptable to the meeting. It was wholly unnecessary for the official receiver to call a shareholder to say that he was induced by the auditors' certificate to concur in the resolution to pay a dividend. As to this part of the case res ipsa loquitur.

A point was made that the form of the order was wrong. But there is nothing in

this. Mr. Theobald could obviously be sued alone in an action at law for breach of his statutory duty as auditor, and for damages resulting from such breach of duty, and the measure of damages would be the sum which he has been ordered to pay. Whether a similar action at law could be maintained against him and the directors jointly is more open to question. I am by no means satisfied that it could not, seeing that the wrongful payment of the dividend was caused by his improper certificate and accounts, and by the use made of them by the directors. But, be this as it may, there was a clear breach of trust by the directors, facilitated, and indeed only rendered possible, by the auditor who failed in discharging his own duty to the shareholders; and I have no doubt that in equity both he and they could be properly declared jointly and severally liable for the misapplication of the company's money which constituted that breach of trust: see *Leeds Estate Building and Investment Co.* v. *Shepherd* (1). With respect, therefore, to the sum of £8,486 11s., wrongfully paid as dividend in 1892, in respect of the alleged profits made in 1891, the appeal, in my opinion, fails.

I agree with VAUGHAN WILLIAMS, J., in holding that the dividend for 1890 was in fact improperly declared and paid. But the evidence that Mr. Theobald was guilty of any breach of duty in certifying the accounts in February, 1891, is far less cogent than that which presses so heavily against him with reference to the accounts of February, 1892. The truth is that the conviction that the bank's affairs were every year getting worse and worse grew upon him year by year. This state of things was shown by the decrease of its investments and reserve capital and the increase of its loans to customers. But the loans to customers and other securities were, speaking roughly, £100,000 less at the end of the year 1890 than at the end of 1891, and, seeing that the accounts prepared by the auditors did accurately represent the position of the company as shown by the books, and that it is not proved that Mr. Theobald really knew, or ought then to have known, that the position of the bank was not correctly shown by the books, I think VAUGHAN WILLIAMS, J., has gone too far in holding Mr. Theobald liable for this sum. The reasons which induced the learned judge to decide that Mr. Theobald was not liable for the dividends paid in 1889 and 1890 appear to me to apply also to the dividend paid in 1891 in respect of the profits of 1890. No doubt the change made by the auditors in 1886 in the form of the certificate they had previously given is very significant, and, unexplained leads to the inference that the auditors did not believe that the books of the company and the balance-sheet prepared from them correctly showed the position of the bank.

But Mr. Theobald's evidence does, in my opinion, show that in February, 1891, matters were not known or believed to be so bad as to lead him to the conclusion that there were then no profits out of which a dividend could properly be paid. It is true that the position of the bank was very unsatisfactory in 1890, and the auditors knew it to be so. This, however, appeared from the balance-sheet and accounts which they laid before the shareholders. It is known now that the assets were put down at too high a figure; but it is not proved that the auditors knew it, or ought to have known it. The Balfour group of companies, though dependent on each other, were by no means in so tottering a state as they were a year later. Wilkinson's debt was still treated by the directors as bearing interest and as a good or, at all events, not as a bad, debt. Benham's debt was unsatisfactory, but the auditors can hardly be blamed for treating it as good, having regard to the solicitor's statement as to the security held for it. This part of the case is very near the line, but, having carefully considered it, I do not think that the evidence is sufficiently strong to establish a case of misfeasance on the part of Mr. Theobald in February, 1891. I am not satisfied that he was then guilty of more than an excusable error of judgment; although, now that all the facts are known, the error is seen to have been very serious in its consequences. As to the sum of £5,946 12s., therefore, the appeal must be allowed. As regards costs, Mr. Theobald's appeal has resulted in reducing the sum for which he has been held liable, but in other respects, and as

regards his main contention, it has failed. Under these circumstances he ought not to receive or pay any costs of the appeal, and the only order as to costs will be that the official receiver be paid his costs out of the assets of the company.

LOPES, L.J.—I agree.

RIGBY, L.J., discussed the evidence against the auditor, which had led him to the same conclusion as LINDLEY, L.J., whose judgment, his Lordship said, he had had the advantage of reading and considering, and then continued as follows: The main issues seem to be (i) whether the auditor has been guilty of any misfeasance in relation to the company; (ii) whether the misfeasance had occasioned to the company loss for which compensation ought to be directed to be made, which will involve the question whether the dividends were in fact paid, not out of profits, but out of capital, and whether such payment was the fault of the auditor; and (iii) the amount of compensation which ought to be made.

In order to determine the first question it will be necessary to consider in some detail the position and duty of the auditors—what they ought to have done and what they have done. [After reading from the Companies Act, 1879, s. 7 (6), which provides (inter alia) that the auditors shall report to the members on the accounts examined by them; and, after referring to arts. 106, 107, and 114 of the company, recited by LINDLEY, L.J., HIS LORDSHIP proceeded:] The articles of association cannot absolve the auditors from any obligation imposed upon them by the statute, and it may be that, in this case, they do not impose any greater obligations as to the balance-sheet, though they make it clear that similar obligations extend to the accounts placed before the company, including the profit and loss account, as well as the balance-sheet. Under the statute the members of the company are entitled to have the safeguard of an expression of opinion by the auditors to the effect that the balance-sheet is a full and fair balance-sheet, and that it is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs. The words "as shown by the books of the company" seem to me to be introduced to relieve the auditors from responsibility as to affairs of the company kept out of the books and concealed from them, but not to confine their duty to a mere statement of the correspondence of the balance-sheet with the entries in the books. A full and fair balance-sheet must be such a balance-sheet as to convey a truthful statement as to the company's position. It must not conceal any known cause of weakness in the financial position, or suggest anything which cannot be supported as fairly correct from a business point of view. The provision as to its being properly drawn up so as to exhibit a correct view of the state of the company's affairs is taken from, though it does not go quite so far as, art. 9 of Table A and the schedule to the Act of 1862. Treated as an addition to the requisition for a full and fair balance-sheet it may not be easy to define the full extent of the obligation which it imposes, nor is it necessary to do so in this case; for it certainly requires a more detailed explanation of the affairs of the company than is contained in any of the balance-sheets of this bank.

It will be important to see what information the auditors actually acquired as to the business of this company and the way in which they reported upon the successive balance-sheets. Mr. Theobald and Mr. Timms were auditors of the bank from its incorporation in 1882, and they made the audits for successive years, down to and including the audit for 1891. The reports of the auditors to the members always took the form of a certificate or memorandum written on the balance-sheet for the year. Their reports on the accounts for 1882 and 1883 contained a statement to the effect that, in their opinion, the balance-sheet exhibited a true and correct view of the position of the bank. In their report on the accounts for 1885 a somewhat less emphatic statement to the same effect appears; but in the subsequent reports no such statement is to be found. In a report to the directors, dated Feb. 11, 1886, dealing with the accounts for 1885, Mr. Theobald, after noticing that

the first-class investments, kept by bankers for quick realisation in case of need, stood at a considerably reduced sum, and that more than the whole capital of the company was invested in four accounts—namely, the Liberator Society, the Lands Allotment Co., the House and Lands Co., and the Building Estates Co.—and that these investments would not be easily realised in critical times, proceeds to say:

> "You are doubtless aware that it is a rule with bankers to have at hand, in cash or easily realisable securities, an amount equal to at least one-third of the customers' current accounts. Considering the small amount of uncalled capital, I think that in this case the proportion is scarcely sufficient."

There can be no doubt that, even at that time, Mr. Theobald was aware that the state of affairs of the bank was unsatisfactory, in the important points of lock-up of capital and consequent deficiency in realisable securities.

The reports of the auditors to the members for the years 1886-1890, both inclusive, are simply to the effect that the cash and bills receivable were correct, that securities had been produced for the investments and loans (no information being given as to the amount of the securities), and that the balance-sheet agreed with the books of the company. The report on the accounts for 1891 states that the balance-sheet is a correct summary of the accounts recorded in the books, and contains, for the first time, the statement, "The value of the assets, as shown in the balance-sheet, is dependent on realisation." Great stress has been laid by counsel for the auditor on the statement last quoted. They argued that it was sufficient to put members upon inquiry, and that from the course taken at the trial they were debarred from giving the evidence of experts as to its importance and signification. But I may say at once that it was the duty of the auditors to convey in direct and express terms to the members any information which they thought proper to be communicated; that the words of the statement, though perfectly clear in their meaning, are also entirely unimportant, amounting to a mere truism; and that no evidence of experts would have been of the slightest use for the purpose of giving to the words a greater importance or signification than they possess in themselves, even if such evidence were admissible.

To me it appears that all the reports from 1886 onwards were imperfect, and that the auditors, in giving reports in such a form, failed entirely to fulfil the statutory duties imposed upon them. Counsel for the auditor argued that such a failure would not amount to misfeasance but only to negligence, and that the auditor is not charged on the summons with negligence. I cannot admit the cogency of that argument. The reports were made in order to fulfil the statutory obligation, and to be read to the meetings in accordance with the statutes. Mr. Theobald says, with reference to this: "My certificate means the same as the Act," and further, "I was not aware that it was considered necessary for me to give the certificate (for 1891) either in the words of the Act or not at all." Mr. Theobald's interpretation of his own certificate cannot be received, either in his favour or against him, and we should not unduly press against him apparent admissions made in the course of a very trying cross-examination; but his evidence does, I think, go so far as to show that the certificates were, in fact, given as reports under the Act; and, independently of the evidence, I think there can be no doubt that they were intended to be, and were, received and acted upon as reports under the Act. I consider the giving of the certificates, assuming them to be to the knowledge of the auditors, misleading certificates, to be a misfeasance within the meaning of s. 10 of the Act of 1890, and not a mere act of negligence; and that this was the meaning of the charge contained in the summons.

I can have no doubt, having regard to the terms of the certificates given and the explanations of Mr. Theobald himself, that there was a strong and growing feeling of dissatisfaction in his mind at the state of the bank's affairs, as shown by its books, and I find no sufficient communication of facts causing this dissatisfaction. The balance-sheets, when examined, do not, in my opinion, fulfil the statutory

requirements of being full and fair balance-sheets, and are not properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, as shown by the books of the company. [His Lordship then dealt with the evidence establishing this in relation to the years 1889, 1890, and 1891, which showed (inter alia) that the proportion of what might be called the outside business of the bank to that with the Balfour companies, and on the special accounts, might, roughly speaking, be put down as two-thirds at the end of 1889, one-third at the end of 1890, and one-fourth at the end of 1891; while the paid-up capital had increased in 1890 by about £76,944, and in 1891 by about £43,642. After dealing with other points in the case, and with Mr. Theobald's suggested belief in the solvency of the Balfour companies, His Lordship proceeded:] Assuming all the Balfour companies and Benham and Wilkinson to have been able to pay the whole of the sum owing by them except the amounts debited in 1891 for interest and commissions, not only the profits available for dividend would be swept away, but of the reserve fund itself little or nothing would remain. Such an assumption would, however, in my opinion, be extravagantly favourable to the auditors, and it only required that one of the debts owing by Wilkinson or by almost any one of the Balfour companies should be proved to be bad to exhaust everything belonging to the bank that was not capital. It turned out that each one of the Balfour companies and Wilkinson and Benham, as well as other debtors of the bank, were insolvent; and it is established that the bank had no funds out of which dividends could, in any point of view, be properly paid.

I wish to make it plain, as far as I can, that I am only relying upon matters which Mr. Theobald, as auditor, knew, or must reasonably be assumed to have known. The auditors must have known, and did know, that the balance-sheet for 1891 was not properly drawn up so as to show the state of the bank's affairs. That the dividend was, in fact, paid out of capital cannot, I think, admit of doubt. It has been argued that the payment of the dividend was not the proximate result of the auditors' report, as the recommendation of the directors and the vote of the meeting had to intervene. This appears to me, however, to misrepresent the state of things. The report of the auditors was a continuing representation, made, indeed, before, but in law and in good sense to be treated as repeated after, the recommendation of the dividend. It was perfectly well known to Mr. Theobald (at any rate, at the meeting where he was present and heard the reading of the report recommending a dividend, and the speech of Mr. Balfour) that this report of his was intended to be relied upon as justifying the recommendation, and as an invitation to the shareholders to vote the dividend. Not only was the report a causa sine qua non of the vote, but it was, in my judgment, a causa causans. How far the judgment should go against the auditor is a question which has given me considerable difficulty. A great deal of the reasoning which has led me to hold that the auditors reporting on the accounts of 1891 as they did was a misfeasance in relation to the company applies only to the case of that last report. The learned judge in the court below has held Mr. Theobald liable, not only for the 1891, but also for the 1890, dividend. I am far from saying that he is clearly wrong, but I cannot satisfy myself that he is clearly right. In the case of the 1890 dividend it is not, upon the evidence, made out to my full satisfaction that the auditors knew the balance-sheet to be substantially misleading, and I think it safer to confine the order to the dividend in respect of 1891.

Order varied.

Solicitors: *E. C. Rawlings; Phelps, Sidgwick & Biddle.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re HAWKES. ACKERMAN *v.* LOCKHART

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), February 24, 25, March 23, 1898]

[Reported [1898] 2 Ch. 1; 67 L.J.Ch. 284; 78 L.T. 336; 46 W.R. 445; 42 Sol. Jo. 381]

Solicitor—Lien—Production of documents subject to lien—Right of third party to production—Enforcement by summary order.

A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if the documents were in his own possession. Accordingly, if a solicitor is required by his client to produce documents under a subpœna duces tecum the solicitor can refuse to do so if he has a lien on them, but the lien is no answer to a demand for their production by a third party. The doctrine is not confined to production under the exigency of a subpœna duces tecum; the same principle applies to other applications by solicitors who are acting for clients in litigation. Production may be enforced by a summary order.

Solicitor—Lien—Administration action—Order for production of documents subject to lien to prevent defeat of creditor's rights.

If in an administration action production by the solicitor for the executors is ordered of documents on which he has a lien acquired in respect of costs owed to him by the deceased in his lifetime, production being required to prevent the legal rights of creditors being defeated, it cannot matter whether the documents which are wanted came into the hands of the solicitor before or after the death of the deceased or before or after the commencement of the action, nor can it matter whether the executors are plaintiffs or defendants, nor who has the conduct of the action.

Solicitor—Lien—Solicitor acting for party to action—Implied agreement not to use lien to embarrass prosecution of action.

A solicitor who engages to act for a party to an action impliedly agrees that he will not use his lien on any document required for the purposes of the action so as to embarrass its prosecution.

Notes. Considered: *Re Jones and Roberts* (1905), 74 L.J.Ch. 458; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96. Followed: *Re Caudery, London Joint Stock Bank* v. *Wightman* (1910), 54 Sol. Jo. 444.

As to a solicitor's lien, see 36 HALSBURY'S LAWS (3rd Edn.) 173 et seq.; and for cases see 42 DIGEST 259 et seq.

Cases referred to:

(1) *Hope* v. *Liddell* (1855), 7 De G.M. & G. 331; 3 Eq. Rep. 790; 24 L.J.Ch. 691; 25 L.T.O.S. 231; 1 Jur.N.S. 665; 3 W.R. 581; 44 E.R. 129, L.JJ.; 18 Digest (Repl.) 83, *691.*

(2) *Hunter* v. *Leathley* (1830), 10 B. & C. 858; Dan. & L. 226; L. & Welsb. 125; 5 Man. & Ry. K.B. 522; 8 L.J.O.S.K.B. 201; 109 E.R. 667; affirmed sub nom. *Leathley* v. *Hunter* (1831), 7 Bing. 517; 1 Cr. & J. 423; 5 Moo. & P. 457; 1 Tyr. 355; 9 L.J.O.S. Ex. 118; 131 E.R. 200, Ex. Ch.; 22 Digest (Repl.) 425, *4618.*

(3) *Ley* v. *Barlow* (1848), 1 Exch. 800; 5 Dow. & L. 375; 3 New Pract. Cas. 68; 17 L.J.Ex. 105; 10 L.T.O.S. 376; 154 E.R. 340; sub nom. *Lee* v. *Barlow*, 5 Ry. & Can. Cas. 1; 18 Digest (Repl.) 83, *684.*

(4) *Furlong* v. *Howard* (1804), 2 Sch. & Lef. 115; 18 Digest (Repl.) 86, **382.*

(5) *Ross* v. *Laughton* (1813), 1 Ves. & B. 349; 35 E.R. 136, L.C.; 42 Digest 326, *3662.*

(6) *Bennett* v. *Baxter* (1840), 10 Sim. 417; 9 L.J.Ch. 137; 4 Jur. 50; 59 E.R. 676; 42 Digest 56, *477.*

(7) *Simmonds* v. *Great Eastern Rail. Co.* (1868), 3 Ch. App. 797; 38 L.J.Ch. 87; 19 L.T. 235; 16 W.R. 1100, L.JJ.; 42 Digest 306, *3401.*

(8) *Belaney* v. *Ffrench* (1873), 8 Ch. App. 918; 43 L.J.Ch. 312; 29 L.T. 706; 22 W.R. 177, L.J.; 42 Digest 306, *3408.*

(9) *Re Boughton*, *Boughton* v. *Boughton* (1883), 23 Ch.D. 169; 48 L.T. 413; 31 W.R. 517; 42 Digest 306, *3404.*

(10) *Warburton* v. *Edge* (1839), 9 Sim. 508; 8 L.J.Ch. 111; 3 Jur. 166; 59 E.R. 454; 42 Digest 260, *2940.*

(11) *Baker* v. *Henderson* (1830), 4 Sim. 27; 58 E.R. 11; 18 Digest (Repl.) 83, *689.*

(12) *Re Capital Fire Insurance Association* (1883), 24 Ch.D. 408; 49 L.T. 697; 32 W.R. 260; sub nom. *Re Capital Fire Insurance Association*, *Ex parte Beall*, 53 L.J.Ch. 71, C.A.; 18 Digest (Repl.) 84, *699.*

(13) *Re South Essex Estuary and Reclamation Co.*, *Ex parte Paine and Layton* (1869), 4 Ch. App. 215; 38 L.J.Ch. 305, L.C.; 18 Digest (Repl.) 84, *698.*

(14) *Boden* v. *Hensby*, [1892] 1 Ch. 101; 61 L.J.Ch. 174; 65 L.T. 744; 40 W.R. 205; 36 Sol. Jo. 153; 42 Digest 306, *3406.*

(15) *Steadman* v. *Arden* (1846), 15 M. & W. 587; 4 Dow. & L. 16; 15 L.J.Ex. 310; 7 L.T.O.S. 261; 10 Jur. 553; 153 E.R. 983; 18 Digest (Repl.) 80, *651.*

(16) *Commerell* v. *Poynton* (1818), 1 Swan. 1; 36 E.R. 273, L.C.; 42 Digest 306, *3411.*

(17) *Blunden* v. *Desart* (1842), 2 Dr. & War. 405; 42 Digest 269, *f.*

(18) *Brassington* v. *Brassington* (1823), 1 Sim. & St. 455; 57 E.R. 182; 18 Digest (Repl.) 83, *687.*

(19) *Christian* v. *Field* (1842), 2 Hare, 177; 5 Jur. 1130; 67 E.R. 74; sub nom. *Christian* v. *Chambers*, *Christian* v. *Field*, 11 L.J.Ch. 97; 42 Digest 263, *2982.*

(20) *Lord* v. *Wormleighton* (1822), Jac. 580; 37 E.R. 969, L.C.; 42 Digest 305, *3390.*

(21) *Colegrave* v. *Manley* (1823), Turn. & R. 400; 37 E.R. 1155; sub nom. *Colegrave* v. ——, 2 L.J.O.S.Ch. 39, L.C.; 42 Digest 307, *3413.*

(22) *Heslop* v. *Metcalfe* (1837), 3 My. & Cr. 183; 8 Sim. 622; 7 L.J.Ch. 49; 40 E.R. 894, L.C.; 42 Digest 307, *3414.*

(23) *Cocks* v. *Nash* (1833), 9 Bing. 723; 3 Moo. & S. 164; 2 L.J.C.P. 129; 131 E.R. 785; 42 Digest 321, *3574.*

(24) *Re Faithfull*, *Re London*, *Brighton and South Coast Rail. Co.* (1868), L.R. 6 Eq. 325; 18 L.T. 502; 42 Digest 259, *2927.*

(25) *Vale* v. *Oppert* (1875), 10 Ch. App. 340; 44 L.J.Ch. 579; 33 L.T. 41; 23 W.R. 780, L.JJ.; 42 Digest 306, *3402.*

Also referred to in argument:

Re Austin, *Ex parte Yalden* (1876), 4 Ch.D. 129; 46 L.J.Bcy. 59; 35 L.T. 720; 25 W.R. 134, C.A.; 42 Digest *2942.*

Re Toleman and England, *Ex parte Bramble* (1880), 13 Ch.D. 885; 42 L.T. 413; 28 W.R. 676; 5 Digest (Repl.) 671, *5902.*

Pratt v. *Pratt* (1882), 51 L.J.Ch. 838; 47 L.T. 249; 30 W.R. 837; 18 Digest (Repl.) 151, *1362.*

Bell v. *Taylor* (1836), 8 Sim. 216; 59 E.R. 87; 42 Digest 266, *3010.*

Lockett v. *Cary* (1864), 3 New Rep. 405; 10 Jur.N.S. 144; 18 Digest (Repl.) 84, *693.*

Robins v. *Goldingham* (1872), L.R. 13 Eq. 440; 41 L.J.Ch. 813; sub nom. *Re Suckling*, *Robins* v. *Goldingham*, 25 L.T. 900; 20 W.R. 277; 42 Digest 307, *3425.*

Appeal by a solicitor from an order of KEKEWICH, J., ordering him to produce certain documents on which he had a lien.

In August, 1895, one Hawkes died, he being then indebted to his solicitor, Cridland, who had in his possession some deeds and documents belonging to Hawkes, on which he (Cridland) had a solicitor's lien. In May, 1896, the executors of Hawkes employed Cridland to institute an action for the administration of the estate of the deceased, and such an action was commenced by Cridland, acting for them. The action not being prosecuted with due diligence, an order was made on May 14, 1897, giving the conduct of the action to a creditor. The executors remained parties to the action, and Cridland continued to act for them. The estate of the deceased was not sufficient to pay his creditors, and a question arose whether steps should be taken to get in a debt said to be due to the estate of the deceased. To determine this question it was necessary to see some of the documents on which Cridland had a lien, which documents were still in his possession. On Feb. 7, 1898, KEKEWICH, J., ordered Cridland to produce the documents at his office for perusal by the solicitors of the creditor having the conduct of the action. This order was made to enable them to prepare and lay before counsel a case for his opinion, as to what steps, if any, should be taken to get in the debt referred to. Cridland appealed against this order.

Patrick Rose Innes for Cridland.
Stewart Smith for the creditor of the deceased.

Cur. adv. vult.

Mar. 24, 1898. The following judgments were read.

SIR NATHANIEL LINDLEY, M.R., stated the facts and continued: The ground of this appeal is that the documents ordered to be produced came into the solicitor's possession, not from the executors for the purposes of the action, but from the deceased in his lifetime, and that he, Cridland, had a lien on them before and at the time of his original client's death and before any retainer by his executors. A great number of authorities were referred to by counsel, but none of them was exactly in point, and it is necessary to consider the question for decision on principle.

A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. This principle is as applicable at law as it is in equity. Accordingly, it has been long settled that, if a solicitor is required by his client to produce documents under a subpœna duces tecum, the solicitor can refuse to do so if he has a lien on them; but that the lien is no answer to a demand for their production by a third party: see *Hope* v. *Liddell* (1), *Hunter* v. *Leathley* (2). This doctrine is not confined to production under the exigency of a subpœna duces tecum. The same principle applies to other applications for production by solicitors who are acting for their clients in litigation: see, at law, *Ley* v. *Barlow* (3); in equity, *Furlong* v. *Howard* (4). Nothing can be clearer than LORD REDESDALE'S judgment in this last case. He said:

> "Though a solicitor may have a lien on a deed for his costs, yet, if his client is bound to produce it for the benefit of a third person, so also must the solicitor. I know this is not so understood in general; but the common opinion that the solicitor may withhold it from all parties in such a case is erroneous. The right is only as between his client and him."

It is on this principle that courts of equity order solicitors acting for clients who are parties to actions to produce documents on which the solicitors have a lien if their production is necessary for the purpose of doing justice to other persons besides their respective clients.

Administration actions are the most familiar instances of such actions. But the principle is not confined to them. As, however, we are dealing with an administration action I will refer only to such actions. It must not be forgotten that before the Supreme Court of Judicature Act, 1873, a creditor could be restrained from enforcing his debt at law after a decree for the administration of his debtor's estate, and a court of equity never allowed the proceedings under the decree to be embarrassed by the liens of solicitors of the parties. The solicitors of the parties to the proceedings are not deprived of their liens and treated as if they had none; but they are not allowed to render the proceedings abortive by refusing to produce documents in their possession which are wanted by other persons than their own clients, and which such other persons have a right to see. But even as between solicitor and client, where the client is a party to an action his solicitor may be bound to produce for the purpose of the action any documents of the client which are wanted for the purposes of the action, and which have come into the solicitor's possession in the course thereof, or for the purpose of conducting the same: see *Ross* v. *Laughton* (5) and other cases collected in Daniell's Chancery Practice (5th Edn.), vol. 2, p. 1717. This rule, however, does not cover the point to be decided in the present case.

To return to administration actions. If a creditor sued his debtor or his executor at law and required the defendant's solicitor by a subpœna duces tecum to produce a document belonging to the defendant, but in the possession of the solicitor who had a lien upon it, I take it to be plain that the lien did not justify the solicitor in refusing to produce the document; and *Ley* v. *Barlow* (3) shows that an order for its production might be made even before trial without subpœna. If these are the principles on which the court acts in an administration action, if the production is ordered in order to prevent the legal rights of creditors from being defeated, it cannot matter whether the documents which are wanted came into the hands of the solicitor of the parties before or after the death of the deceased, or before or after the commencement of the action for administration; nor can it matter whether the executors are plaintiffs or are defendants, nor who has the conduct of the action. Having regard to the rights of the creditors, if Hawkes' executors now had the conduct of the action, their solicitor could not, in my opinion, effectually rely on his lien on the documents of the deceased to prevent their production for the purposes of enabling the executors to get in the assets of the deceased. The rights of the creditors under the administration judgment, and their inability to sue at law, explain the apparent anomaly that the executors should be entitled to obtain production from their own solicitor of documents on which he has a lien as against them. The fact that they have been deprived of the conduct of the action does not improve the solicitor's position so long, at all events, as his clients remain parties to the action, and have not discharged him: see on this point *Bennett* v. *Baxter* (6), *Simmonds* v. *Great Eastern Rail. Co.* (7). Further, Cridland's clients are still parties, and he acts for them. It is unnecessary, therefore, to consider what his right might be under other circumstances.

The general rule of the court, founded on the principles above referred to, is very emphatically stated in *Belaney* v. *Ffrench* (8). That was an administration suit, and it was the case of a solicitor who had acted for several of the parties to it, and had been discharged by them, and who refused to produce documents belonging to them, but on which he had a lien. The receiver who had been appointed in the action wanted to see the documents, and James, L.J., said (8 Ch. App. at p. 920):

> "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the court, and cannot use that means of obtaining payment."

Re Boughton (9) is another recent decision to the same effect, and, further, Fry, J., there points out the importance of the rights of creditors. It is, however, true that the documents which were in question in those cases came into the solicitor's

hands from the clients who discharged them. The point, therefore, made before us by Mr. Cridland's counsel had not to be considered.

I proceed now to examine the authorities more particularly relied upon by Cridland in support of his contention. The first and most important is *Warburton* v. *Edge* (10). The facts of that case are not very clearly stated; but, as I understand them, an administratrix who was abroad had a solicitor here who had acted for her in a suit for the administration of the deceased's estate, but had been instructed by her to act for her no longer, and a receiver had been appointed. The solicitor had some documents which came into his hands after the death of the deceased, on which he claimed a lien, not only for the costs of the suit, but for other costs due to him from the administratrix before the commencement of the suit. The plaintiffs were creditors of the deceased, and they petitioned for an order of a very unusual nature. They prayed for an order on the solicitor to deliver to the receiver or to deposit with the master all deeds, etc., in his custody relating to the personal estate of the deceased, subject to any lien the solicitor might have, and for an inquiry into the existence of any lien which the solicitor might claim, and as to the amount due to him in respect of it, and, if necessary, for a taxation of his bill of costs to the intent that it might be paid out of the estate of the deceased. SHADWELL, V.-C., refused to make any order on this petition. He said the plaintiffs had no right to the production of the documents, as some of them had come into the solicitor's hands before the suit commenced, and he had a lien on them for costs in other business besides the conduct of the suit. The Vice-Chancellor also said the plaintiffs had no right to tax the solicitor's bill. The petition being really a petition by a creditor for the taxation of the solicitor's costs and for payment of them by the administratrix, the order of the Vice-Chancellor seems to have been right. But, if he meant to say that the creditor had no right to have the documents produced for the purpose of the action because of the lien, the Vice-Chancellor, in my opinion, went too far. Having regard to what he said in *Baker* v. *Henderson* (11), he may have meant to go this length. That case presents no difficulty, although the first few words of the judgment were relied upon by counsel for Mr. Cridland.

In *Re Capital Fire Insurance Association* (12) an order was made to wind-up a company. The company had employed a solicitor who, when the petition for a winding-up order was presented, had a lien on some document which the liquidator wanted. CHITTY, J., made an order directing the solicitor to deliver those documents to the liquidator, but subject to the solicitor's lien. On appeal this order was discharged as to some of the documents, viz., those referred to in the third part of the order on which the solicitor had a lien before the petition was presented. The ground of this decision, as I understand it, was that the solicitor was not the solicitor of the liquidator in the winding-up proceedings and was not acting for the company in those proceedings: see per COTTON, L.J., 24 Ch.D. at p. 417, the liquidator having employed another solicitor. The court moreover pointed out that as to these documents the liquidator could obtain production of them under the winding-up sections of the Companies Act, 1862, as decided in *Re South Essex Estuary and Reclamation Co., Ex parte Paine and Layton* (13). No doubt COTTON, L.J., said (see 24 Ch.D. at p. 420) that *Re Boughton* (9) did not apply to "such a case." By this expression I understand was meant the case of documents in the hands of a solicitor before the administration suit commenced, which solicitor was not employed in that suit by the client against whom the lien could be asserted. In such a case the solicitor would be a stranger to the litigation, and could not be compelled to produce documents except as a witness by subpœna duces tecum. That was the sort of case which COTTON, L.J., had to consider, and I do not understand the observations to apply to the case of a solicitor employed in an administration suit by a party to the suit who could be made by the other parties or by creditors to produce documents otherwise than by subpœna.

Boden v. *Hensby* (14) was a partition action. The plaintiff had changed his solicitor, and it was held that the solicitor could not be compelled to produce

documents on which he had a lien before the action was commenced, although he could not withhold those which came into his possession afterwards. North, J., who decided this case, acted on the authority of *Re Capital Fire Insurance Association* (12). If third parties were entitled to have the documents produced, *Boden* v. *Hensby* (14) went too far in favour of the solicitor. These were the principal authorities referred to, and the only ones which it is necessary to notice. None of them appears to me to compel the court to reverse the order appealed from. It seems to me right in principle and the appeal ought, therefore, to be dismissed with costs.

RIGBY, L.J.—The respondent was a creditor of the deceased person whose estate is being administered, and the conduct of the cause has been transferred to him. Mr. Cridland has acted for the plaintiffs from the commencement of the action, and does so now, so that there can be no question as to his having been discharged, if that be material. The order made is for production only, that being apparently sufficient for the purpose of ascertaining what information useful for the statements in the case to be laid before counsel the documents contain. But for the fact that the lien arose before the action was commenced, there could, I think, be no question on the decided cases that the order appealed from is correct.

The question will turn out to be one, in my judgment, of procedure only. There can be no doubt of the right of the creditor to production, and the only question which can arise is whether that right should be enforced against the solicitor as a witness or whether a summary order in the action is, according to the course of practice, permissible. As to documents which the solicitor has obtained in, or for the purposes of, the action, it is clear that a summary order in the action may be made. The only possible doubt is as to those on which he had a lien before the action. Whether the lien was acquired from the testator or his executors, seems to me to be immaterial. At law the very case seems to me to have been decided in *Ley* v. *Barlow* (3), where inspection before trial was ordered of documents which were in the possession of the attorney of a party to the action, notwithstanding that he had a lien upon them before action. This case has not to my knowledge ever been questioned. It was, however, apparently decided on the authority of *Hunter* v. *Leathley* (2), which had reference to a witness required by a subpœna duces tecum to produce the document under consideration, and more especially of *Steadman* v. *Arden* (15), where it is not clear that the lien was insisted upon. It may be possible, therefore, to suggest that the distinction was not so clearly brought before the court as to make the case a conclusive authority. Although, therefore, I am of opinion, as will hereafter appear, that the case was well decided, and that the doctrine is the same in equity as at law, yet, having regard to the numerous cases cited before us in the arguments, and to a certain amount of confusion and apparent conflict between them, I think it better to discuss the present case on principle supported by some authorities which cannot be questioned.

The clear statement of the limit to the right of a solicitor to refuse production of documents on which he has a lien enunciated by Lord Redesdale in *Furlong* v. *Howard* (4) may be and has been rested on the very general rule that no one can give greater rights to another than he has himself. The owner of a document who would himself be obliged to produce it for the purposes of justice cannot give to his solicitor a right to refuse production. Lord Redesdale's statement of the law in *Furlong* v. *Howard* (4) is only one of many statements to the like effect to be found in the books, though it is a very clear and important instance. The principle itself is so obviously just that I do not think it requires any further support on authority, and I only go into the authorities for the purpose of showing that it has been recognised down to the present time, in order to get rid of any argument that might be set up that the law has been changed.

In addition to the cases already mentioned of *Hunter* v. *Leathley* (2) (where the lien was a broker's lien on a policy of insurance, but the principle is the same) and *Ley* v. *Barlow* (3), I may refer to the following cases. In *Commerell* v. *Poynton*

(16) LORD ELDON said (1 Swan. at p. 2): "A solicitor cannot, by virtue of his lien, prevent the king's subject from obtaining justice." The same principle is to be found enunciated throughout the whole of the carefully considered judgment of LORD SUGDEN in *Blunden* v. *Desart* (17). In *Brassington* v. *Brassington* (18), which case was treated as undoubted law in *Hope* v. *Liddell* (1), SIR JOHN LEACH says (1 Sim. & St. at p. 457):

> "It would be very extraordinary if a deed by which property is conveyed were to be of no effect because the party who executed the deed did not choose to pay his solicitor's bill. It may be very reasonable that the husband [the document was a marriage settlement] if calling for the deed for his own purposes, should not have access to it until the solicitor's claim was satisfied; but to refuse to produce it as a witness for the other party cannot be justified."

In *Hope* v. *Liddell* (1), above referred to, KNIGHT BRUCE, L.J., says (7 De G.M. & G. at p. 336):

> "If Benjamin Norton and Edward Spencer Norton [the persons against whom the lien was claimed] were now alive, and either of them had actual possession of the deed, he would be compellable certainly to produce it for the purpose of evidence at the instance of the defendants. Why then . . . should not Mr. Clipperton [the solicitor claiming a lien] do so? I think that he ought."

TURNER, L.J., said that he had long thought the question settled by *Brassington* v. *Brassington* (18). In *Re South Essex Estuary and Reclamation Co., Ex parte Payne and Layton* (13), LORD HATHERLEY, L.C., made, under s. 115 of the Companies Act, 1862, an order for production against a solicitor claiming a lien on documents belonging to a company in liquidation. The Lord Chancellor, after referring to the case of a client asking for production without having paid his solicitor's bill, said it was equally beyond doubt that a solicitor would have been ordered to produce on a subpœna duces tecum obtained by a creditor or third party. He then decides the case on the ground that under the Companies Act the official liquidator represented the creditors as well as the company. This is an express decision of the Lord Chancellor that a creditor is not a person who claims through or under the client so as to be in the same position with him, but is a person claiming hostilely to him so as to be entitled to the full benefit of LORD REDESDALE'S statement of the law in *Furlong* v. *Howard* (4).

In *Belaney* v. *Ffrench* (8) JAMES, L.J., said (8 Ch. App. at p. 920):

> "But a solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the court, and cannot use that means of obtaining payment."

It may be, as suggested by COTTON, L.J., in *Re Capital Fire Insurance Association* (12) that in *Belaney* v. *Ffrench* (8) only papers in the cause were being dealt with; but I do not think that the generality of the language used by JAMES, L.J., ought to be limited, though the case itself would, if COTTON, L.J., is right as to the facts, be no authority as to the way in which production of deeds on which a lien attached prior to suit is to be procured against a debtor who has been discharged. COTTON, L.J., in *Re Capital Fire Insurance Association* (12), said that a solicitor can claim no greater lien than the person who puts the documents into his hands is capable of creating. Many of the cases dealt with by me involve the same principle, and there are other decisions which might if necessary be cited to the same effect: see, for instance, FRY, J., in *Re Boughton* (9). These authorities make it clear that the principle enunciated by LORD REDESDALE in *Furlong* v. *Howard* (4) has never been modified, and any dicta or even any decision if there be any which is contrary to that principle, must be wrong.

I now go to the consideration of the remedies against a solicitor to enforce pro-

duction or delivery notwithstanding his lien. (i) Of course delivery of the document may be enforced by way of redemption as in *Christian* v. *Field* (19), where the plaintiff in a creditors' suit (*Christian* v. *Chambers*), who had in that suit obtained a decree for sale of real estate of a testator for the payment of his debts was held entitled to maintain a suit (*Christian* v. *Field*) to redeem title deeds held by a solicitor of the testator claiming a lien on them, but an entire stranger to the creditors' suit. In that case redemption was the only effectual remedy, since the deeds were wanted for the purpose of delivering them to the purchaser. (ii) Where there is no litigation in which the solicitor acts or has acted for one of the parties the usual course is to summon him as a witness on a subpœna duces tecum, and to require him to produce the document on which he claims a lien. Several of the cases above referred to, including *Brassington* v. *Brassington* (18) and *Hope* v. *Liddell* (1), are of this nature, and there are many other cases both at law and in equity which might be cited. There is no case, so far as I know, where production has not been enforced against a solicitor notwithstanding the lien if the person demanding production could have enforced production against the client. Consistently with Lord Redesdale's statement in *Furlong* v. *Howard* (4), there could be no such case. (iii) There are innumerable instances in which a solicitor has been ordered summarily to produce or deliver without prejudice to his lien where he is or has been a party, plaintiff or defendant. Perhaps the most common case is that now before us, viz., an administration action, though the practice is not confined to administration actions. Wherever the court has taken upon itself the administration of or dealing with an estate for the benefit of persons other than those against whom the lien authorises a refusal to produce, it has been the practice to enforce production in a summary way, by order in the action against the solicitor of any party, and *Ley* v. *Barlow* (3) has been already indicated as a case of this kind at law. No case has been produced which shows that any difference is to be made so long as the solicitor continues to act as solicitor in the action, with reference to a lien existing before suit and one arising during the pending action. Nor can there be any such difference in principle. A solicitor who engages to act for a party to an action impliedly agrees that he will not use his lien on any document required for the purposes of the action so as to embarrass the prosecution of it.

This conclusion would be sufficient for the purpose of this appeal, but many cases of the exercise of the summary jurisdiction have been cited, and it may be desirable to see whether any of them are adverse to the proposition laid down. The first cases of the kind that I need mention are *Ross* v. *Laughton* (5) and *Commerell* v. *Poynton* (16), both decisions of Lord Eldon. In the first, on the application of assignees of a bankrupt defendant to an administration action in which a decree had been made, Lord Eldon made an order for production against the defendant's solicitor notwithstanding his lien. In the second, Lord Eldon, on the application of the defendant against his solicitor who had refused to proceed in the action, ordered the solicitor to permit inspection by the defendant for the purposes of the action, and directed production by the solicitor before the master for the purposes of the action. I mention these cases particularly, because Lord Eldon has been supposed to have withdrawn somewhat from the doctrine involved in them, by what fell from him in *Lord* v. *Wormleighton* (20). Lord Eldon's decision in the last mentioned case has been referred to as more favourable to the solicitor's lien than the earlier cases. The case itself has frequently been misunderstood. It has been argued that Lord Eldon there laid down something inconsistent with the former decisions in *Commerell* v. *Poynton* (16), *Ross* v. *Laughton* (5), and his subsequent decision in *Colegrave* v. *Manley* (21). Lord Cottenham, however, in *Heslop* v. *Metcalfe* (22), treats the case as quite consistent with *Colegrave* v. *Manley* (21), and with *Commerell* v. *Poynton* (16). In like manner Wood and Selwyn, L.JJ., in *Simmonds* v. *Great Eastern Rail. Co.* (7), expressly decided that *Ross* v. *Laughton* (5) was not overruled by it. In *Belaney* v. *Ffrench* (8) Bacon, V.-C., referring to *Lord* v. *Wormleighton* (20), said that Lord Eldon's words were greatly misunderstood if

they were understood to say that a solicitor might, by detaining papers, embarrass the proper and rational progress of an administration suit. The opinion of JAMES, L.J., in the same case has already been cited, and both were expressly approved by FRY, J., in *Re Boughton* (9). Having regard to all these explanations of *Lord* v. *Wormleighton* (20), it is impossible, I think, to treat it as introducing any substantial change into the law as to solicitors' lien. It is, in my judgment, only a decision against the exercise of summary jurisdiction in the case where a solicitor has not discharged himself but has been in effect discharged, and his former clients move against him.

Colegrave v. *Manley* (21) is a very leading and important case on the subject of the summary jurisdiction. There LORD ELDON, in the case of a solicitor who had discharged himself, made an order that he, the late solicitor, should deliver to the new solicitor of his former client all the proceedings in the cause, and all such deeds, evidence, papers, and writings whatsoever as had come into the possession or custody of the late solicitor belonging to the plaintiff and which related to the cause, subject to the lien of the late solicitor for the amount of what should be found due to him on the taxation of his bill of costs. The terms of this order are sufficiently wide to include papers and costs which respectively came into the solicitor's hands and were incurred before the commencement of the suit, though it does not clearly appear that there were any such. In *Baker* v. *Henderson* (11) SHADWELL, V.-C., when making an order on the plaintiff's solicitor for the production of documents in his possession for the purposes of the suit, takes notice that the solicitor had no lien on the documents anterior to the suit. This, however, only means that he had not to decide a question as to such an antecedent lien.

In *Heslop* v. *Metcalfe* (22) the same learned judge, on the authority of *Colegrave* v. *Manley* (21), ordered delivery up by a solicitor, held to have discharged himself, of papers in a suit to his client's new solicitor. This decision was affirmed on appeal by LORD COTTENHAM. LORD COTTENHAM there also relies on *Colegrave* v. *Manley* (21), and especially on a paragraph in LORD ELDON'S judgment in these terms (Turn. & R. at p. 402):

> "So far as the use of papers is concerned, the suitor, when his solicitor discharges himself, must have his business conducted with as much ease and celerity and as little expense as if the connection of solicitor and client had not been dissolved."

It does appear from the report of *Heslop* v. *Metcalfe* (22) (3 My. & Cr. 183) that the papers were only papers in the cause, though the late solicitor claimed a lien thereon for his general costs outside the suit; but this fact was only relied upon as evidence of the solicitor having discharged himself, and there is not a word in the carefully considered judgment of LORD COTTENHAM to show that he would have excluded from the order papers received before the commencement of the suit, and subject to a lien for general costs, if in fact they were necessary for the proper prosecution of the suit. The nature of the suit is not shown from the report.

Warburton v. *Edge* (10) is a case which has been much discussed, and is not easy to understand. I think that the true view of the case is that the petition presented by the plaintiffs, creditors of the deceased person whose estate was being administered, was an informal application for redemption of the documents referred to in it on terms which the plaintiffs had no right to impose, and that it was dismissed partly on that ground and partly on the ground that the plaintiffs had no locus standi. One main reason for the order made on the judgment is that the solicitor had a lien on the documents prior to the right of the administrator to take them out of his hands; the lien was consequently prior to the right of the plaintiffs who were merely general creditors of the deceased's estate, and could only take the estate as they found it. This seems to me to be in direct opposition to the string of authorities above cited commencing with *Furlong* v. *Howard* (4), and deprives the case of any weight as an authority.

A The next case which I think it worth while to deal with is that of *Bennett* v. *Baxter* (6). It decided that the fact of the conduct of an administration suit being taken from the plaintiffs and given to another creditor did not entitle the plaintiffs' solicitor to treat himself as discharged, or in a better position than if he had discharged himself, and gave the creditor having the conduct the right to inspect and take copies of all papers in the cause. On the authority of *Colegrave* v. *Manley* (21) B an order for delivery, if asked for, might, I think, have been made. The constant recurrence of a distinction between the position of a solicitor discharging himself and that of one who has been discharged will be observed, and I think that there has been a good deal of misapprehension as to the meaning of those cases. In fact, they only apply to the exercise of summary jurisdiction to make an order in the suit. If a solicitor, having a lien, does not act and never has acted in the suit C for a client party thereto, the course of procedure against him cannot in general be by way of application in the suit to which he is in every way a stranger. If he begins to act for a party, he must of course be taken to be ready to do everything necessary for carrying on the suit effectually. He certainly cannot set up a lien acquired during the progress of the suit so as to embarrass the proceedings in it; and no case that I have heard of has laid it down that he can, while acting in the D suit, use in such a manner a previously acquired lien. If his client discharges him it is obvious that such discharge cannot in substance affect the right to production of any third party. The utmost effect of any of the class of cases now being dealt with has been to place him in the circumstances of the particular case in the same position as if he had never been a party to the litigation; that is to say, to release him from the summary jurisdiction. Even as to this, I have not observed a case E in which the summary jurisdiction has been cut down except where the client himself or his representative has been the applicant, though I should hesitate to say that there are no cases to that effect. If, on the other hand, the solicitor discharges himself, he has always been held to be in the same position as though he continued to act; that is to say, to be subject to the summary jurisdiction.

Re Capital Fire Insurance Association (12) has been supposed to indicate that the F summary jurisdiction cannot extend to the case of a lien acquired before the commencement of the litigation. I do not think that to be the meaning of the case. COTTON, L.J., there guarded himself carefully against appearing to lay down any such conclusion. He said, referring to the documents which the solicitors had possession of before Sept. 18, 1882, i.e., the commencement of the litigation (24 G Ch.D. at p. 417),

> "they came to the hands of the solicitor before the presentation of the petition, and I see nothing to affect his lien."

He cannot by these words have meant that the right of any person to insist upon the production on subpœna was taken away. When the three authorities relied H upon by CHITTY, J., in the court below were referred to, he says :

> "None of them seem to me to govern the case. A solicitor employed in a suit is in a very different position."

This can, I think, only mean, having regard to what he had before said, that in a I suit a solicitor may be subject to the summary jurisdiction as to documents on which he acquired a lien before suit. It is remarkable that in no case in which a solicitor has been held to be subject to the summary jurisdiction has there been any attempt to limit the summary jurisdiction by saying that it could not apply to a lien acquired before suit. It seems to me that it is more in accordance with common sense that the summary jurisdiction should, if it applies at all, be extended to all cases, than that an order under it should be confined to papers acquired in or for the purposes of the action, while as to those acquired before the action the procedure to compel production by the solicitor as a witness should necessarily be resorted to. My

conclusion is that *Ley* v. *Barlow* (3) should be maintained, and the appeal dismissed with costs. A

VAUGHAN WILLIAMS, L.J.—I agree in the result, but, having been favoured with the opportunity of reading the judgments of SIR NATHANIEL LINDLEY, M.R., and RIGBY, L.J., I prefer to give my own reasons, which differ considerably from those of the Master of the Rolls and RIGBY, L.J. B

I agree that it would seem to be an unsatisfactory state of the law if, in a case where the conduct of an administration suit is taken from the plaintiff-executor and given to a creditor, the solicitor for the plaintiff-executor should be able to embarrass the progress of the suit by refusing to produce documents on which he has a lien, even though he acquired such lien on the documents received from the testator in respect of work done for him; but, if production by the solicitor of such documents C is to be ordered, it is important to ascertain the principle on which the order is made. A precisely similar order was made in *Bennett* v. *Baxter* (6); but SHADWELL, V.-C., in that case, based his order on the misconduct of the solicitor in delaying the suit, which misconduct led to the conduct of the suit being given to a creditor. No misconduct is, however, imputed to the solicitor in the present case, and it, therefore, becomes necessary to consider on what principle an order on this solicitor D for production can be made.

There can be no doubt but that the lien of the solicitor would not be a ground for refusal to produce the documents at the trial of an action if the solicitor were served with a subpœna issued at the instance of any person other than the person against whom the lien came into existence or someone claiming through him. *Hope* v. *Liddell* (1) is a clear authority for this; so also is *Furlong* v. *Howard* (4) E and *Brassington* v. *Brassington* (18). This, however, would not justify the order to produce in this case, unless either it is right to make an order to produce before trial in every case in which production would be compelled at the trial by a person served with a subpœna duces tecum, or unless an executor in an administration action, or a creditor having the conduct of it, is to be treated as a person other than the testator or someone claiming under him. It is said that there is no difference F between the liability to produce at the trial and a liability to produce before the trial, and that whenever the one production can be compelled the other can also. I do not think that is so. If it were so, one would have expected to find instances of orders on mere strangers to an action to produce documents which they had in their possession for inspection by a party to the action before trial. I know of no such order. G

The report on *Furlong* v. *Howard* (4) is very short, and it is not at all clear from it that the order to produce was not at the trial, or that the document was not an instrument in which the applicant who obtained the order had not an interest as a party thereto. In *Ley* v. *Barlow* (3), and in *Steadman* v. *Arden* (15), and in *Hunter* v. *Leathley* (2) the applicant who obtained the order for production before trial had H an interest as a contracting party in the document ordered to be produced for inspection, and at law it was always the practice, even before there was any statutory provision for discovery, to order the production of such documents for the purpose of pleading, but save for this purpose, and in the case of such documents no order could be obtained to compel a third party, a stranger to the action, to produce documents for inspection in a cause: see *Cocks* v. *Nash* (23), where the whole sub- I ject is very fully discussed. Moreover, it is difficult to explain the refusal of the order for production and inspection in *Lord* v. *Wormleighton* (20), or the necessity to rely in *Bennett* v. *Baxter* (6) on the default of the attorney, if there was any broad general rule which could be invoked to the effect that every witness must produce for inspection before trial any document which he would be compelled to produce at the trial on a subpœna duces tecum.

It seems to me important in examining the authorities to notice the distinction between orders for delivery up of papers and an order for production of papers; and

again the distinction between an order for the production of papers by a solicitor who by words or conduct has discharged himself and an order for production by a solicitor who has been discharged without misconduct on his part by the client. The granting or refusal of an order for delivery up of papers by the acting solicitor to the client does not involve the affirmation or negation of any obligation by a stranger to the action to produce a document which he holds subject to his lien; nor does the order for production by a solicitor, who has discharged himself, of documents received by him for the purposes of the cause; but an order on a solicitor discharged by the client to produce before the trial for inspection documents on which he has a lien might involve the affirmation of such an obligation by a mere witness to produce before trial documents on which he had a lien, for the solicitor in such case would without any fault of his own have become a stranger to the action. But I do not think it does. *Re Faithfull* (24) seems to me to lay down the rule that a discharged solicitor is under no obligation to deliver or even produce or allow inspection of papers on which he has a lien. And I am not aware that a solicitor thus discharged has any special rights or liabilities beyond those of other persons holding documents subject to a lien. But, on the other hand, it is clear law that in administration and other representative actions a discharged solicitor cannot resist production at the instance of creditors of documents received for the purpose of the action.

What is the reason of this apparent anomaly? The reason seems to me to be that a solicitor receiving from his client papers in the course of a cause for the purpose of doing justice to his client thereby undertakes to produce them if necessary in the cause, and is not relieved from this undertaking by being discharged by the client in so far as relates to the obligation incurred by the client in that cause. Even if this does not explain the anomaly, the fact remains that administration and representative actions are at all events treated as a special class outside the general rule. The very fact that in cases of orders for production as distinguished from delivery, a distinction is drawn between papers received for the purposes of the cause and papers not so received: see *Ross* v. *Laughton* (5); *Commerell* v. *Poynton* (16); *Vale* v. *Oppert* (25); seems to point to the liability to produce for inspection being based, not on any general obligation, but on special obligations attaching to solicitors.

The result of all these considerations seems to be to show that there is no liability in a mere stranger to produce documents on which he has a lien before the trial or otherwise than at the trial in obedience to subpœna. This being my view, I will not trouble to consider how far the plaintiff in an administration action, as representing the creditors of the estate, can set up the right of third persons to insist on the production under a subpœna, and I will now proceed to consider whether there is any special obligation on a solicitor as such to produce for inspection before trial documents in circumstances like those appearing in the present case. The remedy against a solicitor who wrongfully refuses to produce or deliver up papers is by summary order against him as an officer of the court. The obligation of a solicitor claiming a lien on papers received by him professionally, and the extent of the remedy against him are defined in a long series of cases chiefly in courts of equity.

These cases mostly turn on the difference in the obligation of a solicitor who has been discharged by the client and a solicitor who has discharged himself by refusing to continue to act. The present case differs from such cases in that the solicitor has not been discharged by the client or by his own refusal to act, but continues the solicitor in the cause. So far as relates to the cases of solicitors discharged by the client there is a long series of cases going to show that a solicitor discharged by the client is liable to produce for inspection or deliver up, subject to his lien, all papers received for the purpose of the cause in every case in which litigants other than his client are concerned at the instance of such other parties, and creditors and others concerned in administration and other representative actions are treated for this purpose as parties to the litigation distinct from the client of the solicitor, but these cases all limit the obligation to papers received by the solicitor for the purpose

of the cause and seem to exclude from the obligation papers on which the solicitor has a lien acquired prior to and irrespective of the cause. *Ross* v. *Laughton* (5), *Belaney* v. *Ffrench* (8), *Re Boughton* (9), *Re Capital Fire Insurance Association* (12), *Boden* v. *Hensby* (14) are examples of this class of case. It is difficult to reconcile *Lord* v. *Wormleighton* (20) and *Warburton* v. *Edge* (10) with the obligation to produce or deliver up in these cases. The distinction between *Ross* v. *Laughton* (5) and *Lord* v. *Wormleighton* (20) upon the ground on which the lords justices tried to reconcile them in *Simmonds* v. *Great Eastern Rail. Co.* (7) seems too narrow, as it would exclude administration actions from the scope of those cases. The obligation of the discharged solicitor to produce in the cause papers received for the purpose of the cause in administration or representative actions seems, however, well established.

What is the obligation of a solicitor who has not been discharged in reference to the production of papers? I cannot doubt but that he is bound to produce all papers received in the action; but does his obligation go further? Is he bound to produce papers received before the action on which he had already acquired a lien? I think he is. There is no direct authority; but the observation of Shadwell, V.-C., in *Bennett* v. *Baxter* (6) and of the lords justices, in *Simmonds* v. *Great Eastern Rail. Co.* (7), seem to show that he is, and that this is an obligation, not towards persons other than his client, but to the client himself. The solicitor has a mere right of retainer, and the enforcement of that right seems to me inconsistent with the duty which he has undertaken to perform. He must, I think, be taken to have known, when he accepted the retainer, that it might be necessary to produce under an order for discovery made on his client in the action these papers upon which he had a lien, and to have waived by simple implication his lien so far as the production of the papers might prove necessary in the suit. This obligation is one which continues in its entirety if he voluntarily discharges himself. He must still continue to afford facilities for the prosecution of the suit. It is to be remarked also that there is no case reported in which a solicitor, while still the solicitor on the record, has ever successfully resisted, or indeed attempted to resist, this obligation on account of a lien acquired prior to the action, which is very remarkable, as the opportunity for making such a claim must have arisen again and again. I wish to add that, even if I am wrong in assuming that this is an obligation of the solicitor towards the client, the obligation might yet be held to arise in the case of an administration action or any action in which the rights of other persons are concerned, but I prefer to rest my judgment on the ground of obligation to the client.

I may add that I think that *Re Capital Fire Insurance Association* (12) and *Boden* v. *Hensby* (14), in so far as these cases are authorities for limiting, in the case of a solicitor discharged by the client, the order, whether for production or delivery up of papers, to papers received in the action, are in accordance with previous authority; and I wish further to add that I think that, if *Colegrave* v. *Manley* (21) and *Heslop* v. *Metcalfe* (22) are looked at, there is nothing in them to show that the orders were intended to extend to papers received by the solicitors before the action; but, on the contrary, the observations of Lord Cottenham and the Vice-Chancellor point in the opposite direction. The order in *Bennett* v. *Baxter* (6) is similarly limited to documents in the cause.

Solicitors: *Spencer Cridland & Co.; Frame & Son.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

MARSH *v.* JOSEPH

[Court of Appeal (Lord Russell of Killowen, C.J., Lindley and A. L. Smith, L.JJ.), November 19, 23, 24, December 18, 1896]

[Reported [1897] 1 Ch. 213; 66 L.J.Ch. 128; 75 L.T. 558; 45 W.R. 209; 13 T.L.R. 136; 41 Sol. Jo. 171]

Solicitor—Misconduct—Negligence—Breach of duty—Liability to pay compensation—Measure of liability—Ratification of acts of another—Need to prove full knowledge or unqualified adoption.

Where negligence or other breach of duty is committed by a solicitor, an officer of the court, in a matter in which the court has seisin, the court may, and, if it can do full justice, will, summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the act of negligence or misconduct.

Where the negligence or misconduct is said to have arisen from the ratification by the solicitor of improper or illegal acts previously done by another person, to constitute a binding ratification of acts a priori unauthorised the acts must have been done for and in the name of the solicitor, and there must be proved full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the solicitor intended to take on himself the responsibility for such acts, however culpable they were.

Circumstances in which a solicitor **held** not to have ratified or adopted the fraudulent acts of another.

Solicitor—Partnership—Liability for act of partner—Permission to third person to use name of firm.

It is not within the scope of the agency authority created by the partnership for one partner in a firm of solicitors to allow the use of the name of the firm by another solicitor, and thereby to bind his co-partner with responsibility for any liability which may be thereby incurred.

Notes. Explained and Distinguished: *Re Williams' Settled Estates*, [1910] 2 Ch. 481. Referred to: *Hambro* v. *Burnand* (1903), 8 Com. Cas. 252; *Briess* v. *Woolley*, [1954] 1 All E.R. 909.

As to the liabilities of solicitors and partnerships between them, see 36 Halsbury's Laws (3rd Edn.) 192 et seq., 209-212; and for cases see 42 Digest 319 et seq., 370 et seq.

Cases referred to:

(1) *Slater* v. *Slater* (1888), [1897] 1 Ch. 222, n.; 58 L.T. 149; 42 Digest 368, *4184*.

(2) *Re Dangar's Trusts* (1889), 41 Ch.D. 178; 58 L.J.Ch. 315; 60 L.T. 491; 37 W.R. 651; 5 T.L.R. 266; 42 Digest 368, *4187*.

(3) *Re Ward* (1862) 31 Beav. 1; 54 E.R. 1037; 42 Digest 351, *3993*.

(4) *Todd* v. *Studholme* (1857), 3 K. & J. 324; 26 L.J.Ch. 271; 29 L.T.O.S. 24; 5 W.R. 277; 69 E.R. 1132; 42 Digest 368, *4185*.

(5) *Re Spencer* (1870), 39 L.J.Ch. 841; 21 L.T. 808; 18 W.R. 240, L.C.; 42 Digest 351, *3996*.

(6) *Brydges* v. *Branfill* (1842), 12 Sim. 369; 11 L.J.Ch. 249; 6 Jur. 310; 59 E.R. 1174; 42 Digest 367, *4181*.

Also referred to in argument:

British Mutual Banking Co., Ltd. v. *Charnwood Forest Rail. Co.* (1887), 18 Q.B.D. 714; 56 L.J.Q.B. 449; 57 L.T. 833; 52 J.P. 150; 35 W.R. 590, C.A.; 34 Digest 137, *1059*.

Storey v. *Ashton* (1869), L.R. 4 Q.B. 476; 10 B. & S. 337; 38 L.J.Q.B. 223; 33 J.P. 676; 17 W.R. 727; 34 Digest 140, *1093.*

Limpus v. *London General Omnibus Co.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 11 W.R. 149; 158 E.R. 993; sub nom. *General Omnibus Co., Ltd.* v. *Limpus*, 9 Jur.N.S. 333, Ex. Ch.; 34 Digest 129, *989.*

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 34 Digest 129, *987.*

Phosphate of Lime Co. v. *Green* (1871), L.R. 7 C.P. 43; 25 L.T. 636; 9 Digest (Repl.) 440, *2872.*

Freeman v. *Rosher* (1849), 13 Q.B. 780; 18 L.J.Q.B. 340; 13 Jur. 881; 116 E.R. 1462; 1 Digest (Repl.) 466, *1125.*

Lewis v. *Read* (*Reed*) (1845), 13 M. & W. 834; 14 L.J.Ex. 295; 4 L.T.O.S. 116, 419; 153 E.R. 350; 1 Digest (Repl.) 466, *1124.*

Bolton Partners v. *Lambert* (1889), 41 Ch.D. 295; 58 L.J.Ch. 425; 60 L.T. 687; 37 W.R. 434; 5 T.L.R. 357, C.A.; 1 Digest (Repl.) 460, *1088.*

Brook v. *Hook* (1871), L.R. 6 Exch. 89; 40 L.J.Ex. 50; 24 L.T. 34; 19 W.R. 508; 1 Digest (Repl.) 454, *1056.*

M'Kenzie v. *British Linen Co.* (1881), 6 App. Cas. 82; 44 L.T. 431; 29 W.R. 477, H.L.; 1 Digest (Repl.) 454, *1057.*

Bank of Ireland v. *Evans' Charities Trustees* (1855), 5 H.L.Cas. 389; 25 L.T.O.S. 272; 3 W.R. 573; 3 C.L.R. 1066; 10 E.R. 950, H.L.; 13 Digest (Repl.) 198, *181.*

Mayor, Constables and Co. of Merchants of the Staple of England v. *Bank of England* (1887), 21 Q.B.D. 160; 57 L.J.Q.B. 418; 52 J.P. 580; 36 W.R. 880; 4 T.L.R. 46, C.A.; 13 Digest (Repl.) 199, *182.*

Norton v. *Cooper, Re Manby and Hawksford, Ex parte Bittleston* (1856), 3 Sm. & G. 375; 26 L.J.Ch. 313; 29 L.T.O.S. 378; 3 Jur.N.S. 259; 65 E.R. 701; 42 Digest 342, *3864.*

Scholfield v. *Earl of Londesborough*, ante p. 282; [1896] A.C. 514; 65 L.J.Q.B. 593; 75 L.T. 254; 45 W.R. 124; 12 T.L.R. 604; 40 Sol. Jo. 700, H.L.; 6 Digest (Repl.) 361, *2605.*

Société Générale v. *Metropolitan Bank, Ltd.* (1873), 27 L.T. 849; 21 W.R. 335; 6 Digest (Repl.) 361, *2603.*

Mara v. *Browne*, [1896] 1 Ch. 199; 65 L.J.Ch. 225; 73 L.T. 638; 44 W.R. 330; 12 T.L.R. 111; 40 Sol. Jo. 131, C.A.; 42 Digest 378, *4260.*

Appeals and **Cross-Appeals** by the Attorney-General on behalf of the Crown, John Clear, and J. E. Green, respectively, from a decision of KEKEWICH, J., in a matter arising out of the fraud of John Arthur Hales, a solicitor, suffering imprisonment for forgery in relation to funds paid into court to the credit of the above action.

The Solicitor-General (*Sir Robert Finlay, Q.C.*) and *Ingle Joyce* for the Attorney-General.

Ashton Cross for the appellant Clear.

Witt, Q.C., and *Ernest de Witte* for the appellant Green.

Cur. adv. vult.

Dec. 18, 1896. **LORD RUSSELL, C.J.,** read the following judgment of the court: In this case the question is whether John Clear and J. E. Green, of 1, Old Serjeants' Inn, Chancery Lane, who were in partnership as solicitors under the firm name of "Clear and Green," are liable to make good, or whether either of them is liable to make good, all, or any, and what part of a sum of £6,387 0s. 2d., which stood to the credit of the suit of *Marsh* v. *Joseph*, and which was paid out by the Paymaster-General pursuant to an order of KEKEWICH, J., dated July 13, 1895, that order having been procured by the fraud of one J. A. Hales, a solicitor. Hales was an undischarged bankrupt, and an uncertificated solicitor. That he was the former was known to Clear; the latter fact was not. Hales was also a commissioner for

taking affidavits, and had been brought in this character into connection with Clear and Green.

The facts are these. In 1877 the action of *Marsh* v. *Joseph* was instituted for the administration of the trusts of a settlement of Sept. 9, 1858. In that suit J. A. Hales acted as solicitor for the plaintiffs therein. Under the settlement Jacob Moses (who subsequently changed his name to John Moses Marsh) was entitled to certain property for life, and he had power to appoint the same to one or more of his children, and failing appointment it devolved upon all equally. Later the settled property was sold, and the fund in court represented the proceeds. In July, 1895, Hales called upon Clear and said he had some business, and that he should require another solicitor to represent one of the formal parties, and asked Clear: "Will you act for me?" To this Clear replied: "We shall be very happy on receiving instructions." The name of the case was not mentioned, nor the character of the business, nor the name of the supposed formal party for whom Clear and Green were to act, and those gentlemen heard nothing further about the matter until after the consummation of Hales' fraud, and after payment out by the Paymaster-General of the fund in question.

On July 13, 1895, a petition was presented in the name of Joseph Moses Marsh, which, after reciting the settlement of 1858, that Joseph Moses Marsh had been certified by the chief clerk in the suit of *Marsh* v. *Joseph* to be the eldest son of John Moses Marsh (former Jacob Moses), and that certain appointments of new trustees under the settlement of 1858 had been made, proceeded to state that, by deed poll of Dec. 31, 1894, John Moses Marsh, under his power of appointment, and subject to his own life interest, had irrevocably appointed the sum then in court standing to the credit of the action of *Marsh* v. *Joseph* to his son, Joseph Moses Marsh, absolutely for his own benefit. Such petition further stated that John Moses Marsh died on Mar. 8, 1895. The petition then prayed that the court should, subject to certain provisions as to costs and for payment of succession duty (properly estate duty), order that the fund be paid to the petitioner, Joseph Moses Marsh. Upon the back of that petition the names "John Clear & Co." appear as solicitors for the petitioner. The petition was verified by what purported to be an affidavit of the petitioner, to which were exhibited (among other documents) the settlement of 1858 and the alleged deed-poll of Dec. 31, 1894. The affidavit is endorsed "John Clear & Co., Serjeants' Inn."

For the purposes of the hearing of the petition, Hales, again using the name of "John Clear & Co.," instructed Mr. Brodie Cooper as counsel, to appear in support of the petition, and in the name of "J. Hales" instructed Mr. Cockburn, as counsel, to appear for all the other parties interested, and to consent to the prayer of the petition. Accordingly, the matter came before KEKEWICH, J., on July 13, 1895, when he made the order prayed. The "payment schedule" to the order provided for payment to "John Clear, of Serjeants' Inn," as petitioner's solicitor, of "agreed costs" of petitioner, £15 to "John Hales, of 15, Clifford's Inn," of £10 as "agreed costs" of the respondents, and in respect of the estate duty £224 11s. 5d. Accordingly, on Aug. 10, 1895, three cheques were drawn in the Paymaster-General's office upon the Bank of England—one, payable to Joseph Moses Marsh, for £6,137 8s. 9d.; one, payable to John Clear, for £15; and one, payable to John Hales, for £10. These cheques, with provision for estate duty (£224 11s. 5d.), exhausted the fund in court (£6,387 0s. 2d.). On the same day, by, or upon the introduction of, John A. Hales, an account was opened at Child's Bank in the name of Joseph Moses Marsh, and the cheque of £6,137 8s. 9d. was paid in to the credit of that account, and was credited as cash. On the same day, also, two cheques were drawn upon the account, one for £100 to "self," and the other for £1 8s. 1d. to "J. A. Hales," and were cashed.

Shortly put, the means by which the money was obtained out of court were the fraudulent contrivances of Hales, either acting alone or in complicity with some other person or persons. There was no deed of appointment by John Moses Marsh

—the document produced was a forgery; and no affidavit in verification of the petition had been made by Joseph Moses Marsh. The proceedings were in fraud of that person and the other persons beneficially interested. Ultimately, in October, 1895, Hales was, upon his own confession, convicted at the Old Bailey for forging the name of Joseph Moses Marsh on the back of the cheque for £6,137 8s. 9d.

Between July, 1895, and Aug. 12, 1895, there had been no communication of any kind between Hales and Clear and Green. It will be seen that at the latter date Hales' fraud was complete; he had got the fund in question out of court and under his control, and two cheques against it had been paid. On that Aug. 12, about one o'clock, Hales called at the office of Clear and Green, and saw the former. Hales reminded Clear of his having spoken to him about some business that he was going to bring to Clear and Green. He said, "It is all done. I did it for you. I did not want to bother you. The cheque is waiting for your costs at the Paymaster-General's." Clear thereupon reprimanded him and asked him what business he had to use his name or the name of the firm. To which Hales replied, "I thought it was such a simple matter that it was not worth while. I thought I could carry it out and instructed counsel, and I have done everything necessary—there was a good man, Mr. Brodie Cooper" (referring to the learned counsel who had appeared for the supposed petitioner). To this Clear replied that he liked to know what was going on; that he did not like people to use their names, and that he had never allowed it on any occasion. Clear in his evidence stated that he did not inquire, nor did Hales tell him, what was the nature of the business in which his name or that of his firm had been used, and that he did not ascertain till a much later period that his name or that of his firm had been used for a petitioner who was seeking payment of money out of court. Ultimately Clear took and cashed the cheque for £15, repaid to Hales £10 14s. 6d. out of its proceeds, which the latter said represented payments by him to counsel, and handed the balance, £4 5s. 6d., in cash, to his partner, J. E. Green, who on the same day entered it thus in the cash-book of the firm:—"Received cash of J. Hales, *Re Joseph*, £4 5s. 6d." This was the sole connection of Green with the matter. It is to be noted that KEKEWICH, J., accepted as true the foregoing account given by Clear of the facts so far as he was concerned. The learned judge explicitly finds that Clear had no reason to believe that Hales had intended to use or had used his name until Aug. 12, 1895. As to Green, he also explicitly acquits him of all personal blame. I think these conclusions of the learned judge were warranted by the evidence. It is unnecessary to refer to the fact (which seems to me irrelevant in view of these findings) that in January, 1895, Hales asked Clear to "identify" him at the Paymaster-General's office, and that Clear did so.

It remains, in order to complete the story, to narrate the other facts which occurred on Aug. 12 and some facts which occurred after that date. Between one and two o'clock on Aug. 12 a cheque payable to "self" drawn on account at Child's for £4,000 was cashed; on Aug. 13 a like further cheque for £50 was cashed, and on Sept. 14 a like further cheque for £20 was cashed. There then remained (after payment of these cheques) £1,966 0s. 8d. to the credit of the account, and that sum so remained up to October, 1895, when the fraud was discovered, and it has been recovered for the benefit of the persons entitled. Upon this state of facts the persons defrauded petitioned the court for relief against the Paymaster-General or the Commissioners of the Treasury under the Chancery (Funds) Act, 1872 [repealed by Supreme Court of Judicature (Consolidation) Act, 1925]. The claim to this relief was not denied, but on the hearing of the petition it was alleged on the part of the Treasury that Clear and Green were, as officers of the court, liable to make good the moneys lost, and the court was asked so to order.

The question then was, before KEKEWICH, J., and now is before us, whether on the facts stated the firm of Clear and Green, or any, and if so, which member of the firm is liable for any, and if so, for what part of the moneys lost. The learned judge, as I understand, acquitted Clear of responsibility in respect of all moneys

drawn from the account at Child's Bank up to and including Aug. 12. He says expressly that, in his judgment, no action, however energetic, on Clear's part would have availed to stop the payment of the £4,000 cheque on Aug. 12, but he finds that Clear on that day condoned what he (Clear) thought was an irregularity in the use of his name, and the learned judge makes him liable to repay the amount of the £15 cheque, and for any loss for withdrawal from Child's Bank after the date of Aug. 12. This would represent a liability of Clear for £15, and £50, and £20, in all £85. As to Green, the learned judge, while, as I have said, acquitting him of all personal blame, arrives at the conclusion that Clear was acting within the scope of the partnership authority in what he did, and that therefore Green is subject to the same liability as his partner. From these judgments there are cross-appeals. Green gave notice of appeal on May 21, 1896, the Crown on May 22, 1896, and Clear on June 10, 1896. On the argument before us the discussion proceeded on the appeal of the Crown, for whom it was contended that the learned judge had rightly found that Clear had on Aug. 12, 1895, condoned or ratified the use of his name, but that the learned judge had failed to carry that conclusion to its legitimate consequences by fixing Clear with the results, which, it was contended, followed upon the use of his name, and that he was legally liable for the entire loss—namely, £4,171 8s. 1d., and for the cheques of £15 and £10 for costs. It was further contended that Green was likewise liable for the acts of his partner. On the other hand, it was contended for Clear that his liability was limited to the repayment of the amount of the £15 cheque, and for Green that his liability was limited to the £4 5s. 6d. received by him for the partnership.

We have now to consider these various contentions. No question of jurisdiction was raised before us, but I think it important to state the principal upon which the court acts. It is that, where negligence or other breach of duty is committed by a solicitor, an officer of the court, in a matter in which the court has seisin, the court may, and, if it can do full justice, will, summarily order its officer to make good the loss occasioned by his neglect or breach of duty. But the limit of liability is the measure of the loss flowing from the negligence or breach of duty. The court cannot, merely because the officer has been guilty of misconduct, mulct him in damages. The damages must flow from the act of negligence or misconduct. In the present case the learned judge has divided the loss into (i) the loss which he considers occurred up to and including Aug. 12, and (ii) that after Aug. 12, and he has fixed Clear and Green with the latter loss only.

Before considering whether this is correct, it will be convenient to deal with the broader contention of the Crown—viz., that the firm are liable for all the loss whenever it occurred. Apart from the doctrine of ratification, it cannot be pretended that there was any ground for fixing Clear or Green with liability. Neither had done any blameworthy thing. Neither had authorised the use of the firm's name. Neither knew up to Aug. 12 that the firm's name had in fact been used for any purpose, and when, on that day, Clear learned that it had been used, the mischief had been done, the money had gone out of the control of the court and into that of the perpetrator of the fraud. The money was lost, and the question was not whether the loss could be prevented, but whether any of it could be recovered. How had it been obtained? It had been obtained by reason of the order of the court of July 13, 1895, which in its turn had been obtained by the fraudulent fabrication of the deed-poll and of the affidavit purporting to verify it, followed by the petition containing untrue statements, and the employment by Hales in Clear's name of counsel for the petitioner to support the petition, and of counsel by Hales in Hales's name to consent to the prayer in the petition. Of all this Clear and Green were ignorant. Indeed it is obvious that, if Hales had not chosen to mention the cheque for £15 to Clear, in order to get out of it the fees paid to counsel, the fraud would have been equally successful and complete; or, again, if he had used the firm's name without any such conversation as occurred in July.

What, then, is the true effect of what takes place on Aug. 12? To appreciate

this one must recur to the conversation in July, when Clear was asked by Hales whether he would act for a formal party and said he would if instructed. On Aug. 12 Hales in effect says to Clear, "I did not think it worth troubling you about the formal business I mentioned in July. It was simple; I did it myself. There is a cheque for £15 for you, but you will have to return me all for counsel's fees which I have paid, except £4 5s. 6d., which you keep for yourself." Clear complained of the use of his name, reprimanded Hales, but kept and paid to his partner this £4 5s. 6d. I doubt whether this is any ratification in any real sense; but assuming that it amounts to ratification, of what is it ratification? At most it was ratification of the use of his name in a formal matter for a formal party. Is that enough to fix him with liability for what had been fraudulently done by Hales for his own purposes? I think not. Clear did not know that his name had been used for the petitioner, nor that the object of the petition was to obtain payment out of a fund in court. The amount of the cheque was not such as to suggest that the work had been other than the employment of counsel for a formal purpose, as for a change of investments or appointment of new trustees, or the like. In a word, there was nothing to suggest in the remotest way that Hales had for his own fraudulent purposes used Clear's name and been a party to forgery and perjury in effecting those purposes. We are not called upon to act in business as if every man with whom we come into relations is a thief, and, therefore, men's actions are not to be judged by a standard of unbelief in professional honesty.

To constitute a binding adoption of acts a priori unauthorised these conditions must exist: (i) The acts must have been done for and in the name of the supposed principal; and (ii) there must be proved full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were. In the present case, although the name of Clear (J. Clear & Co.) was used, it is apparent that that user and the other fraudulent acts of Hales were done for his own purposes. It is admitted that Clear had no knowledge of the fraud which had been committed, and, in my judgment, it is impossible properly to draw the conclusion that Clear, by taking the cheque for £15 and keeping the £4 5s. 6d., intended unqualifiedly to take upon himself the responsibility for what had been done, however wickedly and fraudulently it had been done. To use the language of KEKEWICH, J., he condoned what he believed was a mere irregularity. Where the supposed ratification relates to acts as to which there is no pretence of any a priori authority, as in this case, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were. I find an absence of such knowledge and an absence of any ratification except this—putting it at the highest—a ratification of the use of the name of the firm for a formal party. Such ratification is not enough to fix Clear or Green with the fraudulent acts of forgery and perjury, or with the fraudulent statements in the petition to which Hales, to further his own ends, was a party. It follows from what I have said that, even if Clear had a priori authorised the use of his name for a formal party, he would not be responsible for the acts of fraud and forgery committed in this case by his supposed agent for that agent's own fraudulent purposes.

In my judgment, therefore, the contention of the Crown fails as against both Clear and Green. It remains to consider whether KEKEWICH, J., was right in fixing Clear and Green with the loss (as it is called) after Aug. 12 as well as with the amount of the £15 cheque. First as to Clear. Obviously the judgment must stand against Clear for the £15. He received the cheque for £15, part of the fund in court fraudulently obtained, and he has not validly discharged himself of it. As to the rest, I have already pointed out that, in my judgment, the loss

A was complete when the cheque of the Paymaster-General was credited as cash by Child's Bank, on Aug. 10, two days before Clear knew that the firm's name had been used, and that the only question then was whether any of that loss could be recovered back. I understand the learned judge to have proceeded on the ground that Clear had failed in his duty in not promptly informing the court that his name had been used without his authority. But assuming for the moment this failure B of duty, did it prevent the recovery of any part of the money? It is said it did, for that, if he had informed the court, a stop would have been put upon the account at Child's Bank, and the cheques for £50 on Aug. 13 and for £20 on Sept. 14 would not have been honoured. Is this so? I agree that Clear ought to have resented as grossly improper the unauthorised use of his name. Suppose he had said so in stronger terms than he did to Hales, and added, as many men acting on C a high standard of professional conduct would have done: "I will straightway inform the court," is it not probable that Hales would at once have withdrawn the bank balance? Is it not further probable that the balance of £1,965 0s. 5d. which was recovered was allowed to remain because Hales was, in the absence of any threat of this kind, lulled into a false sense of security? Indeed, if Clear had gone to the court, all that he could have said was that he thought it proper to state that D his name had been used without authority, but whether used for any improper purpose he could not say, and some time must have been occupied by inquiring before any action could be taken, and meanwhile, it is not probable Hales would have been idle.

I cannot see my way, therefore, to the conclusion that Clear's silence in any sense led to any part of the loss. But further, to hold Clear liable to make good E the £50 and £20 drawn out from Child's Bank after Aug. 12 can only, in my judgment, be right upon the assumption that Clear knew or ought to have suspected that a dishonest use had been made of his name and that prompt action would, or might, prevent or lessen any loss following upon that dishonest use. But Clear had no knowledge or even suspicion of anything of the sort. To hold him liable for the sums is to hold him responsible for a breach of duty which is not imposed by F any known legal principle, and which the court is not warranted in imposing on its officers. To do so would be too oppressive on honest men desirous of doing right.

This conclusion is quite consistent with cases relied upon by counsel for the Crown, for in all of them the solicitor who was held liable for money improperly obtained out of court had done far more than Clear did in this case. In *Slater* v. G *Slater* (1) the solicitor had allowed his name to be used for the petitioner upon whose application the money was obtained, and that solicitor actually received the money. So, in *Re Dangar's Trusts* (2) the solicitor held liable was the solicitor for the petitioner who obtained the money; he took an active part in obtaining the money, and his negligence, or that of his clerk, caused the loss. In *Re Ward* (3) and in H *Todd* v. *Studholme* (4) the solicitor had the conduct of the suit, and was held liable for his negligence in it. In *Re Spencer* (5) the solicitors had acted for the petitioners, and their negligence caused the loss for which they were held liable. In *Brydges* v. *Branfill* (6) the solicitors were the solicitors for the petitioners, and they received the money. Clear's conduct does not bring him within the principles applicable to any of these decisions.

As to Green, it follows from what I have said that as to him the question is I narrowed to this—is he liable jointly and severally with Clear for the £15, or only for the £4 5s. 6d. which he received from Clear, and paid into the bank account of the firm as part of the partnership assets? That he is liable for the £4 5s. 6d. is obvious, and upon the grounds which apply to the £15 cheque in the case of Clear. Is he liable for anything more? I think he is not. The learned judge, as I gather, proceeded on the ground that it was within the scope of the agency authority created by the partnership for one partner to allow the use of the name of the firm by another solicitor, and thereby to bind his co-partner. Is that sound? As

a proposition of law I know of no authority for it, and I confess I should be surprised to find that it was usual to do so. But any such usage must be established by evidence; the court cannot, as a matter of law, say that there is any such usage, and I do not find that in this case any evidence to that effect was given or offered. Indeed, in this case, the question is not merely whether the permission to use the firm's name was within the scope of the partnership authority, but whether it was within such authority to ratify ex post facto the unauthorised use of such name.

In the absence of any evidence of usage or course of business on these points, I come to the conclusion that the £15 cheque received by Clear was not received by him in respect of any transaction in which he had a right to engage on behalf of the firm. The receipt of the cheque was not the receipt of the firm, nor was Clear's knowledge of the receipt and of the circumstances under which he received it the knowledge of the firm. Green's liability began and ended with the receipt by him from Clear of the £4 5s. 6d. cash, and is confined to that sum. The result, therefore, in my judgment, is that Clear's liability must be reduced to the sum of £15, and of Green to the sum of £4 5s. 6d., part of the £15, and the order appealed from must be varied accordingly. As regards the costs of these proceedings, the costs of and consequent on the petition of the petitioners and the respondents, other than the Paymaster-General and the Commissioners of Her Majesty's Treasury, and other than Hales, Clear, and Green, and except so far as such costs have been increased by the conduct of the Paymaster-General and the Commissioners of Her Majesty's Treasury are to come out of the fund in court. The costs of the petitioners and the respondents, other than Hales, Clear, and Green, so far as they have been so increased as aforesaid, are to be paid by the Commissioners of Her Majesty's Treasury. The commissioners are to pay the costs of their appeal to Clear and Green and the parties interested in the fund, and no costs of Clear's appeal and of Green's appeal. Clear and Green must be relieved of the costs which they were ordered to pay in the court below, but they cannot have any costs there.

Order varied.

Solicitors: *Hare & Co.*, for *The Solicitor to the Treasury; J. E. Green; John Clear; Mear & Fowler.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

BRADFORD CORPORATION *v.* PICKLES

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Ashbourne and Lord Macnaghten), May 9, July 29, 1895]

[Reported [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286]

Tort—Lawful act done with improper or malicious motive—Use of property—Diversion of percolating water from neighbouring land.

No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper, selfish, or even malicious.

Accordingly, where a landowner caused works to be done on his land which had the effect of diverting percolating water under his land from flowing to neighbouring land from which a water authority drew water for its service, the authority having acquired no interest in the water under the landowner's land,

Held: the lawful act of the landowner was not rendered unlawful even if he had done it with the sole object of compelling the authority to acquire rights in the water under his land at his own price.

Chasemore v. *Richards* (1) (1859), 7 H.L. Cas. 349, followed.

Notes. Applied: *Allen* v. *Flood*, ante p. 52. Considered: *Hollywood Silver Fox Farm, Ltd.* v. *Emmett*, [1936] 1 All E.R. 825. Referred to: *Cochrane* v. *Smith* (1895), 12 T.L.R. 78; *Pitts* v. *George* (1896), 66 L.J.Ch. 1; *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; *Mostyn* v. *Atherton* (1899), 69 L.J.Ch. 629; *Quinn* v. *Leathem*, [1900-3] All E.R. Rep. 1; *Husey* v. *London Electric Supply Corpn.*, [1902] 1 Ch. 411; *Fitzroy* v. *Cave*, [1904-7] All E.R. Rep. 194; *Salt Union* v. *Brunner Mond*, [1906] 2 K.B. 822; *English* v. *Metropolitan Water Board*, [1907] 1 K.B. 588; *Pratt* v. *British Medical Association*, [1918-19] All E.R. Rep. 104; *Ware and De Freville, Ltd.* v. *Motor Trade Association*, [1920] All E.R. Rep. 387; *Farr* v. *Butters Bros. & Co.*, [1932] All E.R. Rep. 339; *Re Simeon*, [1937] 3 All E.R. 149; *Sedleigh-Denfield* v. *O'Callagan*, [1940] 3 All E.R. 349; *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E.R. 142; *Tufton* v. *Sperni*, [1952] 1 All E.R. 234; *J. Bollinger* v. *Costa Brava Wine Co.*, [1959] 3 All E.R. 800.

As to rights in uncharted underground water, see 38 HALSBURY'S LAWS (3rd Edn.) 526-528; and for cases see 44 DIGEST 34-36. For Waterworks Clauses Act, 1847, see 26 HALSBURY'S STATUTES (2nd Edn.) 729.

Cases referred to:

(1) *Chasemore* v. *Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, *252*.

(2) *Dickinson* v. *Grand Junction Canal Co.* (1852), 7 Exch. 282; 21 L.J.Ex. 241; 18 L.T.O.S. 258; 16 Jur. 200; 155 E.R. 953; 44 Digest 11, *40*.

Also referred to in argument:

Acton v. *Blundell* (1843), 12 M. & W. 324; 13 L.J.Ex. 289; 1 L.T.O.S. 207; 152 E.R. 1223, Ex. Ch.; 44 Digest 34, *249*.

Keeble v. *Hickeringill* (1706), 11 East, 574, n.; Holt, K.B. 14; 3 Salk. 9; 11 Mod. Rep. 73, 130; 103 E.R. 1127; 43 Digest 8, *30*.

Smith v. *Kenrick* (1849), 7 C.B. 515; 18 L.J.C.P. 172; 12 L.T.O.S. 556; 13 Jur. 362; 137 E.R. 205; 34 Digest 725, *1067*.

Mogul Steamship Co. v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; on appeal, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 968, *6*.

Appeal by the plaintiffs in the action from a decision of the Court of Appeal (LORD HERSCHELL, L.C., LINDLEY and A. L. SMITH, L.JJ.), reported [1895] 1 Ch. 145, reversing a decision of NORTH, J.

The action was brought by the appellants to restrain the respondent from making or continuing a drift or tunnel in his lands situate near East Many Wells, in the parish of Bradford, Yorkshire, whereby the waters of certain springs and underground streams, known as "Many Wells," to which the appellants alleged they were entitled under certain Acts of Parliament, might be diverted, drawn off, or diminished in quantity. The appellants were authorised by the Bradford Corporation Waterworks Act, 1854, to purchase the undertaking of the Bradford Waterworks Co., who had acquired the exclusive right to springs and streams of water arising or flowing in and through farm lands and grounds called Trooper Farm. The respondent was the owner of a farm immediately adjoining Trooper Farm, and on higher ground. He had been advised that large quantities of stone and other minerals on his farm could be profitably worked if the land could be kept

drained and cleared of water without the expense of pumping-engines. The appellants alleged that the action which he took to effect this would result in underground water being diverted from their land.

Cozens-Hardy, Q.C., and *Eyre* (*Sir H. James*, Q.C., with them) for the appellants.

Everitt, Q.C., *Tindal Atkinson*, Q.C., *Butcher*, and *Longstaffe*, for the respondent, were not called on to argue.

Their Lordships took time for consideration.

July 29, 1895. The following opinions were read.

LORD HALSBURY, L.C.—In this action the plaintiffs seek to restrain the defendant from doing certain acts which they allege will interfere with the supply of water which they want, and are incorporated to collect, for the purpose of better supplying the town of Bradford. NORTH, J., ordered the injunction to issue, but the Court of Appeal, consisting of LORD HERSCHELL, L.C., and LINDLEY and A. L. SMITH, L.JJ., reversed his judgment.

The facts that are material to the decision of this question seem to me to lie in a very narrow compass. The acts done, or sought to be done, by the defendant were all done upon his own land, and the interference, whatever it is, with the flow of water is an interference with water which is underground and not shown to be water flowing in any defined stream, but is percolating water, which, but for such interference, would undoubtedly reach the plaintiffs' works, and in that sense it does deprive them of the water which they would otherwise get. But although it does deprive them of water which they would otherwise get, it is necessary for the plaintiffs to establish that they have a right to the flow of water, and that the defendant had no right to do what he is doing. I am of opinion that neither of those propositions can be established. Apart from the consideration of the particular Act of Parliament incorporating the plaintiffs, which requires separate treatment, the question whether the plaintiffs have a right to the flow of such water appears to me to be covered by authority. In *Chasemore* v. *Richards* (1) it became necessary for this House to decide whether an owner of land had a right to sink a well upon his own premises, and thereby abstract the subterranean water percolating through his own soil, which would otherwise, by the natural force of gravity, have found its way into springs which fed the river Wandle, the flow of which the plaintiff in that action had enjoyed for upwards of sixty years. The very question was then determined by this House, and it was held that the landowner had a right to do what he had done, whatever his object or purpose might be, and although the purpose might be wholly unconnected with the enjoyment of his own estate. It, therefore, appears to me that, treating this question apart from s. 49 of the Act of Parliament upon which the whole question turns, it would be absolutely hopeless to contend that this case is not governed by the authority of *Chasemore* v. *Richards* (1).

This brings me back to s. 49 of the Bradford Waterworks Act, 1854, on which reliance has been placed. That section is as follows:

> "It shall not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' arising or flowing in and through a certain farm called 'Trooper' or 'Many Wells' Farm, in the township of Wilsden, in the parish of Bradford, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity, and if any person shall illegally divert, alter, or appropriate the said water, or any part thereof, or sink any such well or pit, or shall do any other act, matter, or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the company repair the injury done by him so as to restore the said springs and

A the waters thereof to the state they were in before such illegal act as aforesaid, he shall forfeit to the company a sum not exceeding £5 for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by, or by the authority of, such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished."

B Whatever may be said of the drafting of this section, two things are clear: first, that the section in its terms contemplates that persons other than the company may be legally entitled to divert, alter, or appropriate the waters supplying or flowing from the streams and springs; and, secondly, that the acts against which the section is directed must be illegal diversion, alteration, or appropriation of the C said waters. The natural interpretation of such language seems to me to be that, whereas the generality of the language of the section might apply to any alteration or appropriation of waters supplying or flowing from the streams and springs called "Many Wells," the section only intended to protect such streams and springs and supplies as the company should have acquired a right to by purchase, compensation, or otherwise; but in such wise as should vest in them the proprietorship of the waters, D streams, springs, etc. And, lest the generality of the language should give them more than that to which they had acquired the proprietary right, the legal rights of all other persons were expressly saved. Upon this assumption the latter part of the section makes penal the illegal diversion, alteration, or appropriation of any streams, etc., of which, by the hypothesis, the company had become the proprietor. I do not think that NORTH, J., does justice to the language of the section when he E says that

> "the section enacts that a man is not to do certain specified things except so far as he may lawfully do them."

The fallacy of that observation (with all respect to NORTH, J.) resides in the phrase "certain specified things." If my reading of the section be correct, the thing that F is prohibited is taking or diverting water which has been appropriated and paid for by the company; but the thing which is not prohibited is taking water which has not reached the company's premises, to the property in which no title is given by the section, and which, by the very act complained of, never can reach the company's premises at all.

To use popular language, therefore, what is prohibited is taking what belongs G to the company, and what is not prohibited is taking what does not belong to the company. I have used popular language because I have no doubt that the draftsman who drew the section was encountered with the proposition in his own mind that you could not absolutely assert property in percolating water at all. You may have a right to the flow of water; you may have a property in the water when it is collected and appropriated and reduced into possession; but in view of the particular H subject-matter with which the draftsman was dealing, it seems to me intelligible enough why he adopted the phraseology now under construction. It appears to me that this is the true construction of the section from the language itself. But I confess I can entertain no doubt that the mere fact that the section as construed by the plaintiffs affords no right to compensation to those whose rights might be affected, is conclusive against the construction contended for by the plaintiffs.

I The only remaining point is the question of fact alleged by the plaintiffs, that the acts done by the defendant are done not with any view which deals with the use of his own land or the percolating water through it, but is done, in the language of the pleader, "maliciously." I am not certain that I can understand or give any intelligible construction to the word so used. Upon the supposition on which I am now arguing, it comes to an allegation that the defendant did maliciously something that he had a right to do. If this question were to have been tried in old times as an injury to the right in an action on the case the plaintiff would have had to allege, and to prove, if traversed, that he was entitled to the flow of the

water which, as I have already said, was an allegation he would have failed to establish. This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me to be absolutely irrelevant. But I am not prepared to adopt LINDLEY, L.J.'s, view of the moral obliquity of the person insisting on his right when that right is challenged. It is not an uncommon thing to stop up a path which may be a convenience to everybody else, and the use of which may be no inconvenience to the owner of the land over which the path goes. But when the use of it is insisted upon as a right it is a familiar mode of testing that right to stop the permissive use, which the owner of the land would contend it to be, although the use may form no inconvenience to the owner. So, here, if the owner of the adjoining land is in a situation in which an act of his, lawfully done on his own land, may divert the water which otherwise would go into the possession of the original trading company, I see no reason why he should not insist on their purchasing his interest from which the original trading company desires to make profit. For these reasons, my Lords, I am of opinion that this appeal ought to be dismissed with costs, and that the plaintiffs should pay to the defendant the costs both here and below.

LORD WATSON.—The appellants have purchased under statutory powers, and are now vested with the whole undertaking of the Bradford Waterworks Co., incorporated by an Act which transferred to that company the undertaking of a corporation having the same name, created by statute in 1842, together with all rights and privileges thereto belonging. The older of these companies acquired for the purposes of their undertaking a parcel of land known as "Trooper Farm," and also certain springs or streams arising in or flowing through the farm. From these springs and streams the appellants and their predecessors have hitherto obtained a valuable supply of water for the domestic use of the inhabitants of Bradford. Trooper Farm is bounded on the west and north by lands belonging to the respondent, which are about 140 acres in extent. The first of these boundaries, on the west—which alone is of importance in the present case—is a public highway called "Doll's Lane." The respondent's land to the west of that boundary is on a higher level than Trooper Farm, and has a steep slope downwards to the lane. Its substrata are intersected by two faults running east and west—one at each end of the boundary—which prevent the escape of percolating water either to the north or south, and the nature and the inclination of the strata are such that the subterraneous water which they contain must, by the natural force of gravitation, eventually find its way to Trooper Farm. The sources from which the appellants derive a supply of water near to the western boundary of Trooper Farm are two in number. The first of these is a large spring, known as "Many Wells," which issues from their ground twenty or thirty yards to the east of Doll's Lane; the second is a stream to the south of "Many Wells," which has its origin in a smaller spring on the respondent's land, close to Doll's Lane, at a point known as the "Watering Place," from which the water flows in a definite channel into Trooper Farm. It is an admitted fact that neither the appellants, nor either of the companies whose undertaking is now vested in them, ever acquired from the respondent, or his predecessors in title, any part of their legal right to, or interest in, the water in their land, whether above or below the ground; and also that the statutes—to the benefit of whose provisions the appellants are now entitled—make no provision for compensating the respondent in the event of such right or interest being prejudicially affected by the appellants' undertaking.

In the year 1892 the respondent began to sink a shaft on the other side of the land to the west of "Many Wells" spring, and also to drive a level through his land adjoining the lane, for the professed purpose of draining the strata, with a view

A to the working of his minerals. These operations had the effect of occasionally discolouring the water in the "Many Wells" spring, and also of diminishing to some extent the amount of water in that spring, and in the stream coming from the "Watering Place"; and it became apparent that, if persevered in, they would result in a considerable and permanent diminution of the water supply obtainable from these sources. The appellants then brought the present suit, in which they B crave an injunction to restrain the respondent from continuing to sink the shaft or drive the level, and from doing anything whereby the waters of the spring and stream might be drawn off, or diminished in quantity, or polluted, or injuriously affected.

It is clear that, apart from any privilege which may have been conferred upon them by statute, the respondent, as in a question with the appellants, has a legal C right to divert or impound the water percolating beneath the surface of his land, so as to prevent it from reaching Trooper Farm, and feeding, or assisting to feed, the "Many Wells" spring, or the stream flowing from the Watering Place. Upon that point there can be no doubt, since *Chasemore* v. *Richards* (1) was decided by this House in the year 1859. But the appellants argued at your Lordships' Bar, as they did in both courts below, that the principle of *Chasemore* v. *Richards* D (1) is inapplicable to the present case, because, in the first place, the operations contemplated and commenced by the respondent are expressly prohibited by statute; and, in the second place, these operations were designed and partly carried out by the respondent not with the honest intention of improving the value of his lands or minerals, but with the sole object of doing injury to their undertaking.

The statutory provisions upon which the appellants rely as supporting the first E of these pleas are to be found in s. 234 of the Act of 1842, and in s. 49 of the Act of 1854, which is a mere repetition of the previous enactment. The clause relates to the Many Wells springs, an expression which, as the context shows, includes the stream coming from the Watering Place. It contains two separate enactments, one of them prohibitory, and the other penal. First of all, it declares that it shall F not be lawful

> "for any person other than the said company to divert, alter, or appropriate in any manner other than by law they may be legally entitled"

any of the water "supplying or flowing from" these springs, or to sink any well or pit, or to do any act, matter, or thing whereby "the waters of the said springs" G may be drawn off or diminished in quantity. That declaration is followed by the provision that,

> "if any person shall illegally divert, alter, or appropriate the said water or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters shall be drawn off or diminished in quantity,"

H and shall not, on being required to do so by the company, immediately restore the springs and waters to the same condition in which they were before the alleged act, they shall be liable to pay £5 to the company for each day until restoration is made, besides compensating the company for any damage sustained through their illegal act.

The appellants endeavoured to construe the prohibitory clause as effecting a virtual I confiscation in their favour of all water rights in or connected with the respondent's land lying to the west of Trooper Farm. It appears to me to be exceedingly improbable that the legislature should have intended to deprive a landowner of part of his property for the benefit of a commercial company without any provision for compensating him for his loss. But it is not necessary to rely upon probabilities, because, in my opinion, the language of the clause is incapable of bearing such an interpretation. I think that the plain object of the statutory prohibition, which has two distinct branches, was to give protection to the supply of water which had been acquired by or belonged to the company for the time being, and that it was

not meant to forbid, and does not prevent, any legitimate use made by a neighbouring proprietor of water running upon or percolating below his land before it reached the company's supply and became part of their undertaking. The first branch makes it unlawful for any person other than the company to divert, alter, or appropriate any of the "waters now supplying" the Many Wells springs, which appear to include sources of supply existing upon lands adjacent to Trooper Farm. Had the prohibition been absolute it would have struck against the operations of the respondent; but it is subject to the qualification that the respondent, or any landowner similarly situated, may lawfully divert those waters which ultimately feed the Many Wells springs, so long as he does so in any manner which is not in excess of his common law rights. The respondent's operations, of which the appellants' complain, are within his proprietary right, and are, therefore, not obnoxious to that part of the prohibition. The second branch, which prohibits the sinking of wells and other operations, has no reference to outside waters, more or less distant, which might ultimately find their way to the Many Wells springs. It relates to "the waters of the said springs," an expression which, in my opinion, can only denote the waters which have actually reached the Many Wells springs, or some channel or reservoir which has been prepared for their reception upon their issuing from those springs. The prohibition gives effectual protection against the withdrawal or diminution, either by an adjacent proprietor or any other person, of waters which have come within the dominion of the appellants. But it does not prevent the diversion or impounding by an adjacent proprietor of water in his own land which has never reached that point, so long as his operations are such as the law permits. For these reasons, in so far as concerns the first plea urged for the appellants, I concur in the judgment of the Court of Appeal.

The second plea argued by the appellants, which was rejected by both courts below, was founded upon the text of the Roman law (Dig. lib. 39, tit. 3, art. 1, s. 12), and also, somewhat to my surprise, upon the law of Scotland. I venture to doubt whether the doctrine of Marcellus would assist the appellants' contention in this case; but it is unnecessary to consider the point, because the noble and learned Lords who took part in the decision of *Chasemore* v. *Richards* (1) held that the doctrine had no place in the law of England. I desire, however, to say that I cannot assent to the law of Scotland as laid down by Lord Wensleydale in *Chasemore* v. *Richards* (1) (7 H.L. Cas. at p. 388). The noble and learned Lord appears to have accepted a passage in Bell's Principles (s. 966), which is expressed in very general terms, and is calculated to mislead unless it is read in the light of the decisions upon which it is founded. I am aware that the phrase in aemulationem vicini was at one time frequently, and is even now occasionally, used very loosely by Scottish lawyers. But I know of no case in which the act of a proprietor has been found to be illegal, or restrained as being in aemulationem, where it was not attended with offence or injury to his neighbour. In cases of nuisance a degree of indulgence has been extended to certain operations, such as burning limestone, which in law are regarded as necessary evils. If a landowner proceeded to burn limestone close to his march, so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal, or greater, convenience to himself, and without giving cause of offence, the court would probably grant an interdict. But the principle of aemulatio has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same as the law of England. No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper, or even malicious. I, therefore, concur in the judgment which has been moved by the Lord Chancellor.

LORD ASHBOURNE.—I concur. To my mind the case is clear, and turns upon considerations sufficiently simple, and far from obscure. The appellants have no case, unless they can show that they are entitled to the flow of the water in

question, and that the respondent has no right to do what he is doing. Putting aside the statutes, the respondent's rights cannot be seriously contested. The law stated by this House in *Chasemore* v. *Richards* (1) cannot be questioned. The respondent has acted within his legal rights throughout, and is he to forfeit those legal rights, and be punished for their legal exercise, because certain motives are imputed to him? If his motives were the most generous and philanthropic in the world, they would not avail him when his actions were illegal. If his motives are selfish and mercenary, that is no reason why his rights should be confiscated when his actions are legal. It is to be noted that the respondent or his predecessors in title never parted with any of their legal rights; it is not suggested that the appellants, by agreement or otherwise, ever acquired them; and no indication is given that there is an intention to compensate the respondent for his legal rights sought to be appropriated, or injuriously affected, by the appellants. The appellants' contention on the construction of the statues would practically confiscate the respondent's water rights. I see nothing in the statutes to interfere with, or prejudice, his legal rights. Very clear words would be required to support the contention that legal rights have been swept away without compensation. Waters that have come under the control of the appellants are fully protected, but there is not a word to hinder or cramp the action of the respondent unless he acts "illegally" or proceeds in any manner "other than by law he may be legally entitled." I, therefore, concur in the order proposed.

LORD MACNAGHTEN.—For fifty years the corporation of Bradford have supplied their town with water. They were empowered to do so by an Act of Parliament passed in 1854, which authorised and required them to purchase the undertaking of a then existing company called "The Bradford Waterworks Co." The chief source of their water supply was taken over from that company. It comes from a cluster of springs known as "The Many Wells." These springs issue from the lower slope of a hill-side at some distance from the town. Above them, in the immediate neighbourhood, there is a tract of land belonging to the respondent, Mr. Pickles. Owing to the fall of the ground and the nature and lie of the strata beneath the surface, Mr. Pickles' land forms a sort of gathering room or reservoir for subterranean water. Two faults, nearly parallel to each other, run downwards through it, and there is a bottom of impermeable clay. At present there is no way of escape for the imprisoned waters except by the Many Wells springs. Within the orbit of his own land Mr. Pickles has set about making a tunnel or drift which, apparently, is intended to pierce one of the two faults that keep the underground water within bounds. If this is done, the result, it is said, will be to allow the water to run off in some other direction. The corporation claim an injunction to restrain Mr. Pickles from going on with the proposed works. They put their case in two ways. They say that under the circumstances the operation which Mr. Pickles threatens to carry out is something in excess of his rights as a landowner. Failing that ground, they maintain that his proceedings are in contravention of the express terms of their special Act.

As regards the first point, the position of the appellants is one which it is not very easy to understand. They cannot dispute the law laid down by this House in *Chasemore* v. *Richards* (1). They do not suggest that the underground water with which Mr. Pickles proposes to deal flows in any defined channel. But they say that Mr. Pickles' action in the matter is malicious, and that, because his motive is a bad one, he is not at liberty to do a thing which every landowner in the country may do with impunity if his motives are good. Mr. Pickles, it seems, was so much alarmed at this view of the case that he tried to persuade the court that all that he wanted was to drain some beds of stone which he thought that he could work at a profit. In his innocent enterprise the court found a sinister design; and it may be taken that his real objective was to show that he was master of the situation, and to force the corporation to buy him out at a price satisfactory to himself. Well, he has

something to sell, or at any rate he has something which he can prevent other people from enjoying unless he is paid for it. Why should he, he may think, without fee or reward, keep his land as a storeroom for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish, and grasping. His conduct may seem shocking to a moral philosopher. But where is the malice? Mr. Pickles has no spite against the people of Bradford. He bears no ill-will to the corporation. They are welcome to the water, and to his land, too, if they will pay his price for it. So much, perhaps, might be said in defence or in palliation of his conduct. But the real answer to the claim of the corporation is that in such a case motives are immaterial. It is the act, not the motive for the act, that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element. On this point both NORTH, J., and the Court of Appeal decided against the corporation; and the decision, as it seems to me, is plainly right.

On the second point, in which NORTH, J., was in favour of the corporation, and the Court of Appeal against them, there is certainly more to be said. I quite agree with the Court of Appeal in the result at which they have arrived; but, speaking for myself, I rather take leave to doubt whether the section of the special Act, on which the question turns, is so unsatisfactorily drawn, and so difficult to construe, as it seemed to be to the Court of Appeal. The old waterworks company was incorporated by an Act passed in 1842. It was dissolved and re-incorporated in 1854 in view of the immediate transfer of the undertaking to the corporation. In the Act of 1854, the provisions of which were kept in force for the benefit of the corporation, the section in question is the 49th. But that section is merely a reproduction of s. 234 in the Act of 1842, and it will be more convenient to deal with the earlier Act. The Act of 1842 scheduled certain lands which the company were empowered to take. Among them was part of a farm belonging to one Seth Wright, which was known as "Trooper" or "Many Wells" Farm. By s. 233 the company were authorised to divert or alter the course of a certain beck called "Hewenden Beck," which is a tributary of the river Aire, "and also to divert and take the water from" the Many Wells springs, described as "the springs and streams of water called Many Wells rising or flowing in and through . . . Trooper or Many Wells Farm." At the date of the passing of the Act the water issuing from the Many Wells springs in Trooper Farm, and a stream which rose in the adjoining land, flowed in several defined channels through Trooper Farm into Hewenden Beck, which forms one of the boundaries of the farm. The scheduled portion of the farm comprised apparently some, but not all, of those channels.

However, after the Act was passed, the company purchased the whole of Trooper Farm, and, as required by the Act, they made compensation to the mill-owners on Hewenden Beck for the loss of the waters of the Many Wells springs. Section 234 is a protective clause corresponding in the main with s. 14 in the Waterworks Clauses Act, 1847. It was to come into operation after the purchase of the Many Wells springs. According to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights, and interests which have been acquired by purchase, not to transfer arbitrarily from one person to another property and rights for which nothing has been paid, and for which no compensation is provided. Section 234 prohibits in terms two classes of acts, and it imposes a penalty not exceeding £5 per day on any person infringing its provisions so long as the injury lasts. One of these classes is treated as legal or illegal, according to circumstances; the other is treated as illegal under all circumstances.

In the first place, the section says that

> "after the Many Wells springs have been purchased by the company, it shall not be lawful for any person, other than the said company, to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters now supplying or flowing from the same."

Both as regards the underground sources of the springs, and as regards the streams flowing from them in their natural course, it forbids any act by any person in excess of his legal rights. At that time, it must be remembered that the rights of landowners in regard to underground water had not been finally determined. If the view which commended itself to the Court of Exchequer in *Dickinson* v. *Grand Junction Canal Co.* (2) had been established, the proposed action of Mr. Pickles would, no doubt, have been illegal. As it is, there is nothing in the first part of the prohibition to restrict or curtail his rights as a landowner in dealing with underground water percolating through his land in unknown channels.

In the second place, the section declares that no person but the company is

> "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity."

What is the meaning of the expression "the water of the said springs?" The natural and obvious meaning seems to me to be the waters issuing from the springs, such as they happen to be in quantity and volume, at the point of issue, or in one case at the point of entry, into Trooper Farm. The expression cannot include the underground sources which serve to feed the springs. Otherwise you would have this singular result, that things which by reason of the saving of existing rights, are treated as legal and permissible in one part of the clause, are treated as illegal and prohibited by another. It must means the water which the company were authorised to "divert and take from" those springs which the section at its commencement assumes the company to have purchased; not the waters which supply the springs, but the waters which the springs supply. A comparison of other sections in the Act will confirm this view if any confirmation is required. The expression "The waters of the said 'Many Wells' " occurs in s. 275, and then it is evidently synonymous with the following words in a parallel passage in s. 238,

> "the water issuing from the springs of water before-mentioned called 'Many Wells,' and which is hereby authorised to be taken and diverted for the purposes of this Act."

After the company had compensated the millowners on Hewenden Beck and purchased Trooper Farm, the waters of the Many Wells springs at and from the point of issue in Trooper Farm, and the water of the stream which rose in the adjoining land at and from the point of its entry into Trooper Farm, became the absolute property of the company, and it was the duty of the company to carry those waters to Bradford. No one was to interfere with them. Any such interference is characterised, in a later part of the section, as an illegal act. And, indeed, it seems to me very difficult to conceive how such an act could in any case be legal, unless the company constructed their works in a perverse and foolish manner. No one from whom the company acquired land or even an easement for the purposes of their works could lawfully let down those works. No one else, it may be assumed, would be in a position to do so. No one could lawfully tap their aqueducts or conduits.

I am of opinion that the act which Mr. Pickles proposes to do is not within either of the two classes of prohibited acts mentioned in s. 234. It is not within the first class, because at the time of the passing of the Act his predecessor was legally entitled, and he is now legally entitled, to do the thing which is complained of. It is not within the second class, because Mr. Pickles does not propose to do anything which can have the effect of drawing off or diminishing in quantity the waters of the Many Wells springs, such as they may be at the point of issue in Trooper Farm, or as regards the stream which does not rise in Trooper Farm at the point of its entry into that farm. It was argued somewhat faintly that s. 49 of the Act of 1854 must have a wider meaning than that which I think ought to be attributed to s. 234 of the Act of 1842, because the Act of 1854 incorporates the Waterworks Clauses Act, 1847, and s. 14 of that Act covers, it is said, everything

which is covered by s. 234 of the Act of 1842 if it be construed as it seems to me it ought to be construed. There would be very little in such an argument under any circumstances, because it is only natural that the promoters of the legislation of 1854 would on the reconstruction of the company desire to retain or re-enact every clause in the former Act which could make for their protection. But the truth is, that the section of the Waterworks Clauses Act, 1847, which corresponds with s. 49 of the Act of 1854, does not apply to the Many Wells springs which were purchased under the Act of 1842. The Act of 1854, which incorporates the Waterworks Clauses Act, 1847, declares that, in construing that Act, the expression "the special Act" shall mean the Act of 1854. It does not mean or include the Act of 1842. I am, therefore, of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Cann & Son*, for *McGowen*, Town Clerk of Bradford; *Ullithorne, Currey & Currey*, for *W. & G. Burr & Co.*, Keighley.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

Re BOARDS. KNIGHT *v.* KNIGHT

[Chancery Division (North, J.), January 18, 1895]

[Reported [1895] 1 Ch. 499; 64 L.J.Ch. 305; 72 L.T. 220; 43 W.R. 472; 13 R. 278]

Will—Legacy—Abatement—Bequest of legacies coupled with gift of residue—Gift of residue charged primarily on personalty—No direction for payment of legacies out of mixed fund—Charge on realty in aid of personalty.

The testator gave, among other legacies, a legacy to a charity of the residue of an annuity fund for which, under the terms of the will, as construed, the personal estate was primarily liable and not a mixed fund comprising the net proceeds of the sale of real and personal estate. Both the legacies and the annuity were charged on the real estate only to the extent of any deficiency in the personal estate and there was no direction for their payment out of the mixed fund.

Held: the legacy to the charity must abate only in the proportion which the value of the impure personalty bore to that of the pure personalty and to the extent to which it was necessary to resort to the proceeds of sale of the real estate in aid of the personalty for payment of the legacies.

Notes. Considered: *Re Thompson, Public Trustee* v. *Husband*, [1936] 2 All E.R. 141; *Re Beaumont's Trusts, Walker* v. *Lawson*, [1950] 1 All E.R. 802; *Re Martin, Midland Bank Executor and Trustee Co., Ltd.* v. *Marfleet*, [1955] 1 All E.R. 865. Referred to: *Re Rowe, Bennetts* v. *Eddy*, [1941] 2 All E.R. 330; *Re Ridley, Nicholson* v. *Nicholson*, [1950] 2 All E.R. 1; *Re Berrey's Will Trusts, Greening* v. *Warner*, [1959] 1 All E.R. 15.

As to order of payment of legacies, see 16 Halsbury's Laws (3rd Edn.) 353 et seq.; and for cases see 23 Digest (Repl.) 518 et seq.

Cases referred to:

(1) *Greville* v. *Browne* (1859), 7 H.L.Cas. 689; 34 L.T.O.S. 8; 5 Jur.N.S. 849; 7 W.R. 673; 11 E.R. 275; 23 Digest (Repl.) 517, *5810*.

(2) *Elliott* v. *Dearsley* (1880), 16 Ch.D. 322; 44 L.T. 198; 29 W.R. 494, C.A.; 23 Digest (Repl.) 518, *5824*.

(3) *Gainsford* v. *Dunn* (1874), L.R. 17 Eq. 405; 43 L.J.Ch. 403; 30 L.T. 283; 22 W.R. 499; 23 Digest (Repl.) 518, *5818*.

Also referred to in argument:

Roberts v. *Walker* (1830), 1 Russ. & M. 752; 39 E.R. 288; 23 Digest (Repl.) 491, *5578*.

Allan v. *Gott* (1872), 7 Ch. App. 439; 41 L.J.Ch. 571; 26 L.T. 412; 20 W.R. 427, L.JJ.; 23 Digest (Repl.) 489, *5559*.

Re Stephens, *Warburton* v. *Stephens* (1889), 43 Ch.D. 39; 59 L.J.Ch. 109; 61 L.T. 609; 23 Digest (Repl.) 367, *4367*.

Originating Summons by the trustees of the testator's will to determine: (i) whether the annuity fund created by the testator was payable primarily out of personal estate, and was only payable out of realty in the event of a deficiency of the personal estate to make up the fund (in which case the legacy to the Royal Agricultural Benevolent Institution must abate in the proportion which, at the testator's death, the impure personalty bore to the pure personalty and also to the extent to which it was necessary to resort to the real estate for payment of the legacies charged on the fund); or whether the annuity fund was a blended fund consisting of personal estate and the proceeds of sale of real estate (in which case the last-mentioned charitable legacy must abate in the proportion which, at the testator's death, the realty and impure personalty bore to the whole estate); and (ii) who was entitled to so much of the legacy to the Royal Agricultural Benevolent Institution as that charity was not entitled to take.

The defendants were Edward Boards Knight, the residuary legatee; the Royal Agricultural Benevolent Institution, a legatee; executors of the heir-at-law and next of kin.

Edward Boards, by his will dated Jan. 9, 1878, after giving certain pecuniary legacies to his trustees and executors and his furniture to his wife as therein mentioned, proceeded:

> "I also bequeath unto my wife a legacy of £2,000, and a life annuity of £400 sterling."

And the testator then bequeathed further pecuniary legacies, including two charitable legacies, and directed that the two charitable legacies should be paid in precedence of the other legacies bequeathed out of such part of his personal estate as the law permitted to be appropriated by will to charitable purposes. He directed that the annuity to his wife should be payable quarterly during her life. He also directed his trustees and executors to purchase, appropriate, and set apart as soon as convenient after his decease, a sufficient fund or sufficient funds for answering the annuity, and that such funds might consist partly of any of the stocks, shares, or securities, forming part of his personal estate at the time of his decease, but so, nevertheless, that his wife should not be prejudiced by reason of the failure of any of his stocks, shares, or securities set apart to meet the annuity, and any deficiency occasioned by such failure should be made up out of the capital devoted to such annuity, and he empowered his trustees and executors to vary and transpose from time to time as they should deem advisable the stocks and securities upon which his estate should at any time be invested. After directing his trustees and executors to sell his freehold, copyhold, and leasehold estates as soon as convenient after his decease, and for facilitating the sale thereof, devising and bequeathing to his trustees all his freehold and leasehold lands and tenements, the testator directed his trustees and executors for the time being (subject to the discretion given to them as to the annuity) to convert all his residuary personal effects into money as soon as conveniently might be after his decease, and he directed them to stand possessed of the net proceeds arising from the sale and conversion of his real and personal

estate and effects (after and subject to the payment of his debts and funeral and testamentary expenses and the legacies, and, after making due provision for the annuity) upon trust for Edward Boards Knight. The testator further directed as to the funds and personal effects set apart to answer the annuity bequeathed, that the same, after the death of his wife or the cesser of the annuity, should fall into and form part of his residuary estate, and be held accordingly upon trust for the Royal Agricultural Benevolent Institution of England, meaning thereby the Royal Agricultural Benevolent Institution.

The testator died on Nov. 11, 1878, and his will was proved on Dec. 17 of the same year. His widow, Kate Boards, died on April 5, 1894. The fund appropriated to meet the widow's annuity consisted of the sum of £11,428 11s. 6d. India Three-and-a-Half per Cent. Stock standing in the names of the trustees. The testator's personal estate proving insufficient, it was purchased partly from the proceeds of sale of real estate, and partly from pure and impure personalty. In the residuary account the value of the whole of the testator's estate was expressed at the sum of £53,468 0s. 5d., of which sum £33,141 14s. 11d. represented the value of the pure personalty. Edward Boards Knight, to whom the testator's residuary real and personal estate was given, claimed such portion of the annuity fund as the Royal Agricultural Benevolent Institution, a charitable corporation, could not take.

Stewart Smith for the plaintiffs.

Cozens-Hardy, *Q.C.*, and *Rowden* for the Royal Agricultural Benevolent Institution.

Swinfen Eady, *Q.C.*, and *Upjohn* for the residuary legatee.

Micklem for the executors of the testator's heir-at-law and one of his next of kin.

NORTH, J.—In the present case the bequest of the annuity must be treated upon the footing that under the terms of the will the personal estate was primarily liable to make up the annuity fund. [His Lordship read the will and continued:] Having regard to the long series of cases, of which *Greville* v. *Browne* (1) may be cited as an example, it cannot be disputed that the direction to the trustees to hold the proceeds of the sale and conversion of the testator's real and personal estate after, and subject to, the payment of his debts and funeral and testamentary expenses and the legacies, and after making due provision for the annuity, on trust for E. B. Knight, has the effect of charging the legacies and the annuity upon the real estate; but that may mean that they are to be thrown upon the real estate pari passu with the personalty, or only in aid of the personalty, if the personalty is insufficient.

What is the meaning here? Under the will, down to this point, the annuity is payable out of personalty only. Then there is this gift. What is the gift? To construe the words strictly, the gift is only of the net proceeds arising from the sale and conversion remaining after something has been taken out of the gross proceeds; i.e., it is not a gift of the whole fund, subject to certain payments being made out of it, but it is a gift of what is left, being the net proceeds after such payments have been made. But there is nothing here directing these payments to be made. That is provided for in the earlier part of the will. In this latter part the testator, having something still left to dispose of, gives it as the net proceeds left after the payments previously directed have been made. I do not see how this gift of what is described as the net proceeds can be said to mean the entire proceeds, or if not the entire proceeds, anything else than what is left after all other payments previously directed have been made.

I think that the testator uses the phrase "net proceeds" here in precisely the same way in which James, L.J., used the same words in *Elliott* v. *Dearsley* (2), and I refer to them, not as deciding a point of law, but as illustrating the use of language. He says there (16 Ch.D. at pp. 329, 330):

> "The reasonable view of his intention is that he considered that the mortgages on the estates which were to be immediately sold would be paid out of the pro-

ceeds of the sale of those estates, and that the net proceeds only would go into the mixed fund out of which the estates that were not to be sold at once would be exonerated."

There he uses the words "net proceeds," referring to what was left after various payments had been taken from the gross proceeds. So here, after the expenses of the sale, the debts, funeral and testamentary expenses and legacies and annuity have been provided for, we arrive at the ultimate gift of the net proceeds to Edward Boards Knight. That being so, it seems to me there is not any direction whatever for the payment of legacies or of the annuity out of the net proceeds of the sale and conversion, because those net proceeds are what is left after those payments have been made. That being so, *Elliott* v. *Dearsley* (2) seems to me to be precisely in point, as this is a case in which the annuity is not ordered to be paid out of any mixed fund arising from the conversion of the real and personal estate, but out of a sum directed to be set apart for the purpose out of the personal estate.

There is nothing in this clause indicating more than that, if necessary, the real estate might be resorted to: I do not find any words indicating that any payment is to be made out of the real estate and the personal estate pari passu, or rather I should say any direction for the payment of the annuity or legacies out of the real estate. Under these circumstances *Elliott* v. *Dearsley* (2) is directly in point, and, as the observations of SIR GEORGE JESSEL, M.R., in *Gainsford* v. *Dunn* (3) (L.R. 17 Eq. at p. 408), seem to me to be somewhat inconsistent with that case, I must follow the later decision of the Court of Appeal. [HIS LORDSHIP then decided that Edward Boards Knight, as residuary legatee, took so much of the legacy to the Royal Agricultural Benevolent Institution as that charity was not entitled to take; and made a declaration that the annuity fund was payable primarily out of personal estate, and was only payable out of realty in the event of a deficiency of the personalty; and that so much of the annuity fund as was attributable to realty and impure personalty went to Edward Boards Knight as residuary devisee and legatee.]

Solicitors: *Rooks, Spiers & Wales*, for *Richardson, Foxwell & Hart*, Much Hadham; *Morley, Shirreff & Co.; C. O. Humphreys, Son & Kershaw.*

[*Reported by* J. TRUSTRAM, ESQ., *Barrister-at-Law.*]

LYNES *v.* SNAITH

[QUEEN'S BENCH DIVISION (Lawrance and Channell, JJ.), February 2, 1899]

[Reported [1899] 1 Q.B. 486; 68 L.J.Q.B. 275; 80 L.T. 122; 47 W.R. 411; 15 T.L.R. 184; 43 Sol. Jo. 246]

Limitation of Action—Landlord and tenant—Tenant at will—No rent paid by tenant—Exclusive occupation—Entry by landlord to do repairs—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 7.

On the death of his son, the owner of a row of cottages permitted the defendant, who was the wife of the deceased son, to occupy one of the cottages rent free, telling her that she could "live in it always rent free." For thirteen years the defendant occupied the cottage rent free; her name was in the rate book and she paid the parish rates; she did most, if not all, of the internal repairs at her own expense; and she never made a written acknowledgment of the owner's title to the cottage. The owner paid the water rates, property tax,

and insurance premium. On four occasions during the defendant's possession the owner, when he was executing external repairs to adjoining cottages, carried out similar repairs to the defendant's premises. On these occasions he entered the premises with the defendants knowledge, but without asking for or obtaining the defendant's consent. He also carried out internal repairs on one occasion in the same manner. Apart from paying some fees for the education of the defendant's children and medical fees for one of the children and paying for its burial, the owner left the management of the cottage to the defendant. On the owner's death the cottages were left to trustees on trust for the plaintiff, who was the owner's step-daughter, for life, and she claimed possession and caused a notice to quit to be served on the defendant.

Held: on the facts the defendant was not a guest of the owner, but a tenant at will, and that tenancy had not been determined by the owner entering without her consent to carry out repairs; moreover, since the defendant had been in continuous occupation for thirteen years, the plaintiff's right to the property was barred under s. 7 of the Real Property Limitation Act, 1833 [repealed], as amended by the Real Property Limitation Act, 1874 [repealed].

Practice—Adding persons as parties—Plaintiffs added after judgment delivered, but before entry—R.S.C., Ord. 16, *r.* 2, *r.* 11.

Per CHANNELL, J.: New plaintiffs may be added under Ord. 16, rr. 2, 11, of the Rules of the Supreme Court, after judgment has been delivered, but before it is entered.

Notes. The Real Property Limitation Act, 1833, and the Real Property Limitation Act, 1874, were repealed and replaced by the Limitation of Action Act, 1939 (13 HALSBURY'S STATUTES (2nd Edn.) 1159).

Considered: *Taylor* v. *Twinberrow*, [1930] All E.R. Rep. 342. Doubted: *Cobb* v. *Lane*, [1952] 1 All E.R. 1199. Referred to: *Errington* v. *Errington and Woods*, [1952] 1 All E.R. 149.

As to the limitation of actions and tenancies at will in general, see 24 HALSBURY'S LAWS (3rd Edn.) 243 et seq.; and for cases see 32 DIGEST 451.

Cases referred to:

(1) *Peakin* v. *Peakin*, [1895] 2 I.R. 359; Digest Supp.

(2) *Doe d. Bennett* v. *Turner* (1840), 7 M. & W. 226; 10 L.J.Ex. 213; 151 E.R. 749; subsequent proceedings sub nom. *Turner* v. *Doe d. Bennett* (1842), 9 M. & W. 643; 11 L.J.Ex. 453; 152 E.R. 271, Ex. Ch.; 32 Digest 451, *1183*.

Also referred to in argument:

Doe d. Dayman v. *Moore* (1846), 9 Q.B. 555; 15 L.J.Q.B. 324; 8 L.T.O.S. 211; 10 Jur. 815; 115 E.R. 1387; 32 Digest 451, *1185*.

Moore v. *Doherty* (1843), 5 I.L.R. 449.

Doe d. Baker v. *Coombes* (1850), 9 C.B. 714; 19 L.J.C.P. 306; 15 L.T.O.S. 90; 137 E.R. 1073; 32 Digest 456, *1222*.

The Duke of Buccleuch, [1892] P. 201; 61 L.J.P. 57; 67 L.T. 739; 40 W.R. 455; 36 Sol. Jo. 394; 7 Asp.M.L.C. 294, C.A.; 1 Digest (Repl.) 205, *922*.

Appeal by the defendant from Leicester County Court in an action brought against her by the plaintiffs for the possession of the cottage at 27, Walnut Street, Leicester. The plaintiffs were the trustees and a beneficiary of the estate of John Smith, deceased, the former owner of the premises.

The learned county court judge gave judgment for the plaintiffs for possession of the premises and £7 10s. mesne profits and found as follows: (i) That the relation of landlord and tenant did not exist between John Snaith and the defendant; that John Snaith was at times in actual and at all other times in constructive possession of the house throughout the period in question, and that the defendant's occupation was not exclusive and was that of a licensee and not of a tenant; that the fact that she was rated as being the person in apparent occupation and paid the occupier's

rates was not conclusive that she occupied as tenant, and that the present case was in principle similar to that of *Peakin* v. *Peakin* (1). (ii) That, assuming that the defendant occupied the house as tenant at will, such tenancy was determined every time the landlord entered the premises to do repairs, as he was not under any contract to repair and did not ask or obtain permission from the defendant to enter the premises for the purpose, but entered by his agents and workmen of his own motion and in exercise of his right to resume possession whenever he thought proper; that sending workmen on to the premises and doing repairs thereon was more than a "mere entry," such as is referred to in s. 10 of the Real Property Limitation Act, 1833; that during the occupation by the landlord's workmen the defendant had no exclusive possession; and that on each withdrawal of the landlord's agents a new tenancy at will or on sufferance commenced by implied grant. (iii) That the defendant by allowing John Snaith to enter and lay out money on the premises as his property without protest, and by requesting him (on at least one occasion) to do repairs to the house as owner thereof, is estopped from setting up that at those times the Statute of Limitations was running in her favour.

After the judge had given judgment, but before it was entered, the plaintiff's solicitor applied to add the trustees as co-plaintiffs together with the beneficiary in whose name the proceedings had been instituted. The solicitor for the defendant objected, but the judge found that, having regard to s. 24 of the Supreme Court of Judicature Act, 1873, the joinder was immaterial as between the plaintiff and the defendant and that the trustees were entitled to be added, and so he made an order joining them under R.S.C., Ord. 16, r. 11. Judgment was then entered in favour of all the plaintiffs.

The Real Property Limitation Act, 1833 [repealed] provides:

"Section 7. When any person shall be in possession . . . of any land . . . as tenant at will, the right of the person entitled subject thereto or of the person through whom he claims . . . to bring an action to recover such land . . . shall be deemed to have first accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined.

"Section 10. No person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon."

By the Rules of the Supreme Court Ord. 16:

"Rule 2. Where an action has been commenced in the name of the wrong person as plaintiff . . . the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just.

"Rule 11. No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that . . . the names of any parties, whether plaintiffs or defendants, who ought to have been joined . . . be added."

Montague Lush for the defendant.
Corner for the plaintiffs.

LAWRANCE, J.—The first point in this case is, whether the defendant was tenant at will of the house here in question or occupied it merely as the guest of John Snaith. I think it is clear on the facts that she was tenant at will. She paid most of the rates and she did the internal repairs, and she was in no way interfered with

in her occupation by John Snaith. This being so, and she having been in possession over thirteen years, the statute of limitations has run in her favour unless there has been an interruption in its operation. It is said that there has been; that the entry of John Snaith to do repairs from time to time constituted interruptions. This was one of a row of cottages belonging to Snaith. When he repaired the others he repaired this one. It seems to me he no more resumed the possession of this cottage than of the others when he did the repairs. This entry was not contrary to the defendant's wish. On the contrary, it is evident she was desirous that he should enter more often than he was willing to do repairs. All he did was intended not as a taking of possession, but merely as a kindness to her. I can see no evidence to support the finding of the county court judge, and I think the appeal must be allowed.

CHANNELL, J.—I am of the same opinion. I think we must give judgment for the defendant on the merits. There is, therefore, no need to decide as to the second point. However, I may just say that I think the amendment by adding the trustees as co-plaintiffs could be made at the stage it was made. Judgment then had been pronounced, but it had not been entered. Whether it was final judgment or not, the case was not disposed of till judgment was entered; there was still, in the words of FRY, L.J., something to do.

As to the other point, I think it is fairly clear when the Real Property Limitation Act, 1833, is looked at. It is, I think, clear on the face of it that the possession of the defendant was the possession of an occupier, and not the constructive possession of the owner. Probably under the old statute of limitations the possession would have been held to be not adverse, and, therefore, that no title could accrue under that statute. But the doctrine of non-adverse possession is now done away with. The tenancy of the defendant was or commenced as a tenancy at will. As to tenancies at will, there was rather a peculiar special provision in the Real Property Limitation Act, 1833. That provision was s. 7. [HIS LORDSHIP read s. 7, and continued:] The effect of this is that if a person comes into possession as tenant at will and continues in possession for thirteen years without paying rent, he acquires the ownership of the land by the joint effect of that statute and the Real Property Limitation Act, 1874 [repealed]. It was clear here there was a tenancy at will—the statement that the defendant might occupy the house rent free was sufficient to show that. The possession was the possession of the occupier, and not of the owner. The case in no way resembles those in which a servant or agent of the owner had held the possession for him.

Clearly, then, the county court judge was wrong. And we can review his decision, though in many ways it may have been a decision on a question of fact. In an action of ejectment the burden of proof lies on the plaintiff. Accordingly the burden here lies on the plaintiff to show that Snaith took possession of the house when he carried out the repairs. There is no evidence of that. There is no evidence his entry to do the repairs was against the wish of the defendant. There was no actual objection in fact, and in fact objection to it on her part was very unlikely. In *Doe d. Bennett* v. *Turner* (2) there was objection on the occupier's part, and that just made the whole difference. If it had been shown that the defendant was in occupation on the express terms that she should do all the internal repairs, that would probably have taken the case out of the statute, as the obligation to do the repairs might be held to be equivalent to rent. Probably the judge was misled by the Irish case of *Peakin* v. *Peakin* (1). That case is not on all fours with this, and I may add it seems to me doubtful.

Appeal allowed.

Solicitors: *Metcalfe & Sharp*, for *Stretton & Aysom*, Leicester; *Warwick Webb*, for *Harry Bray*, Leicester.

[*Reported by* J. ANDREW STRAHAN, ESQ., *Barrister-at-Law.*]

WYNNE *v.* WYNNE

[Probate, Divorce and Admiralty Division (Sir Francis Jeune, P.), July 4, 1898]

[Reported 78 L.T. 796]

Variation of Settlement—Settlement in favour of petitioner to provide for children of marriage and in default to give petitioner absolute control of settled property—No children of marriage—Dissolution of marriage—Re-conveyance of property to petitioner.

Where the real substance of a settlement in favour of a petitioner is to provide for any children of the marriage and in default of children to give the petitioner absolute control of the property, there is no issue of the marriage, and the petitioner has obtained a decree absolute of divorce, the court may order that the trustees re-convey the property comprised in the settlement to the petitioner.

Notes. Distinguished: *Walpole* v. *Walpole and Goddard*, [1901] P. 196; *Webb* v. *Webb*, [1929] P. 159.

As to variation of settlements after a divorce, see 12 Halsbury's Laws (3rd Edn.) 451 et seq.; and for cases see 27 Digest (Repl.) 641 et seq.

Case referred to:

(1) *Meredyth* v. *Meredyth and Leigh*, [1895] P. 92; 64 L.J.P. 54; 72 L.T. 898; 43 W.R. 304; 11 T.L.R. 186; 11 R. 651; 27 Digest (Repl.) 643, *6066*.

Application for the confirmation of the registrar's report recommending that the settled property of the petitioner, Marianne Aubrey Wynne should be re-conveyed to her by the trustees of the settlement freed from the trusts of the settlement.

The petitioner obtained on Oct. 27, 1894, a decree nisi dissolving her marriage with the respondent, Llewelyn Malcolm Wynne, on the ground of his adultery and desertion, and on May 9, 1898, the decree was made absolute. The petitioner applied for variation of an ante-nuptial settlement dated Jan. 10, 1881. The wife under this settlement brought certain property into trust. Among other limitations it was provided that in the event of failure of issue of the marriage the wife's settled property subject to the previous interests created by the settlement should go as she should by will or codicil appoint, and in default of appointment if she survived her husband to her absolutely, but if she died in the lifetime of her husband in trust for such person or persons as at her decease would have become entitled to her personal estate under the statutes for the distribution of the effects of intestates if she had died intestate and unmarried and domiciled in England. There was no issue of the marriage. The registrar recommended that the wife's settled property should be re-conveyed to her by the trustees of the settlement freed from the trusts of the settlement.

Herbert Robertson and *J. C. Priestley* for the petitioner.

F. Whinney for the respondent's trustee in bankruptcy.

Lewis Coward and *Gwynne Hall* for the trustees of the settlement.

SIR FRANCIS JEUNE, P.—I think I can accede to this application for the confirmation of the registrar's report. It seems to me that I can do so on the authority of *Meredyth* v. *Meredyth and Leigh* (1). This settlement gives a possible interest to the next of kin, and the only question which I have to consider is whether I shall be unduly interfering with their interest. The real substance of the settlement is to provide for any children of the marriage, and in default of children to give the petitioner absolute control of the property. There have been no children of the marriage and the purpose of the settlement has substantially failed. I think I shall only be following the rule laid down in *Meredyth* v. *Meredyth and Leigh* (1), and

acting on the true principles governing these cases if I order the trustees to re-convey the property as recommended by the registrar. I shall, therefore, confirm the registrar's report.

Solicitors : *Arthur Newton & Co.; Hasties; Gedge, Kirby & Millett.*

[*Reported by* H. W. Giveen, Esq., *Barrister-at-Law.*]

Re GALLARD. Ex parte GALLARD

[Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), November 15, 1895]

[Reported [1896] 1 Q.B. 68; 65 L.J.Q.B. 199; 73 L.T. 457; 44 W.R. 121; 12 T.L.R. 43; 40 Sol. Jo. 99; 2 Mans. 515]

Bankruptcy—Committee of inspection—Solicitor—Member employed as agent to trustees' solicitor—Retrospective sanction of court—Solicitor's right to profit derived from transaction arising out of bankruptcy—Office expenses—Disbursements.

A solicitor, a member of the committee of inspection of the bankrupt's estate, did work as agent of the firm of solicitors of the trustee without having previously obtained the sanction of the court as required by r. 317, of the Bankruptcy Rules, 1886.

Held: (i) the court had no power to give its sanction after the work had been done, and the solicitor was not entitled to derive any profit therefrom; (ii) the whole of the solicitor's bill of costs, except disbursements, was "profit," and nothing could be allowed for office expenses.

Bankruptcy—Committee of inspection—Solicitor—Retainer by committee—Solicitor's clerk member of committee—Setting aside retainer.

Per Lord Esher, M.R.: Where a solicitor accepted a retainer from a committee of inspection, one member of which was a clerk in his employ, an immediate application to the court to set aside the retainer ought to be granted.

Notes. Rule 317 of the Bankruptcy Rules, 1886, has been replaced by r. 350 (2) of the Bankruptcy Rules, 1952.

Referred to : *Re Spink, Ex parte Slater* (1913), 108 L.T. 811.

As to powers exercisable without the consent of the committee of inspection, see 2 Halsbury's Laws (3rd Edn.) 384 et seq.; and for cases see 4 Digest (Repl.) 267 et seq.

Appeal by Miss H. Gallard, a creditor, from an order of Vaughan Williams, J., in bankruptcy, varying the certificate of taxation of a solicitor's bill of costs in the bankruptcy, and holding that in addition to being repaid for out-of-pocket expenses, the solicitor was entitled to £75 for the expense of keeping up an office and a staff of clerks, and that only £40 could fairly be regarded as profit made out of the transaction, and therefore only £40 was disallowed.

In 1887 a receiving order was made against George Gallard, and in October, 1887, a trustee was appointed by the creditors with a committee of inspection. One of the members of the committee of inspection was a Mr. Williams, a solicitor, and a member of the firm of Cooper and Williams, at Brighton; another member was Mr. Hunt, managing clerk to Messrs. Ashurst, Morris, Crisp & Co. The committee of inspection appointed Messrs. Ashurst, Morris, Crisp & Co. solicitors to the trustee.

In the course of the bankruptcy it became necessary for Messrs. Ashurst, Morris, Crisp & Co. to employ an agent at Brighton, and they accordingly arranged with Mr. Williams that he should act as their agent there on the usual agency terms. No sanction of the court was obtained for this arrangement.

Mr. Williams did the work and sent in to the trustee's solicitors an agency bill of costs for £139, which Messrs. Ashurst, Morris, Crisp & Co. paid. The trustee claimed to be reimbursed out of the estate. In re-taxing the bill, which was ordered upon the application of a creditor, the master, acting upon r. 317 of the Bankruptcy Rules, 1886, disallowed the whole sum except out-of-pocket expenses.

The Bankruptcy Rules, 1886, r. 317 [see now Bankruptcy Rules, 1952, r. 350 (2)], provided as follows:

> "No member of a committee of inspection of an estate shall, except under and with the sanction of the court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy."

Cooper Willis, *Q.C.*, and *Æneas Macintosh* for the creditor.
Herbert Reed, *Q.C.*, and *Muir Mackenzie* for the trustee.

LORD ESHER, M.R.—Notwithstanding the great experience and knowledge of Vaughan Williams, J., I think with all deference that we ought not to agree with his decision in this case. There are two points arising here. The sanction of the court is required, under r. 317 of the Bankruptcy Rules, 1886, in order to entitle a member of a committee of inspection of a bankrupt's estate to derive any profit from any transaction arising out of the bankruptcy. That sanction was not obtained by Mr. Williams before he did the work in respect of which we are asked to disallow the profits claimed by him. The learned judge was of opinion that the sanction of the court could be given after the transactions had closed. It seems to me that, upon the true construction of r. 317, the learned judge was wrong in so holding. In my opinion, the sanction of the court must be obtained under that rule before a member of the committee of inspection of an estate has done any of the things in respect of which he claims any profit. Mr. Williams did not earn his profits "under and with the sanction of the court," and, since the court has no power to give its sanction subsequently, we must hold that he is not entitled to any profit for the work he has done in the bankruptcy.

I think that Messrs. Ashurst, Morris, Crisp & Co. made a mistake in employing Mr. Williams as their agent. The learned judge said that he thought that they did not mean to do anything wrong, and I accept that. No blemish upon their honour arises from what they did, but they certainly made a mistake in employing as their agent a member of the committee of inspection without first obtaining the sanction of the court. It has been argued that the work which he did was very beneficial to the estate. I do not doubt it. But the question here is, whether he can be allowed to make any profit out of the matter, and whether he is entitled to be paid anything except in respect of disbursements. The learned judge agreed that Mr. Williams was not entitled to any profit, but he decided that the other charges in his bill of costs besides disbursement were not all profits. Mr. Williams has to keep up an office and a staff of clerks, and so the learned judge held that an allowance ought to be made for these office expenses, and that the only profit arising out of the work done was the amount of the bill of costs less these office expenses and disbursements. That is a very dangerous view to take. The profits of a solicitor are that which he claims to be paid, less his disbursements. I cannot agree with the very lenient view taken by the learned judge. Everything in the bill must be taken off except in respect of disbursements, and this appeal must be allowed.

There is another important question raised in this case. Messrs. Ashurst, Morris, Crisp & Co., without any wrong intent, accepted a retainer from the committee of inspection of which one of their clerks was a member. That does not seem to me to

be good practice. It was a mistake on their part. They should have immediately obtained the sanction of the court. Though it is not necessary for me to decide the point now, my view certainly is that, if a solicitor accepts a retainer from a committee of inspection when one of the members of the committee is in such close relations with him as their clerk was to Messrs. Ashurst, Morris, Crisp & Co., an application made at once to the court that the retainer be set aside ought to be granted by the court in the exercise of its inherent powers.

LOPES, L.J.—I am of the same opinion. The true construction of r. 317 is an important matter. I understand it to mean that the sanction of the court must be obtained before, not after, the work is done in respect of which a profit is claimed. The sanction of the court is a condition precedent to the making of profits. In the present case Messrs. Ashurst, Morris, Crisp & Co., without obtaining the sanction of the court, employed Mr. Williams as their agent at Brighton, he being a member of the committee of inspection. No doubt he was well acquainted with the details of the bankruptcy, and his employment was in some respects a proper one. But Messrs. Ashurst, Morris, Crisp & Co. made a mistake in employing him while he was a member of the committee of inspection. He comes within the provisions of r. 317, and therefore, he is not entitled to derive any profit from that which he did as agent for Messrs. Ashurst, Morris, Crisp & Co. in this bankruptcy. No question is raised as to his payment in respect of disbursements. The only question is as to a sum of about £115. VAUGHAN WILLIAMS, J., came to the conclusion that Mr. Williams was entitled to the whole of that sum except £40, which, he decided, represented the profit arising from the work done. The rest of that sum, about £75, the learned judge attributed to the expenses of the office and clerks, and he held that that sum was not profit. I cannot understand that decision. It seems to me that the outgoings of the office could not in any way be attributed to the expenses of the bankruptcy. All that the solicitor can claim to be paid is out-of-pocket expenses. Everything else in his bill is profit. The learned judge was wrong in deducting only £40; he should have deducted everything except disbursements. I, therefore, agree that the appeal must be allowed.

KAY, L.J.—The duties of the committee of inspection of a bankrupt's estate are obvious. They are to watch over the administration of the bankruptcy, and to control, to any extent they may think right, that which may be done by the trustee or the solicitor or anyone else who takes part in the administration. That being so, r. 317 was passed. I entirely agree with what has been said as to its construction. The words seem to me to be very clear. A member of the committee is not to derive any profit from any transaction "except under and with the sanction of the court." That means, he must have the sanction of the court at the time he is engaged in the transactions from which he hopes to derive profit. It cannot be said that the court can give its sanction afterwards. That would be contrary to both the letter and the spirit of the rule. The sanction must be obtained before any work is done by a member of a committee of inspection which would be profitable to him. That is my reading of the rule. In the present case Mr. Williams was a member of the committee of inspection, and never obtained the sanction of the court before acting as agent to Messrs. Ashurst, Morris, Crisp & Co., who were solicitors for the trustee in bankruptcy. They arranged with him that he should act as their agent at Brighton on the usual agency terms, and they have paid him money for so acting. It is completely against the spirit of the rule that he should receive any profit for what he has done as agent for the trustee's solicitors. His duty, as a member of the committee, to keep down the expenses of the bankruptcy, conflicts with his own interest to incur expenses and make a profit. That is the very mischief that the rule was intended to get rid of.

Then it is said that the learned judge has not allowed Mr. Williams any profit. He has, in fact, allowed him not only his disbursements, but a sum of about £75

which is said not to be profit. Mr. Williams has an office and clerks, and he asks that the cost of keeping up his office and clerks should be attributed to the expenses of the work he has done, and that only the balance of his bill should be treated as profit. It is the first time I have ever heard that suggestion made. If he were allowed to pay for the costs of keeping up an office and a staff of clerks out of that which he says is not profit, his interest would be in direct conflict with his duty as a member of the committee of inspection to keep down the expenses of the administration. I am of opinion that the £75 which the learned judge allowed were profits arising from work done by Mr. Williams, and the learned judge had no power to allow anything in respect of office expenses. Rule 317 is imperative. As the £75 were improperly allowed, we must now order that that amount be struck out of the bill.

Appeal allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.; J. C. Buckwell*, Brighton.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

LONDON AND RIVER PLATE BANK, LTD. *v.* BANK OF LIVERPOOL

[QUEEN'S BENCH DIVISION (Mathew, J.), November 4, 6, 1895]

[Reported [1896] 1 Q.B. 7; 65 L.J.Q.B. 80; 73 L.T. 473; 1 Com. Cas. 170]

Bill of Exchange—Forgery—Forgery of endorsements—Acceptance and payment to bona fide holders for value in belief that endorsements genuine—Right to recover as money paid under mistake of fact—Delay—Change in position of holders.

Where the drawee of a bill of exchange accepts the bill with forged endorsements on it in the belief that such endorsements are genuine, and in the same belief pays the bill at maturity to a bona fide holder for value, he cannot afterwards, if such an interval has elapsed that the position of the holder may have been altered, recover his money as money paid under a mistake of fact.

A bill of exchange was drawn in three parts, two of which were stolen, and, after endorsements had been forged, one draft was presented for acceptance by a bona fide holder and was accepted by the plaintiffs. In the belief that the endorsements were genuine and that they were liable on the bill, and without any negligence on their part, the plaintiffs paid the bill at maturity to the defendants who were bona fide holders for value. After the discovery of the theft and forgeries some months later, the third part of the bill was presented, and, this being a genuine bill, the plaintiffs paid it. Having without negligence paid the bill twice, the plaintiffs sought repayment from the defendants of the money paid by them in respect of the first draft as money paid under a mistake of fact.

Held: an interval having elapsed during which the position of the defendants had altered, the plaintiffs could not recover the sum paid to the defendants as money paid under a mistake of fact.

Notes. Section 71 of the Bills of Exchange Act, 1882, provides rules where a bill is drawn in a set: see 2 HALSBURY'S STATUTES (2nd Edn.) 542.

Considered: *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A.C. 49. Applied: *Morison* v. *London County and Westminster Bank, Ltd.*, [1914-15] All E.R. Rep. 853. Referred to: *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 86.

As to the effect of forged signatures on a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 190; and for cases see 6 DIGEST (Repl.) 97 et seq.

Cases referred to:

(1) *Price* v. *Neal* (1762), 3 Burr. 1354; 1 Wm. Bl. 390; 96 E.R. 221; 6 Digest (Repl.) 99, *773*.

(2) *Smith* v. *Mercer* (1815), 6 Taunt. 76; 1 Marsh. 453; 128 E.R. 961; 6 Digest (Repl.) 99, *776*.

(3) *Cocks* v. *Masterman* (1829), 9 B. & C. 902; Dan. & H. 329; 4 Man. & Ry.K.B. 676; 8 L.J.O.S.K.B. 77; 109 E.R. 335; 6 Digest (Repl.) 99, *777*.

(4) *Wilkinson* v. *Johnson* (1824), 3 B. & C. 428; 5 Dow. & Ry.K.B. 403; 3 L.J.O.S.K.B. 58; 107 E.R. 792; 6 Digest (Repl.) 99, *778*.

(5) *Mather* v. *Lord Maidstone* (1856), 18 C.B. 273; 25 L.J.C.P. 310; 27 L.T.O.S. 261; 139 E.R. 1374; 6 Digest (Repl.) 119, *890*.

Also referred to in argument:

Milnes v. *Duncan* (1827), 6 B. & C. 671; 9 Dow. & Ry.K.B. 731; 5 L.J.O.S.K.B. 239; 108 E.R. 598; 6 Digest (Repl.) 337, *2444*.

Holland v. *Russell* (1863), 4 B. & S. 14; 2 New Rep. 188; 32 L.J.Q.B. 297; 8 L.T. 468; 11 W.R. 757; 122 E.R. 365, Ex. Ch.; 1 Digest (Repl.) 773, *3047*.

Action by the plaintiffs, the London and River Plate Bank, Ltd., brought to recover from the defendants, the Bank of Liverpool and Messrs. Larrinaga & Co. £261 0s. 11d., alleged to have been paid by the plaintiffs to the defendants under a mistake of fact, and which the plaintiffs sought to recover as money paid under a mistake of fact. The plaintiffs claimed the sum as the amount of first of exchange in favour of Fueyo & Co., accepted by the plaintiffs and paid to the defendants either personally or by their agents for that purpose under the mistake of fact that the endorsements thereon were genuine, and that the person presenting the same was the lawful holder thereof.

On April 18, 1893, Hipolito Garcia, a merchant of Monte Video, who was desirous of making a remittance to a firm of Fueyo & Co., in Havana, purchased a draft drawn by the Monte Video branch of the plaintiff bank on the head office in London, for £261 0s. 11d., payable 120 days after date to the order of Fueyo & Co. of Havana. The bill was issued in three parts in the usual way, and Hipolito Garcia forwarded two parts of the draft to his correspondents Fueyo & Co., in payment of an account. These drafts never reached their destination, and they appear to have been stolen in their transit through the post office. Subsequently, a person, who called himself Pedro Garcia, appeared at Havana, having with him the first and second of exchange, and he called there upon a firm of Loychate & Co., and produced the draft which purported to be indorsed to him, first from Fueyo & Co. to Hipolito Garcia and then by Hipolito Garcia to him, and he asked Loychate & Co. to buy the bill on London. They did not know much about Pedro Garcia, and they, therefore, intimated to him that before they paid the amount of the bill they would like to know whether or not it would be accepted in England. Pedro Garcia fell in with that proposal, and accordingly the bill was, at the request of Loychate & Co., endorsed to the firm of Larrinaga & Co. in Liverpool. Larrinaga & Co. presented the bill for acceptance to the plaintiffs, and the bill was accepted by the plaintiffs, and upon intimation of that fact Loychate & Co. paid the amount of the bill to Pedro Garcia, who thereupon disappeared, and had not since been heard of. The bill having in this way reached the hands of Larrinaga & Co., they in the usual course of business, discounted the bill with the Bank of Liverpool, and handed them the bill endorsed by themselves, and were credited with the amount at the time when the bill was so transferred. The bill matured about a fortnight after, and it was then presented by the Bank of Liverpool to the plaintiff bank, and was paid by them on Aug. 19, 1893. It was admitted that the Bank of Liverpool and Larrinaga & Co. had acted in perfect good faith, and it was asserted by the plaintiffs that they had paid the bill under the impression that it was a genuine bill upon which they were

liable. Some time after Fueyo & Co., who expected to be paid the amount of their bill by Hipolito Garcia, informed him that they had received no remittance. Then it was discovered that the original first and second of exchange had been stolen, and had been dealt with in the way mentioned. Hipolito Garcia then sent to Fueyo & Co. the third of exchange—that being a genuine bill—and that was forwarded with the proper indorsements to the plaintiffs, and they were compelled to pay it and did pay it in July, 1894. The plaintiffs, therefore, paid the draft twice over, and under the circumstances they demanded from the Bank of Liverpool and from Larrinaga & Co. repayment of the money that they had handed over in discharge of the first and second of exchange, which they said they had paid under a mistake of fact.

Bigham, Q.C., and *Boydell Houghton* for plaintiffs.
T. G. Carver for defendants.

Cur. adv. vult.

Nov. 6, 1895. **MATHEW, J.**—This action is brought by the plaintiffs to recover from the Bank of Liverpool and from a firm of Larrinaga & Co., the sum of £261, the amount of a draft which had been accepted by the plaintiff bank, and which they had paid, but which they allege they paid under a mistake of fact. It appeared a long time after payment had ben made that the endorsements on the draft were forgeries, and it followed that the plaintiffs were not liable on the draft at the time they paid it. It is admitted that the Bank of Liverpool and Larrinaga & Co., had become possessed of the bill in good faith, and so far as they were concerned, they were as ignorant as the plaintiffs of the fact that the endorsements were forged.

It was argued for the plaintiffs that if it could be shown that the plaintiffs had not been negligent when they paid the money over, it might be recovered from the Bank of Liverpool, or from Larrinaga & Co. It was agreed that there was no evidence of negligence on the part of the plaintiffs; that when they paid the bill they paid it under the impression that it was a genuine bill, and that there were no means whatever of ascertaining that the endorsements on the bill were a forgery. It was said that the substance of the rule that where there was no negligence in a case of this sort, the acceptor paying a forged bill, could get the money back, was recognised in the early case of *Price* v. *Neale* (1).

In that case the acceptor of the bill—I am referring to one only of the two bills therein mentioned—in the belief that the signature of the drawer was genuine, paid the amount. The bill turned out to be a forgery, and in an action to recover the money paid to the holder, LORD MANSFIELD said that the acceptor was bound to know the drawer's handwriting. From that it was urged that the foundation of the liability of the plaintiff in such a case was negligence, and that if there was no negligence the acceptor was entitled to recover the money back. But that is not the decision. If the forgery were cleverly executed one does not see how it is possible that the acceptor should know it was a forgery, and it would seem extraordinary that the right of the acceptor to recover the money paid to the holder should depend upon whether or not the forgery was cleverly executed. It was not said in that case that there had been negligence, nor was it said that if there had been no negligence the action would lie. Neither of those two propositions is laid down, and one or other would have been indispensable to the position taken up for the plaintiffs. The principle underlying the decision in that case seems to me to be this, that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not afterwards withdraw from that position; and no single case has been produced in which, where payment had been made on a forged endorsement to the holder in good faith, the money has been recovered back. That case was followed by *Smith* v. *Mercer* (2), where it was said in the course of some of the judgments, that where a banker had paid a forged draft, believing that it had been accepted by his customer, he ought to know his customer's signature. The banker may not be able by any amount of

care to ascertain whether or not the acceptance was a forgery, and the same observations I have made with regard to the former case apply to this also, and neither case establishes the principle contended for on behalf of the plaintiffs.

The true principle is developed in the clearest possible form in *Cocks* v. *Masterman* (3). There was an intermediate case of *Wilkinson* v. *Johnson* (4), which stands by itself, and which we need not discuss. In *Cocks* v. *Masterman* (3) the simple rule was laid down in clear language for the first time that, when a bill becomes due and is presented for payment, the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered instantly, it may be the money can be recovered back, but if it be not and the money is paid in good faith and is received in good faith, and there is an interval of time, in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill, and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder should have time to give notice of dishonour to the other parties to the bill; but, even in such a case, it is manifest that the position of a man of business may be most seriously compromised even by the delay of a day. That clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as I have always understood, it is unimpeachable, and it has been recognised in *Mather* v. *Lord Maidstone* (5).

In the case before me there cannot be a question that the position of the Bank of Liverpool would be seriously compromised if they were now compelled to repay this money because it was not until months afterwards that it was discovered that there was anything wrong with the bill, and meanwhile the Bank of Liverpool had lost their right of giving notice to Larrinaga & Co., that the bill had not been paid. I now come to refer to the exact position of the Bank of Liverpool in the matter. The Bank of Liverpool and Larrinaga & Co., are both made defendants, and the plaintiff's counsel was called upon to elect as to which he was proceeding against. If Larrinaga & Co. had handed the bill for collection to the Bank of Liverpool, they would be the proper defendants on the assumption of liability. If, on the other hand, the Bank of Liverpool were the holders of the bill by endorsement from Larrinaga & Co., the Bank of Liverpool would be the persons to be sued, on the same assumption of liability. In this case I am satisfied that the Bank of Liverpool were holders of the bill; that payment was made to them, and that, therefore, they are entitled to retain the money. Therefore, I think this action fails, and I give judgment for the defendants with costs.

Judgment for defendants.

Solicitors: *Bompas, Bischoff, Dodgson, Coxe & Bompas; Wynne, Holme & Wynne*, for *H. Forshaw & Hawkins*, Liverpool.

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

A

BRAY *v.* FORD

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Shand), December 2, 3, 18, 1895]

B

[Reported [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 12 T.L.R. 119]

Court of Appeal—New trial—Miscarriage—Misdirection—Libel—Measure of damages.

By R.S.C. Ord. 39, r. 6 [see now R.S.C. Ord. 58, r. 10, sub-r. (2)]: "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the court . . . some substantial wrong or miscarriage has thereby been occasioned in the trial. . . ."

C

In an action for libel, if the judge so directs the jury as to lead them to take such an erroneous view of any material part of the alleged libel as may have affected their minds in considering what damages they shall award, there is a substantial "miscarriage" within the meaning of R.S.C. Ord. 39, r. 6, and a new trial must be ordered, though the court should be of opinion that other parts of the alleged libel were sufficient to justify the damages actually given.

D

Notes. The power of the Court of Appeal to order a new trial on the ground of misdirection is now governed by R.S.C. Ord. 58, r. 10, sub-r. (2).

E

Distinguished: *Floyd* v. *Gibson* (1909), 100 L.T. 761. Considered: *Barber & Co.* v. *Deutsche Bank (Berlin) London Agency*, [1918-19] All E.R. Rep. 407; *Williams* v. *Barton*, [1927] All E.R. Rep. 751. Applied: *Hobbs* v. *Tinling & Co.*, *Hobbs* v. *Nottingham Journal*, [1929] All E.R. Rep. 33. Considered: *Rook* v. *Fairrie*, [1941] 1 All E.R. 297; *Braddock* v. *Bevins*, [1948] 1 All E.R. 450; *Re*

F

Gee, Wood v. *Staples*, [1948] 1 All E.R. 498; *Re French Protestant Hospital*, [1951] 1 All E.R. 938. Referred to: *Bath* v. *Standard Land Co.*, [1911] 1 Ch. 618; *Greenlands* v. *Wilmshurst and London Association for Protection of Trade*, [1913] 3 K.B. 507; *Tolley* v. *J. S. Fry & Sons* (1929), 46 T.L.R. 108; *Ley* v. *Hamilton* (1934), 151 L.T. 360; *Farmer* v. *Hyde*, [1937] 1 All E.R. 773; *Re Macadam, Dallow* v. *Codd*, [1945] 2 All E.R. 664.

G

As to ordering a new trial by reason of misdirection, see 30 Halsbury's Laws (3rd Edn.) 473, 476; and for cases, see Digest (Practice) 593-594. As to misdirection as to measure of damages, see 11 Halsbury's Laws (3rd Edn.) 310-311; and for cases, see 17 Digest (Repl.) 185-186.

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), refusing a new trial in an action for libel resulting in a verdict for the plaintiff with £600 damages.

H

The plaintiff, who was a solicitor and justice of the peace in Leeds, and the defendant were for many years members of the Leeds Liberal Club and were both interested in the Yorkshire College, to the funds of which they had largely subscribed. The plaintiff was a governor and vice-chairman of the council of the college, and had acted as its solicitor, receiving profit costs for his services. At first he made a present of his time and labour to the college, but after entering into partnership with another solicitor in 1878 he considered that he was not at liberty to do so. He informed the college of this, and bills of costs were afterwards delivered to and charged against the college in the usual way. The total amount of profit received by the plaintiff on these bills, which covered the period from 1879 to 1893, was £103 10s., but his annual subscriptions during the same period considerably exceeded that amount. The defendant, having learned that the plaintiff received profit costs, wrote to him a letter which constituted the alleged

I

libel, and circulated it among more than 300 governors of the college and certain other persons. The letter began thus :— A

Leeds, Feb. 26, 1894.

"Sir,—During last summer, as you are aware, it came to my knowledge that, whilst holding the fiduciary position of vice-chairman of the Yorkshire College, you were illegally and improperly, as you know, making profit as its paid solicitor." B

Then followed comments which a jury would be justified in regarding as gravely libellous.

The plaintiff brought an action for libel, and at the trial at Leeds before CAVE, J., and a special jury, it was contended on his behalf that under the articles of association of the college he was entitled to profit costs, notwithstanding the fact that he C held the fiduciary position of director of the institution. CAVE, J., directed the jury that the plaintiff was entitled to take profit costs from the college, and the jury assessed the damages at £600. The Court of Appeal held that although there had been a misdirection on the construction of the articles of association of the college, and the plaintiff was not entitled to take profit costs, there were imputations in the letter sufficient to sustain the verdict, and therefore that there had been no D substantial wrong or miscarriage within the meaning of Ord. 39, r. 6, and refused a new trial. The defendant appealed.

Sir Edward Clarke, *Q.C.*, *Bigham*, *Q.C.*, *Atherley Jones* and *H. Greenwood* for the defendant.

Sir Frank Lockwood, *Q.C.*, *Blake Odgers*, *Q.C.*, and *Scott Fox* for the plaintiff.

Their Lordships took time for consideration. E

Dec. 18, 1895. The following opinions were read.

LORD HALSBURY, L.C.—In this action for libel, the judge directed the jury that the plaintiff, a solicitor, was entitled to charge an institution, of which he was himself both occasionally the solicitor and also a governor—that is, a person intrusted F with the government and management of the institution in question—the profit costs which he would have been entitled to charge if he had not filled that character. It is not necessary to consider whether the institution could have given such a consent as would have enabled him to have taken such profit, because I am of opinion that no such consent was, in fact, given; the matter relied on is absolutely irrelevant to such a question. It cannot now be denied that this was a misdirection. G The only question, therefore, which we have to deal with is whether, in the language of Ord. 39, r. 6, a substantial wrong or miscarriage has been thereby occasioned at the trial.

I think that there has been a substantial wrong and a miscarriage. I think that there has been a substantial wrong, since I think that the defendant was not permitted to present his case to the jury with the argument that his original H complaint was true. This seems to me a substantial wrong, and I am not prepared to say what a jury might think if they were told that the original complaint was itself unfounded, or if they were told that, though the original complaint was well founded, there was excess in the language by which that original complaint was made; but it appears to me that it was, in this case, withdrawing from the jury a question which the defendant had a right to have submitted, a right which was so I relevant and important to the discussion that I must say I cannot regard it as a trivial or immaterial matter; and I think it was a miscarriage, as this view was not presented to the jury. What influence such a wrong might have had upon the verdict or upon the amount of damages I am not disposed to consider. The case must be tried again, and I desire to say nothing which can in any way influence the arguments upon the trial which must take place. It is nothing to the purpose to say that the rest of the printed matter complained of as a libel would justify a verdict for the same amount of damages. I absolutely decline to speculate what

might have been the result if the judge had rightly directed the jury. It is enough for me that an important and serious topic has been practically withdrawn from the jury, and this is, I think, a substantial wrong to the defendant. I do not think it desirable to say what would be my own construction of the rule in other cases not now before me. I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed, that a new trial should be ordered, and I move your Lordships accordingly.

LORD HERSCHELL stated the facts and continued: At the trial it was contended that the plaintiff was, by virtue of the fourth clause of the college's memorandum of association, entitled to receive remuneration for his services, notwithstanding the position he held as vice-chairman of the council. CAVE, J., adopted this view, and so directed the jury. The Court of Appeal have held that this was erroneous, and I agree with them. I do not think the words relied on have the effect contended for. It is not now in controversy that, if this be so, the plaintiff was not warranted in making a charge for his professional services.

It is an inflexible rule of the court of equity that a person in a fiduciary position, such as the plaintiff's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrongdoing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services. It is clear, however, that CAVE, J., misdirected the jury, and that, as the misdirection cannot be said to have been on a point wholly immaterial, the defendant would have been entitled, prior to the Judicature Act, to a new trial as of right. That Act provides that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the court, some substantial wrong or miscarriage has been thereby occasioned in the trial. The Court of Appeal came to the conclusion that there had been no such wrong or miscarriage in the present case. They thought, as I understand, that the nature of the libel was such that the jury would have been entitled to give, and would probably have given, the same verdict, even if the direction of the judge had been the other way.

If I had thought that the enactment relied on sanctioned dealing with the case in this way, I am far from saying that I should have differed from the conclusion at which they arrived. But I have come, with some reluctance I own, to the conclusion that it does not. The provision is, in my opinion, a very beneficial one, and I should be sorry to say anything to narrow its scope further than the language employed seems to me to render necessary. In cases in which the question is what are the facts, or the proper inferences to be drawn from the facts, if the court think that the verdict of the jury is in accordance with the true view of the facts, and of the inferences to be drawn from them, it may be that they would have done right in refusing to grant a new trial on the ground of misdirection, even where the parties had a right to claim that the action should be tried by a jury. But in the case of an action for libel not only have the parties a right to trial by jury, but the assessment of damages is peculiarly within the province of that tribunal. The damages cannot be measured by any standard known to the law, they must be determined by a consideration of all the circumstances of the case, viewed

in the light of the law applicable to them. The latitude is very wide. It would often be impossible to say that the verdict was a wrong one, whether the damages were assessed at £500 or £1,000. Where, then, the judge so directs the jury as to lead them to take an erroneous view of any material part of the alleged libel, and this view may have affected their mind in considering what damages they should award, I think that there has been a substantial miscarriage within the meaning of the rule. The court may think, as I might think in the case before your Lordships, that the jury would have given the same damages if the law had been correctly expounded, but this is a mere matter of speculation; it cannot be asserted with the least certainty that they would have done so. The jury have returned their verdict on what they were erroneously led to think was the case, and not on the real case which the defendant was entitled to have submitted to them. I find it impossible to say that the case upon which the jury ought to have adjudicated ever was wholly before them, and that they were allowed to give to all the circumstances which might legitimately have influenced the verdict their due weight. This seems to me to establish that there has been a substantial miscarriage, and that the defendant is entitled to a new trial.

LORD WATSON.—I shall endeavour, without recapitulating the facts of this case, to indicate the considerations which have led me to differ from the conclusion arrived at by the learned judges of the Court of Appeal. The error committed by the judge consisted in his directing the jury that the plaintiff, as a governor of the Yorkshire College, was legally justified in charging and accepting payment of full professional remuneration in respect of services rendered by him to the college in his capacity of solicitor. Your Lordships can entertain no doubt that the plaintiff was neither entitled to charge profit costs in respect of these services nor to retain them when received by him. Such a breach of the law may be attended with perfect good faith, and it is, in my opinion, insufficient to justify a charge of moral obliquity, unless it is shown to have been committed knowingly or with an improper motive. Ord. 39, r. 6, makes it imperative that a new trial shall not be granted on the ground of misdirection, unless, in the opinion of the court, some "substantial wrong or miscarriage has been thereby occasioned in the trial." I think it is clear that the misdirection given by CAVE, J., at the trial was such as to occasion a miscarriage, in the sense in which that word was understood by the legal profession at the time when the Rules of 1883 were framed. The only question, therefore, which your Lordships have to consider is whether the miscarriage has been substantial within the meaning of the order.

Every party to a trial by jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that tribunal. In the present instance the case made in evidence by the defendant was not submitted to the jury. The whole imputations in his letter of Feb. 26, 1894, which are said to be libellous, arise out of and are strung upon the allegation that the plaintiff's acceptance and retention of full remuneration for the professional services rendered by him to the college were in violation of the law. The text or basis of these imputations was, in point of fact, true; but the case went to the jury on the footing that it was false. It is plain that the judge did not regard its falsity as an immaterial feature of the case which the jury had to consider. He told the jury:

> "In my judgment he [i.e., the plaintiff] was not making a profit illegally or improperly, and, if it was not illegal or improper, of course Mr. Ford could not know that it was either, and that does impute to him conduct which, if it were true, would no doubt tend to lower him in public estimation, and properly so tend."

I have already indicated my opinion that the illegality of the plaintiff's conduct would not necessarily justify a charge of acting improperly, if the impropriety im-

puted meant anything more than illegality; and I agree with the judges of the Court of Appeal in thinking that, assuming illegality, there are other imputations in his letter which might sustain a verdict against the defendant.

I do not profess to know all the considerations by which juries are influenced in arriving at their verdict; but it does appear to me that, in assessing damages, a jury might reasonably take into their consideration whether the charge upon which libellous imputations were made by way of comment was or was not in itself a libel. In the one aspect, the defendant's letter conveyed a wholly baseless and libellous charge; in the other, a well-founded accusation, followed up by language which conveyed other and libellous imputations. I do not feel myself in a position to affirm that, in each of these cases, the same jury would have awarded the same sum of damages. I could not possibly arrive at that conclusion without first assessing the damages in each case for myself; and that is a duty which, in my opinion, I ought not to undertake in a case like the present. In such a case the assessment of damages does not depend upon any definite legal rule, and is the peculiar function of the jury, by whom the party liable is entitled to have the measure of his pecuniary liability determined. For these reasons I have come to the conclusion that there has been a substantial miscarriage within the meaning of Ord. 39, r. 6, and that the case must be remitted for new trial.

I have purposely abstained from suggesting any general rule applicable to the construction of Ord. 39, r. 6. I doubt the possibility of formulating any rule which would be useful, and I do not doubt the inexpediency of making the attempt. Each case must depend upon its own circumstances. **LORD MACNAGHTEN,** who is unable to be present, has requested me to state that he concurs in the views which I have expressed.

LORD MORRIS and **LORD SHAND** concurred.

New trial ordered.

Solicitors : *C. Rawlings; Richard Smith & Sons* for *William Warren*, Leeds.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re CHAPMAN. FREEMAN *v.* PARKER

[COURT OF APPEAL (Lord Herschell, L.C., Lindley and A. L. Smith, L.JJ.), January 15, 17, 18, 21, 1895]

[Reported 72 L.T. 66; 11 T.L.R. 177; 39 Sol. Jo. 217]

Trustee—Unreasonable conduct—Liability for costs thereby incurred.

A trustee may be honest, and yet from over-caution or some other cause he may act unreasonably, and if his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he thereby causes his cestuis que trust expense which would not otherwise have been incurred, he must bear such expense, and it ought not to be thrown on the trust estate or on his cestuis que trust.

The defendant was the trustee of a trust fund and paid the income of the fund to the plaintiff as directed by the testator's will. After some years he was seized with a suspicion that the plaintiff was dead and that the person to whom

he had been paying the money was an impostor. He refused to be satisfied with the evidence produced by the plaintiff as to her identity and she was forced to take out an originating summons to compel him to continue to pay her the income of the fund. There were found no grounds for the defendant's suspicions, and he was ordered to pay the costs of the summons. On appeal against the order as to costs,

Held: as the defendant refused to be satisfied as to the plaintiff's identity by evidence which would have satisfied a reasonable man, he must bear all the expenses resulting from his conduct and must pay the costs of the application.

Notes. As to cases where a trustee is liable for costs, see 38 HALSBURY'S LAWS (3rd Edn.) 947, 948; and for cases see 43 DIGEST 825 et seq.

Cases referred to in argument:

Cotterell v. *Stratton* (1872), 8 Ch. App. 295; 42 L.J.Ch. 417; 28 L.T. 218; 37 J.P. 4; 21 W.R. 234, L.C. & L.JJ.; 35 Digest 696, *4393*.

Mendes v. *Guedalla* (1862), 2 John. & H. 259; 31 L.J.Ch. 561; 6 L.T. 746; 8 Jur. N.S. 878; 10 W.R. 482; 70 E.R. 1054; 43 Digest 987, *4288*.

Wrigley v. *Sykes* (1856), 21 Beav. 337; 25 L.J.Ch. 458; 26 L.T.O.S. 252; 2 Jur. N.S. 78; 4 W.R. 228; 52 E.R. 889; 23 Digest (Repl.) 313, *3788*.

Selby v. *Whittaker* (1877), 6 Ch.D. 239; 47 L.J.Ch. 121; 37 L.T. 514; 26 W.R. 117, C.A.; 44 Digest 558, *3743*.

Taylor v. *Glanville* (1818), 3 Madd. 176; 56 E.R. 475; 43 Digest 776, *2161*.

Goodson v. *Ellisson* (1827), 3 Russ. 583; 38 E.R. 694, L.C.; 43 Digest 776, *2162*.

Re Wylly's Trusts (1860), 28 Beav. 458; 2 L.T. 788; 25 J.P. 84; 6 Jur. N.S. 906; 8 W.R. 645; 54 E.R. 442; 43 Digest 803, *2425*.

Re Knight's Trusts (1859), 27 Beav. 45; 28 L.J.Ch. 625; 33 L.T.O.S. 54; 5 Jur. N.S. 326; 54 E.R. 18; 43 Digest 826, *2711*.

King v. *King* (1857), 1 De G. & J. 663; 27 L.J.Ch. 29; 30 L.T.O.S. 177; 4 Jur. N.S. 721; 6 W.R. 86; 44 E.R. 881, L.JJ.; 43 Digest 776, *2167*.

Re Parsons, Ex parte Belchier, Ex parte Parsons (1754), Amb. 218; 27 E.R. 144; sub nom. *Belchier* v. *Parsons*, 1 Keny. 38, L.C.; 43 Digest 887, *3295*.

Speight v. *Gaunt* (1883), 9 App. Cas. 1; 53 L.J.Ch. 419; 50 L.T. 330; 48 J.P. 84; 32 W.R. 435, H.L.; 43 Digest 884, *3273*.

Appeal against an order by NORTH, J., in so far as it directed that the defendant should pay the costs of an originating summons taken out by the plaintiff to compel the defendant to pay the income of a trust fund to her.

Miss Chapman, who died in 1871, by her will bequeathed the income of a fund to her old servant Mrs. Freeman for her life, and after her death to her niece Ann Freeman for her life, with a gift over of the capital to other persons. Of the two trustees of the will, Francis Parker, a barrister, was the acting trustee. He paid the income to Mrs. Freeman during her life. She died in 1876. Parker then paid the income of the fund to Ann Freeman down to 1891, when he began to entertain a suspicion that Ann Freeman whom he had never seen personally was really dead, and that the individual to whom he had been paying the income was an impostor, who had been personating Ann Freeman. He required evidence to be adduced to satisfy him on this point. The evidence which was given, however, failed to satisfy him at all, and he declined to pay the income. Ultimately Ann Freeman took out an originating summons to compel him to do so. It was decided by NORTH, J., that there was no foundation for Parker's suspicions, and that he had acted unreasonably. The learned judge accordingly ordered him to pay the income to the plaintiff and also to pay the costs of the application. Parker now appealed against the order so far as it directed that he should pay the costs.

The defendant appeared in person.

Swinfen Eady, Q.C., and *R. J. Parker*, for the plaintiff, were not called upon to argue. *Cur. adv. vult.*

Jan. 21, 1895. The following judgments were read.

LORD HERSCHELL, L.C.—This is an appeal from a judgment of North, J., by which he ordered the defendant to pay over certain dividends and the costs of the proceedings. The appeal is only from the latter part of the order, namely, as to the costs. The defendant contends that not only ought he not to have been ordered to pay the costs, but that he should be allowed to receive them.

The law which, in my opinion, is applicable to the case may be shortly stated. I think that a trustee is bound to act reasonably. I do not dissent from the defendant's proposition that what is reasonable must be measured by the responsibility which the law imposes on a trustee. I do not think that a trustee is bound to run any risks. I think that he is entitled to satisfy himself by all reasonable inquiry and investigation, because, if he pays money to any person who is not properly entitled to receive it, he may be held liable. But if he sees risk where none in fact exists, and if he refuses to be satisfied by evidence which would satisfy all reasonable men, then I think that he must bear all the expenses which his conduct causes, and cannot throw that expense upon any particular beneficiary or upon the trust estate.

The defendant contends that the trustee is the only judge of what is reasonable, and that he is entitled to be satisfied in such a way as he considers proper. I most entirely dissent from that proposition. The defendant asked how the court could decide whether a trustee had been acting reasonably, and suggested that that point must be left to the trustee himself. But the courts have every day in a variety of cases to determine whether men are acting reasonably; and I can see no ground why they should not determine what is reasonable in the case of a trustee, just as in any other case. So much for the law. I pass now to the facts. [His Lordship stated the facts and reviewed at some length the evidence which was furnished to the defendant to show that the plaintiff was the real Ann Freeman, and the grounds on which the defendant relied for considering that evidence unsatisfactory. His Lordship was of opinion that the evidence in favour of the plaintiff was overwhelming, and that the matters upon which the defendant had based his objections were absolutely of no weight. He did not think that any other human being would have displayed such phenomenal scepticism. His Lordship continued:] One word I will add, as to the defendant's conduct. I do not believe that he acted dishonestly, or that he had any personal ends to serve. I think that it was sheer unreasonableness on his part. Sometimes a man gets an idea into his head and nothing will shake him. That is the case with the defendant.

The question is: What is to be done? It would be a most lamentable state of the law if the costs occasioned by this unreasonable conduct should fall either on the beneficiary or on the trust estate. I think that the proper order is that the defendant should pay all the costs, to be taxed as between solicitor and client. It may be unfortunate that the defendant, having acted honestly, shall be compelled to pay the costs; but it would be still more unfortunate if they should be allowed to fall on the beneficiary or on the trust estate. I think that the judgment of North, J., must be affirmed, with costs.

LINDLEY, L.J.—I am of the same opinion. [His Lordship stated that he had not a word to say against the defendant's honesty, but he thought that the defendant had acted most unreasonably. He continued:] A trustee may be honest, and yet, from over-caution or some other cause, he may act unreasonably; and if, as in this case, his conduct is so unreasonable as to be vexatious, oppressive, or otherwise wholly unjustifiable, and he thereby causes his cestuis

que trust expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his cestuis que trust. In my opinion NORTH, J., acted on a right principle. I think that the costs should be taxed as between solicitor and client.

A. L. SMITH, L.J. concurred, adding that, if there was ever a case in which a defendant trustee ought to pay costs, this was the case.

On the application of the plaintiff's counsel, the court ordered the trust fund to be brought into court.

Appeal dismissed.

Solicitors : *Arkcoll, Cockell & Chadwick.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

WOODSIDE & CO. *v.* GLOBE MARINE INSURANCE CO., LTD.

[QUEEN'S BENCH DIVISION (Mathew, J.), December 4, 9, 1895]

[Reported [1896] 1 Q.B. 105; 65 L.J.Q.B. 117; 73 L.T. 626; 44 W.R. 187; 12 T.L.R. 97; 40 Sol. Jo. 115; 8 Asp.M.L.C. 118; 1 Com. Cas. 237]

Insurance—Marine insurance—Valued policy—Depreciation in value of thing insured owing to damage—Subsequent total loss by perils insured against—Right of assured to recover as for total loss.

By a valued time policy the plaintiffs insured their ship, valued at £20,000, with the defendants "against the risk of loss or damage by fire and/or explosion." While the policy was in force the ship was driven ashore by perils of the sea and stranded, and while stranded was totally destroyed by fire. By the stranding the vessel was seriously damaged, but was still a ship, capable of being floated and repaired, though at a cost exceeding her repaired value. In an action brought by the plaintiffs to recover a total loss upon the policy,

Held: the valuation in the policy was, in the absence of fraud, binding and conclusive between the parties, and, therefore, the plaintiffs were entitled to recover as for a total loss under the policy on the basis of the valuation, notwithstanding the partial loss and depreciation in the value of the ship by the stranding.

Notes. For loss, partial loss and abandonment of a ship in marine insurance, see now the Marine Insurance Act, 1906, ss. 55-66, and for measure of indemnity, see ibid. ss. 67-78.

Considered : *Wilson Shipping Co.* v. *British and Foreign Insurance Co.*, [1920] 2 K.B. 25; *Rickards* v. *Forestal Land, Timber and Railways Co., Ltd.*, *Robertson* v. *Middows, Ltd.*, *Kann* v. *W. W. Howard Bros. & Co., Ltd.*, [1941] 3 All E.R. 62.

Referred to : *Russian Bank for Foreign Trade and Excess Insurance Co.*, [1918] 2 K.B. 123.

As to measure of indemnity in marine insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 135 et seq.; and for cases see 29 DIGEST (Repl.) 288 et seq. For the Marine Insurance Act, 1906, see 13 HALSBURY'S STATUTES (2nd Edn.) 14 et seq.

Cases referred to :

(1) *Barker* v. *Janson* (1868), L.R. 3 C.P. 303; 37 L.J.C.P. 105; 17 L.T. 473; 16 W.R. 399; 3 Mar.L.C. 28; 29 Digest (Repl.) 288, *2170.*

(2) *Lidgett* v. *Secretan* (1871), L.R. 6 C.P. 616; 40 L.J.C.P. 257; 24 L.T. 942; 19 W.R. 1088; 1 Asp.M.L.C. 95; 29 Digest (Repl.) 293, *2222*.

(3) *Shawe* v. *Felton* (1801), 2 East, 109; 102 E.R. 310; 29 Digest (Repl.) 167, *1032*.

Commercial Action tried before MATHEW, J., brought to recover a total loss upon a policy of marine insurance effected by the plaintiffs with the defendants upon the plaintiffs' steamship, the *Bawnmore*, which was valued in the policy at £20,000.

The policy was a time policy, remaining in force for the twelve months from May 6, 1895, to May 5, 1896, inclusive, and it was "against the risk of loss or damage by fire and/or explosion," and in the policy the insurers bound themselves to pay to the assured all such damage and loss by fire and/or explosion, not exceeding the sum of £1,000 within seven days after such loss was proved, and that in proportion to the sums subscribed against their respective names. While the policy was in force the vessel was by the peril of the seas driven ashore on the coast of Oregon and was stranded, and while stranded was totally destroyed by fire.

The plaintiffs claimed as for a total loss under the policy, the ship having been, as they contended, totally lost by the perils insured against, namely, by fire and explosions, which began about Aug. 29, and continued for several days until the ship was, as the plaintiffs alleged, completely gutted. The defendants said that at the time when the fire occurred the ship was already a constructive total loss by the stranding, and they denied their liability on that ground. It was ordered in chambers that the question should be tried as a matter of law on the assumption that the ship when stranded was still a ship capable of being floated and repaired, though at a cost exceeding her repaired value, and upon the argument it was agreed that the case should be dealt with as if the owners were their own underwriters against the perils of the seas which caused the stranding.

Bigham, Q.C., (*Leck* with him) for the plaintiffs.

Joseph Walton, Q.C., and *J. A. Hamilton* for the defendants.

Cur. adv. vult.

Dec. 9, 1895. **MATHEW, J.**, having stated the facts, read the following judgment:—For the plaintiffs, reliance was placed upon the decisions in *Barker* v. *Janson* (1) and *Lidgett* v. *Secretan* (2). The ship, it was said, though seriously damaged by the stranding, was still capable of being repaired as a ship; and the valuation in the policy was, therefore, binding, notwithstanding the depreciation in her value due to her having been driven ashore. For the defendants it was argued that if the fire had occurred first and the damage had not been repaired, the underwriters would not have been liable; and that no doubt would be so because the assured would not have sustained any loss by the fire. The result, it was said, ought to have been the same in this case. The constructive total loss made a subsequent loss legally impossible; there was, it was said, a merger; and the assured must be treated as if they had been already indemnified, and had received the value of their ship; and therefore, that it was not right that they should be permitted to recover twice over for what was one loss. But if the owners are to be regarded as insurers in respect of the stranding, the doctrine of satisfaction would prevent any such result.

I am of opinion that the plaintiffs are entitled to judgment. The loss by stranding would only become total if the assured gave timely notice of abandonment. If none were given, the loss would be a particular average only, and it would seem clear that a partial loss, however serious, would not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation. Whether the subject-matter of the insurance be ship or goods, the valuation is the amount fixed by agreement by which, in case of loss, the indemnity is to be calculated. When goods are insured, the valuation may be low when the policy attaches, but the value to the owner may be enhanced when the goods have nearly reached their destination by the expenses of transit, etc., nevertheless, the valuation is binding. And again,

if the valuation be high, though the goods at the time of loss may be depreciated in value from fall of prices, or the unusual length of the voyage, or other causes for which the underwriter is not liable, the valuation cannot be opened. Neither appreciation nor depreciation, where there is no fraud, will affect the underwriter's liability. In the case of a ship, in the same way, the vessel may, for many causes, be worth much less at the time of loss than the agreed value, but the valuation determines the amount of the indemnity. This has clearly been the law since *Shawe* v. *Felton* (3).

I am unable to distinguish such a loss as the present from any other in which, while the subject-matter of the insurance still exists, and there is no ground for suggesting fraud or wagering, the diminution in value is relied upon to exonerate the underwriter from the whole or from part of his liability. It is impossible, as Lord Kenyon said in *Shawe* v. *Felton* (3), to draw the line between a greater or less diminution of value. I give judgment for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors: *Lowless & Co.; Waltons, Johnson Bubb & Whatton.*

[*Reported by* W. W. Orr, Esq., *Barrister-at-Law.*]

LILES *v.* TERRY

[Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.), November, 7, 1895]

[Reported [1895] 2 Q.B. 679; 65 L.J.Q.B. 34; 73 L.T. 428; 44 W.R. 116; 12 T.L.R. 26; 40 Sol. Jo. 53]

Solicitor—Duty to client—Gift by client to solicitor's wife—Presumption of undue influence.

The rule of law which invalidates a gift to a solicitor unless the donor has previously had competent and independent advice in the matter, is absolute, and no evidence is admissible to rebut the presumption of undue influence which arises from the relationship of the two parties.

Per Lopes and Kay, L.JJ.: The rule is equally applicable to a gift to a solicitor's wife, and the fact that she may be a relative of the donor is immaterial.

Notes. Considered: *Barron* v. *Willis*, [1900] 2 Ch. 121. Applied: *Lloyd* v. *Coote and Ball*, [1915] 1 K.B. 242. Referred to: *Wright* v. *Carter*, [1900-3] All E.R. Rep. 706.

As to presumption of undue influence in transactions between solicitor and client, see 36 Halsbury's Laws (3rd Edn.) 87 et seq.; and for cases see 42 Digest 76 et seq.

Cases referred to:

(1) *Rhodes* v. *Bate* (1866), 1 Ch.App. 252; 13 L.T. 778; 12 Jur.N.S. 178; 14 W.R. 292, L.JJ.; 42 Digest 78, *700.*

(2) *Wright* v. *Proud* (1806), 13 Ves. 136; 33 E.R. 246, L.C.; 33 Digest 131, *80.*

(3) *Hatch* v. *Hatch* (1804), 9 Ves. 292; 1 Smith, K.B. 226; 32 E.R. 615, L.C.; 42 Digest 77, *687.*

(4) *Goddard* v. *Carlisle* (1821), 9 Price, 169; 147 E.R. 57; 42 Digest 48, *385.*

Also referred to in argument:

Price v. *Jenkins* (1877), 5 Ch.D. 619; 46 L.J.Ch. 805; 37 L.T. 51, C.A.; 25 Digest (Repl.) 253, *606.*

Gibson v. *Jeyes* (1801), 6 Ves. 266; 31 E.R. 1044, L.C.; 33 Digest 171, *575.*

Morgan v. *Minett* (1877), 6 Ch.D. 638; 36 L.T. 948; 25 W.R. 744; 42 Digest 79, *706.*

Huguenin v. *Baseley* (1807), 14 Ves. 273; 33 E.R. 526, L.C.; 35 Digest 81, *782.*

Allcard v. *Skinner* (1887), 36 Ch.D. 145; 56 L.J.Ch. 1052; 57 L.T. 61; 36 W.R. 251; 3 T.L.R. 751, C.A.; 12 Digest (Repl.) 111, *659*.

Tyars v. *Alsop* (1889), 61 L.T. 8; 53 J.P. 212; 37 W.R. 339; 5 T.L.R. 242, C.A.; 42 Digest 79, *707*.

Hunter v. *Atkins* (1834), 3 My. & K. 113; Coop. temp. Brough. 464; 40 E.R. 43, L.C.; 25 Digest (Repl.) 286, *914*.

Appeal from a decision of Charles, J., at the trial of an action brought to set aside a deed dated Oct. 12, 1892, made between the plaintiff and the defendant Terry, whereby the plaintiff had assigned to him a lease of two houses upon the trusts therein mentioned.

The plaintiff was a lady, who, at the time of the execution of the deed, was seventy-seven years of age. The defendant Terry was a solicitor. By this deed the plaintiff assigned the lease to him upon trust to pay to herself the rents and profits for her life, and after her death to her elder sister for life, and after her death in consideration of the natural love and affection of the plaintiff towards her niece, the wife of the defendant Terry, upon trust for Mrs. Terry absolutely. The plaintiff's elder sister died before the commencement of this action. The plaintiff had no separate advice in the matter of the execution of this deed, which had been drawn by the defendant Terry. Evidence was given at the trial of what led to the preparation of the deed by the defendant Terry, and also as to what occurred at its execution by the plaintiff. On the latter point it was somewhat contradictory. Charles, J., at the trial of the action without a jury, refused to set the deed aside. The plaintiff appealed.

C. L. Attenborough for the plaintiff.
Stephen Lynch for the defendants.

LORD ESHER, M.R.—The question raised in this case is whether, by virtue of a definite rule laid down by courts of equity, the court is not bound to set aside a certain deed of conveyance which has been executed by the plaintiff. As regards the facts in the case, I take them in truth to be, as I think Charles, J., found, that when the plaintiff executed this deed she intended that what she did should have the effect of assigning the property in it to the wife of the solicitor; that she further intended to pass the property in such a way that she should never be able to revoke what she had done; and that the solicitor explained to her fully and fairly at the time the difference between a will and a deed. Not only did she, in my opinion, know perfectly well the effect of what she was doing, but I think that no influence was used over her to make her execute the deed. The deed moreover did not, and could not, benefit the solicitor himself. It was simply in favour of his wife, who was the plaintiff's niece, and whom the plaintiff wished to benefit.

But even though these may be the facts of the case, nevertheless by a rule in equity the deed must be set aside because the defendant Terry was a solicitor, and he himself drew the deed and was with her when she signed it, and no other solicitor gave any independent advice in the matter to the plaintiff. The rule of equity upon which I give my decision has been laid down by judges of very great authority, and the presumption which arises against the defendant out of his relations towards the plaintiff is one of law which cannot be refuted by any evidence of fact whatever. That is the effect of the rule which has been laid down by Lord Eldon and by Turner, L.J., and they intended it to have that effect. I submit to that rule, though it seems to me an unfortunate one because it may work terrible injustice. But the court is bound by authority, and until that rule be altered or set aside by some higher authority, it must stand as the law. Upon the ground only of that rule of law I think that this appeal must be allowed and the deed set aside.

LOPES, L.J.—I agree that the appeal must be allowed. I am sorry to differ from the Master of the Rolls as to his comments upon any case that comes before the

court, but in the present instance I feel compelled to differ from him to some extent. The rule which we must apply here is a hard and fast one, but I do not consider it to be an unfortunate one. It is founded upon public policy, and, though perhaps there may be some hard cases under it, it is, in my opinion, highly beneficial on the whole. I should, therefore, regret to see it altered.

I think that the authorities establish that a gift to a solicitor made by a client who has had no independent advice, while the relationship of client and solicitor exists between them, or while there is any influence over the client arising from that relationship, is invalid. Before such a gift can be considered valid, the relationship of client and solicitor must be wholly at an end. When a case has been shown to be within that rule, no evidence is of any avail to make the gift valid. If a client wishes to make a gift to his solicitor, what the solicitor must do in order to make the gift a valid one is to obtain competent and independent advice for the donor. Some judgments of LORD ELDON have been cited which are strong authorities in support of this rule, but there is also a very valuable judgment of TURNER, L.J., in *Rhodes* v. *Bate* (1), which enables us to say whether this rule exists as a hard and fast one. He says (1 Ch. App. at p. 257):

> "I take it to be a well-established principle of this court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them."

That, to my mind, clearly establishes the existence of the rule I have alluded to. As to the facts of this case, I must say that I have not come to the same conclusion as the Master of the Rolls. I do not recognise any substantial distinction between a gift to a solicitor and a gift to a solicitor's wife, even though she may be a relative of the donor. Though the gift be to his wife, it is clear that he may benefit largely by it. She might perhaps immediately after receiving the gift hand it on to her husband. But it is unnecessary to say more as to the facts, because I base my decision upon the inflexible rule of equity which applies to cases of this kind.

KAY, L.J.—I agree with the result of the judgment of the Master of the Rolls, though I differ entirely from his comments upon the case. It is a rule of public policy which forbids a person under the influence of another from conferring benefits on that person; that is to say, a gift from the one to the other cannot be accepted unless the donor has received good professional advice before the gift is complete. LORD ERSKINE, L.C., in *Wright* v. *Proud* (2) used these words (13 Ves. at p. 138):

> "So, independent of all fraud, an attorney shall not take a gift from his client, while the relation subsists; though the transaction may be, not only free from fraud, but the most moral in its nature."

In *Hatch* v. *Hatch* (3) LORD ELDON said (9 Ves. at pp. 296, 297):

> "This case proves the wisdom of the court in saying, it is almost impossible in the course of the connection of guardian and ward, attorney and client, trustee and cestui que trust, that a transaction shall stand, purporting to be bounty for the execution of antecedent duty."

There is a slight difference between those two judgments, for in the one it is said that an attorney cannot take a gift from his client, while in the other it said to be almost impossible. But the explanation is given by the judgment of TURNER, L.J., in *Rhodes* v. *Bate* (1) where he says that if the gift should be one of a very trifling nature the court will take no notice of the relationship between the donor and donee.

Nevertheless the rule is a strict one that a gift from a client to his solicitor is bad unless the donor has previously had competent and independent advice. That seems to me to be a most wise rule and eminently calculated to produce justice between persons who are in a confidential relation to each other, not only between guardian and ward, but especially so between attorney and client, since a client must be to a certain extent under the influence of his attorney. An attorney receiving a gift would be in a position of great suspicion, and therefore before he accepts it he should advise his client to go and get the independent advice of another solicitor. That is no great hardship upon him. But if he does not do that, then he has allowed himself to come under the well-established rule against the validity of such gifts, and he cannot support the transaction.

In the present case the gift was made not to the solicitor himself, but to his wife. But in *Goddard* v. *Carlisle* (4) RICHARDS, C.B., said (9 Price, at p. 179):

> "There is no difference in principle between a gift of this sort to a man's wife, and a gift immediately to himself, if the gift to the wife be effected by undue means on the part of the husband."

The principle and basis of the rule is that, while confidential relations exist between a solicitor and client, it is impossible to rebut any inference of undue influence in the making of the gift. It applies as much in the case of a gift to the solicitor's wife as in the case of a gift to the solicitor himself. With regard to the facts of this case I do not take the same view of the evidence as the Master of the Rolls. It seems that some time before the execution of this deed the plaintiff had expressed her intention of leaving these houses to her niece. That is to say she intended to make a will in her niece's favour. A will is a revocable instrument, and all that a promise to make a will in somebody's favour means is that the promisor has at that time an intention of making a will of that nature. There is no evidence here as to any instructions being given by the plaintiff for the drawing of the deed, but when she met the solicitor for the purpose of signing her will he put this deed also before her. She asked why there were two documents to sign. She says now that she did not understand that the deed was irrevocable. [HIS LORDSHIP referred to the evidence, and stated that in his opinion it did not support the allegation that the plaintiff when signing the deed understood the difference between a deed and a will.] However, I do not base my judgment upon that, because even if the plaintiff knew the difference between a deed and a will, under the long-established rule in equity which I have mentioned, this deed must be declared void. I agree that the deed must be set aside, and this appeal will therefore be allowed.

Appeal allowed.

Solicitors: *John Attenborough; Wilson & Son.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

DYER *v.* MUNDAY AND

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), March 6, 7, 1895]

[Reported [1895] 1 Q.B. 742; 64 L.J.Q.B. 448; 72 L.T. 448; 59 J.P. 276; 43 W.R. 440; 11 T.L.R. 282; 14 R. 306]

B

Master and Servant—Liability of master for act of servant—Act done by servant in course of employment—Assault—Conviction of servant—Release from further proceedings—Subsequent action against employer.

A master is liable for a wrongful assault committed by his servant in the course of, and in furtherance of, his employment, and an action will lie against the master even though the servant has been convicted and fined for the assault. C

The defendant was a furniture dealer and much of his business consisted of selling furniture on the hire-purchase system. P., the manager of one of his shops, had authority to do this and also to re-take furniture if payments fell into arrear. P. went with another servant of the defendant to re-take a bed the hirer of which was in arrears with his payments, but the plaintiff, the hirer's landlord, refused to let them take it away on the grounds that the hirer had left it as security for unpaid rent. There was a struggle, the plaintiff was injured, and the other servant was later convicted and fined for assault. In an action for damages against the defendant for trespass and assault, D

Held: P. and the other servants were acting in the course of their employment in re-taking the bed, and the defendant was liable even though the servant had already paid the fine and was released from further civil proceedings. E

Notes. Considered: *Radley* v. *L.C.C.* (1913), 109 L.T. 162; *Jefferies and Atkey* v. *Derbyshire Farmers* (1920), 36 T.L.R. 825; *Warren* v. *Henly's, Ltd.*, [1948] 2 All E.R. 935. Referred to: *Hamlyn* v. *Houston* (1902), 87 L.T. 500; *Poland* v. *John Parr & Sons*, [1926] All E.R. Rep. 177; *Britt* v. *Galmoye and Nevill* (1928), 44 T.L.R. 294; *Navarro* v. *Moregrand, Ltd.*, [1951] 2 T.L.R. 674.

As to liability of master to a third party in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 535 et seq.; and for cases see 34 DIGEST 125 et seq. For the Offences Against the Person Act, 1861, s. 45, see 5 HALSBURY'S STATUTES (2nd Edn.) 804. F

Cases referred to:

(1) *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 11 W.R. 149; 158 E.R. 993; sub nom. *General Omnibus Co., Ltd.* v. *Limpus*, 9 Jur.N.S. 333, Ex. Ch.; 34 Digest 129, *989*. G

(2) *Seymour* v. *Greenwood* (1861), 7 H. & N. 355; 158 E.R. 511; sub nom. *Greenwood* v. *Seymour*, 30 L.J.Ex. 327; 4 L.T. 835; 25 J.P. 693; 8 Jur.N.S. 214; 9 W.R. 785 Ex. Ch.; 8 Digest (Repl.) 124, *800*.

(3) *Bayley* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1872), L.R. 7 C.P. 415; 41 L.J.C.P. 278; on appeal (1873), L.R. 8 C.P. 148; 42 L.J.C.P. 78; 28 L.T. 336 Ex. Ch.; 8 Digest (Repl.) 124, *801*. H

Also referred to in argument:

Merryweather v. *Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337; 1 Digest (Repl.) 786, *3141*.

Masper v. *Brown* (1876), 1 C.P.D. 97; 45 L.J.Q.B. 203; 34 L.T. 254; 40 J.P. 265; 24 W.R. 369; 21 Digest (Repl.) 304, *660*. I

Holden v. *King* (1876), 46 L.J.Q.B. 75; 35 L.T. 479; 41 J.P. 25; 25 W.R. 62; 21 Digest (Repl.) 304, *662*.

Richards v. *West Middlesex Waterworks Co. and Newton* (1885), 15 Q.B.D. 660; 54 L.J.Q.B. 551; 49 J.P. 631; 33 W.R. 902; 1 Digest (Repl.) 700, *2522*.

Poulton v. *London and South Western Rail. Co.* (1867), L.R. 2 Q.B. 534; 8 B. & S. 616; 36 L.J.Q.B. 294; 17 L.T. 11; 31 J.P. 677; 16 W.R. 309; 8 Digest (Repl.) 127, *812*.

Edwards v. *London and North Western Rail. Co.* (1870) L.R. 5 C.P. 445; 39 L.J.C.P. 241; 22 L.T. 656; 18 W.R. 834; 34 Digest 136, *1055*.

Barwick v. *English Joint Stock Bank* (1867), L.R. 2 Exch. 259; 36 L.J.Ex. 147; 16 L.T. 461; 15 W.R. 877, Ex. Ch.; 34 Digest 129, *987*.

Houldsworth v. *City of Glasgow Bank* (1880), 5 App. Cas. 317; 42 L.T. 194; 28 W.R. 677, H.L.; 39 Digest 686, *2722*.

Appeal from a decision of LAWRANCE, J., with a jury at the trial of an action to recover damages for trespass and assault.

The action was brought against Munday and Price to recover damages for trespass and assault. The defendant Munday carried on business as a dealer in furniture, and Price was the manager of one of his shops. It was a regular part of the business to sell furniture upon the hire-purchase system. Price had sold a bedstead upon the hire-purchase system to one Stiles. Stiles was then a lodger residing in the house of the plaintiff. Stiles ceased to lodge in the plaintiff's house, but left the bedstead there. He was in arrear with the payment of his instalments under the hire-purchase agreement, and he asked Price to take back the bedstead. Price and another man, named Simson, went together to the plaintiff's house to take possession of, and remove the bedstead. The plaintiff objected upon the ground that Stiles had left it as a security for arrears of rent. While Price and Simson were engaged in getting possession of the bedstead, Simson assaulted the plaintiff. For this assault he was convicted and fined, and paid the fine. All the above facts took place without the knowledge of Munday.

The action was tried before LAWRANCE, J., and a jury, when a verdict was found for the plaintiff for £40 damages. The defendant Munday applied to the Court of Appeal for judgment or for a new trial.

The Offences Against the Person Act, 1861, provides:

"Section 44. If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on the behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

"Section 45. If any person against whom any such complaint as in either of the last three preceding sections mentioned, shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

Montague Lush for the defendant.

M. Shearman for the plaintiffs.

LORD ESHER, M.R.—In this case the action was brought to recover damages for assault and trespass. The learned judge left the case to the jury. This application is made upon the ground that there was nothing to leave to the jury, and that the plaintiff ought to have been non-suited. The question before us is, not whether a right direction was given to the jury, but whether there was any evidence upon which the judge might properly leave the case to the jury with a proper direction—whether the judge could properly have left this case to the jury with a direction in the words of the rule laid down in *Limpus* v. *General Omnibus Co.* (1). The question is whether it was part of the business of Price and of his employment by his master, if any of the instalments were not paid, to get the goods back from the person to whom they had been hired? It was a very material part

of this business to get back goods whenever instalments were not paid. The jury, therefore, might properly come to the conclusion that it was a part of the business, which was left to the management of Price, to get back the goods if instalments were not paid. He went to this house for that very purpose, and the jury might properly find that it was part of his employment. He went to the house in order to get the bedstead and take it back for his master. There was a struggle, and the plaintiff was injured. Price was doing that which he was employed to do, and he did it in a brutal manner.

Under these circumstances could the judge properly ask the jury whether he was employed to get back the bedstead, and whether he did what he did in the course of that employment? In *Limpus* v. *London General Omnibus Co.* (1) WILLES, J. (1 H. & C. at p. 540) states the proper question to be

> "whether the servant was acting at the time in the course of his master's service, and for his master's benefit; if so, his act was that of his master, although no express command or privity of his master was proved."

It seems to me that this case is within those very words, and that those words would be a proper direction to the jury in this case, and that there was evidence to support such a direction.

It has been contended that, if the excess of the servant is a criminal act, that would take the case out of the general rule. But in *Seymour* v. *Greenwood* (2) and in *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (3) there were assaults, which were criminal acts, and the courts did not take the ground that the general rule was not applicable if the excess of the servant was a criminal act. I do not say that, if a criminal act is done by the servant in the course of his employment, it may not be such that the jury may say that it was not done in course of, or in furtherance of his employment, but was of such a character that it was done only to satisfy his own brutal temper. The fact that what was done was a criminal offence may be material for the consideration of the jury, but the mere fact that it was a criminal offence does not take the case out of the general rule. The question is not whether the act was within the authority of the servant. The authority of the servant is to do what he is told, and to do it properly. But the law says that if a man, who is employed to do a thing properly, in the course of his employment exceeds his authority, then the master is liable. The law has always been so laid down. I think, therefore, that there was evidence to leave to the jury upon which they might find for the plaintiff, and that the judge was not bound to non-suit the plaintiff.

With reference to the argument upon the Offences Against the Person Act, 1861, s. 45, all we have to do so to construe the Act itself. The statute itself does whatever is done. In my opinion the Act does not effect anything in respect of a person other than the person convicted or acquitted. This appeal, therefore, fails, and must be dismissed.

LOPES, L.J.—I am of the same opinion. As to the statute I agree with what the Master of the Rolls has said. Looking at its provisions it is clear that it applies only to the person convicted or acquitted. The object of the Act was to remedy the evil of criminal proceedings being first taken, and of a civil action being then brought to recover damages for the same assault. The exoneration given by the statute clearly applies only to the person who has been proceeded against criminally.

As to the other point, I confess that for some time I was in doubt, but that doubt has been removed. The assault took place under these circumstances. Price was the general manager of the defendant, and he had authority to let out furniture on the hire-purchase system, and to retake the furniture if instalments became in arrear. In the present case he seems to have acted for the purpose of getting back a bed for his master. While doing so there was a struggle, and the plaintiff was assaulted. These being the facts, it is contended that there was no evidence upon

which to leave to the jury the question whether Price was acting within the scope of his employment. It is perfectly clear that the question whether acts are, in fact, within the scope of the employment of a servant is one for the jury, but that the question whether the particular acts can be within the scope of the employment is for the judge.

It is said that the judge ought to have non-suited the plaintiff in the present case. I think that the jury might properly come to the conclusion that Price, being the general manager of the defendant, had authority to get possession of the bed, and that in the interests of his master, and in furtherance of his employment, he committed the assault. The law is, that all acts of a servant done in the course of his employment, and in furtherance of the employment, and in the master's interests, are within the scope of the servant's employment, and that the master is liable for such acts, although they may be contrary to his express orders, and amount to a criminal offence. *Seymour* v. *Greenwood* (2) and *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (3) are contrary to the contention of the defendant. It was, in my opinion, open to the jury to find that the act was, in fact, done within the scope of the servant's employment. If, however, the act was done from private malice, or outside the course of the employment, then the master is not liable. I agree that the appeal must be dismissed.

RIGBY, L.J.—I am of the same opinion upon both points. The Offences Against the Person Act, 1861, s. 45, alters the common law by providing that when a person has been convicted for an assault and has paid or suffered the penalty no further proceeding, civil or criminal, can be brought against him for the same cause. It has been argued that, by the conviction, the servant was released, and that at common law, by the release of one tort-feasor, any right of action against another for the same tort is put an end to, and that, therefore, the statute not only releases the one who has been convicted, but has the same operation as a release by the parties. There is nothing of that kind to be found in the Act itself, and we ought not so to construe it.

Then as to the other question. In the reported cases different expressions have been used, which have led to some confusion. In some of the cases the expression "scope of his authority" is used. I think, however, that those words in those cases mean exactly the same thing as "course of his employment." An act may be done by a servant in the course of his employment, though it may be quite outside the scope of any authority which has been given to him. In the present case the servant did wrong in using violence. The law has been clearly laid down by WILLES, J., in *Bayley* v. *Manchester, Sheffield, and Lincolnshire Rail. Co.* (3), where he says (7 C.P. at p. 420):

> "A person who put another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted, either in the manner of doing such an act or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

In the present case the class of acts which this person was appointed to do included the resumption of the possession of furniture if instalments were not paid. The act complained of was done by the servant while engaged in doing such acts. If, in the course of doing those acts, the servant acted in accordance with, or against, his orders is immaterial. The master is responsible for what the servant does. There was here a case proper to be left to the jury, and this appeal fails.

Appeal dismissed.

Solicitors: *O. H. Swann; Shearman & Rayner.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

GRANT *v.* THOMPSON

[QUEEN'S BENCH DIVISION (Wills and Wright, JJ.), January 31, 1895]

[Reported 72 L.T. 264; 43 W.R. 446; 11 T.L.R. 207; 18 Cox, C.C. 100; 15 R. 290]

B

Maintenance of Action—Criminal proceedings—Indemnity of solicitor in respect of costs of prosecution—Right of action on indemnity.

The doctrine of maintenance is confined to civil actions, and does not apply to criminal proceedings, the "maintaining" of which is, therefore, not illegal. Accordingly, where a person gives a guarantee whereby he agrees to indemnify a solicitor in respect of the costs of criminal proceedings to be undertaken against another person, and such proceedings are taken and costs incurred, the solicitor can maintain an action on that guarantee, and the person sued thereon cannot set up as a defence that the agreement was void as being tainted with the illegality of maintenance.

C

Notes. As to maintenance of an action, see 1 HALSBURY'S LAWS (3rd Edn.) 39 et seq.; and for cases see 1 DIGEST (Repl.) 80 et seq.

D

Cases referred to :

(1) *Harris* v. *Brisco* (1886), 17 Q.B.D. 504; 55 L.J.Q.B. 423; 55 L.T. 14; 51 J.P. 37; 34 W.R. 729; 22 T.L.R. 709, C.A.; 1 Digest (Repl.) 99, *744*.

(2) *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1; 52 L.J.Q.B. 454; 31 W.R. 792; 1 Digest (Repl.) 82, *618*.

E

Appeal by the defendant from a decision of His Honour Judge LUMLEY SMITH, Q.C., sitting at Westminster County Court.

The plaintiff, a solicitor, sought to recover from the defendant a sum of £20 for work done as solicitor for Madame Holderner under the following guarantee :

F

"24, Bride Lane, London, E.C., Aug. 11, 1892.—Dear Sir,—In consideration of your taking up the proceedings against Nassib A. Shibley on behalf of Madame Holderner, I hereby undertake and agree to indemnify you to the extent of £20 towards the costs of such proceedings, it being understood that you are not to call upon me to pay you that sum for a period of twelve months from this date.—Yours faithfully, T. Gibson Thompson.—G. R. Grant, Esq., Solicitor."

G

The defendant had been in the employment of Shibley, and sued him for damages for wrongful dismissal, but failed. Shibley retaliated by charging the defendant with theft, but failed. The plaintiff acted as solicitor for the defendant in both proceedings. The plaintiff then stated to the defendant that Shibley had hired furniture of one Bustani, and had dealt with the furniture in such a way as to bring himself within the criminal law, and that Bustani could prosecute him. The plaintiff accordingly assisted the defendant to open communications with Bustani. Bustani and Madame Holderner (who was stated to be the wife of Bustani, and whose property the goods turned out to be) consented to a prosecution being commenced by the plaintiff in the name of Madame Holderner. Shibley was charged, and, after being remanded in custody, was committed for trial at the Middlesex Quarter Sessions, for larceny as a bailee, under the Larceny Act, 1861, s. 3 [see now s. 1 (1) of the Larceny Act, 1916 : 5 HALSBURY'S STATUTES (2nd Edn.) 1012]. After the commencement of the proceedings, the plaintiff obtained from the defendant the guarantee now in question. Shibley was acquitted; Bustani and Madame Holderner disappeared without paying any part of the plaintiff's bill of costs, amounting to over £72, and, after some delay, the plaintiff brought the present action against the defendant.

H

I

A The learned judge drew the inferences of fact from the evidence that the defendant did not act from charitable motives towards Madame Holderner, and that there was no privity of estate, kinship, or relationship of master and servant, or otherwise between the plaintiff and Madame Holderner of the nature to justify maintenance as explained in *Harris* v. *Brisco* (1) and other cases, and that the plaintiff knew all this.

B Before the learned judge it was objected on the part of the defendant that the agreement was void as tainted with the illegality of maintenance. The plaintiff replied that the maintenance of criminal suits was legal; and, secondly, that even if such maintenance was illegal, the agreement was nevertheless binding as between himself and the defendant. The learned judge held that the maintenance of criminal suits was not illegal, and that it was not illegal on the part of the defendant C to "maintain" Madame Holderner's criminal proceedings. It therefore became unnecessary for him to decide the second point, namely, whether, assuming maintenance, the contract between the plaintiff and the defendant was nevertheless binding on the defendant, though he expressed the opinion that as maintenance was a misdemeanour and the contract had been made when the plaintiff and the defendant were fully cognisant of all the facts, it was very doubtful if the contract could D be enforced, assuming the law of maintenance to apply. He therefore gave judgment for the plaintiff for £20, the amount claimed, and he gave leave to appeal. The defendant appealed.

Boxall (*Willis*, *Q.C.*, with him) for the defendant.

R. Wallace, *Q.C.* (*G. C. Smith* with him), for the plaintiff, was stopped.

E **WILLIS, J.**—I am very clearly of opinion that the county court judge was right, and I also think that he gave a very careful and exhaustive judgment on the subject. It seems to me that the law is, that there cannot be maintenance in the case of a criminal prosecution. The prosecutor in criminal proceedings is only nominally the prosecutor, and the theory is that the prosecution is a proceeding taken at the F suit of the Crown. The reason why a person has the right to use the name of the Sovereign in criminal proceedings is, that it is for the benefit of the community that there should be no impediment in putting the criminal law in motion when circumstances demand it. In such a case as the present the circumstances did not demand it, but no one can foresee that until the case is ended. The real remedy of the plaintiff when he complains that the criminal law has been improperly put G in motion against him is by an action for malicious prosecution, and if in such action it should appear that there was no reasonable and probable cause, and that there was malice, then the person who so put the law in motion, whether the nominal prosecutor or not, would be liable. That being so, there is therefore effectual protection in the case of an unfounded prosecution. In civil suits there is no such protection, because in civil suits there is no action for malicious prosecution analogous H to one for malicious prosecution consequent upon a proceeding in a criminal court. That would seem to show that the only case where you can have an action for maintenance is where there cannot be an action for malicious prosecution—that is, in civil suits.

When we once realise that every person has an interest, and is allowed to put the law in motion in criminal matters, the foundation of the doctrine of main- I tenance is gone. Maintenance is meddling with matters in which a person has no concern. This clearly can have no application in criminal matters, as a person puts the criminal law in motion, not for his own protection, but for the public good. That seems to me to be substantially the view the learned judge took in this case, and I should hardly have thought it necessary to say so much if it had not been for the great respect I entertain for the opinion expressed by Lord COLERIDGE, C.J., in *Bradlaugh* v. *Newdegate* (2) that the doctrine of maintenance is not confined to civil actions. That was a mere dictum, and I do not think it was at all necessary for the decision of the case, and probably there were no authorities on that point

brought to his attention. In the present case the learned counsel for the defendant has found it necessary to rely on that dictum; but it is sufficient to say in general terms that he has not been able to produce even the semblance of an argument in favour of his contention. He has founded an argument on the meaning of the word "quarrel" in certain of the definitions of maintenance which speak about interfering in "quarrels and actions." But the word "quarrel" is certainly not applicable to proceedings of a criminal nature by the Crown, nor is the word "action," though in COMYN'S DIGEST, to which we have been referred, the word is apparently used as applicable in criminal matters, but it is not so used in the ordinary acceptation of the term. It has never been generally used with such a meaning, either in Acts of Parliament or elsewhere.

During the argument we have been referred to the proceedings in "attaint." That was a very peculiar proceeding, and it was commenced by a writ of attaint which could issue either out of Chancery or out of the King's Bench or Exchequer. The judgment in such a proceeding was partly punitive, and it is quite obvious that that proceeding has no analogy to the present case. I think therefore that this appeal fails.

WRIGHT, J.—I agree.

Appeal dismissed.

Solicitors: *G. R. Grant & Co.; Easton & Cargill.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

HODDER *v.* WILLIAMS

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Kay, L.JJ.), November 5, 1895]

[Reported [1895] 2 Q.B. 663; 65 L.J.Q.B. 70; 73 L.T. 394; 44 W.R. 98; 12 T.L.R. 24; 40 Sol. Jo. 32; 14 R. 757; 59 J.P. 724]

Execution—Forcible entry by sheriff—Building not a dwelling-house.

In levying execution under a writ of fi. fa. a sheriff is justified in breaking open the outer door of premises occupied by the judgment debtor provided they are not occupied by him as part of his dwelling-house.

Notes. As to seizure of goods and right of entry under a writ of fi. fa., see 16 HALSBURY'S LAWS (3rd Edn.) 41 et seq.; and for cases see 21 DIGEST (Repl.) 566 et seq.

Cases referred to:

(1) *Penton* v. *Brown* (1664), 1 Keb. 698; 1 Sid. 186; 83 E.R. 1193; 21 Digest (Repl.) 567, *619*, *625*.

(2) *Semayne's Case* (1604), 5 Co. Rep. 91a; 77 E.R. 194; sub nom. *Seyman* v. *Gresham*, Cro. Eliz. 908; sub nom. *Semayne* v. *Gresham*, Moore, K.B. 668; Yelv. 29; 21 Digest (Repl.) 566, *614*.

(3) *Lee* v. *Gansel* (1774), 1 Cowp. 1; Lofft. 374; 98 E.R. 935; 21 Digest (Repl.) 567, *628*.

(4) *Brown* v. *Glenn* (1851), 16 Q.B. 254; 20 L.J.Q.B. 205; 16 L.T.O.S. 341; 15 Jur. 189; 117 E.R. 876; 21 Digest (Repl.) 564, *598*.

(5) *Hobson* v. *Thelluson* (1867), L.R. 2 Q.B. 642; 8 B. & S. 476; 36 L.J.Q.B. 302; 16 L.T. 837; 15 W.R. 1037; 21 Digest (Repl.) 635, *1229*.

(6) *American Concentrated Must Corpn.* v. *Hendry* (1893), 62 L.J.Q.B. 388; 68 L.T. 742; 57 J.P. 521, 788; 9 T.L.R. 340, 445; 37 Sol. Jo. 341, 475; 5 R. 331; 21 Digest (Repl.) 564, *600*.

Also referred to in argument:

Ryan v. *Shilcock* (1851), 7 Exch. 72; 21 L.J.Ex. 55; 18 L.T.O.S. 157; 16 J.P. 213; 15 Jur. 1200; 155 E.R. 861; 18 Digest (Repl.) 324, *693*.

Appeal from a decision of Vaughan Williams, J., at the trial of an action brought against the sheriff of Dorsetshire for trespass in breaking into the plaintiff's premises in Chancery Lane, Bridport, and seizing his goods. The plaintiff was a judgment debtor. For the purpose of executing a writ of fi. fa. the sheriff's officer went to the premises in question, and finding them locked asked the plaintiff who was standing outside to open the door. The plaintiff refused to do so. The officer then broke in the outer door of the premises, and entered and seized goods of the plaintiff. The premises consisted of a shop and workshop, and a place for storing goods. The plaintiff was a coachbuilder, and used the premises for the purposes of his business. They were merely business premises, no one lived there.

At the trial of the action before Vaughan Williams, J., with a jury, the jury assessed the damages at £50; but the learned judge after the verdict ruled that the forcible entry by the sheriff's officer was lawful, and he therefore gave judgment for the defendant. The plaintiff appealed.

Macaskie for the plaintiff.

Channell, Q.C. (*Bullen* and *Muir Mackenzie* with him) for the defendant.

LORD ESHER, M.R.—It seems to me that in this case we should apply the good rule that an ancient decision, such as *Penton* v. *Brown* (1), which is more than two hundred years old, upon a matter of practice, which is one of continual occurrence in the ordinary dealings of life, should not be overruled. The case is still stronger when it has been handed down through the centuries from book to book by careful writers and commentators, in text books which are being continually acted on by people in the daily affairs of life. Even if we were of opinion that the decision was wrong we ought not to overrule a case decided two hundred years ago, the principle and reason of which has been since frequently recognised by great judges.

The first direct decision we have to deal with is *Penton* v. *Brown* (1). The judges who decided that case acted upon what in their view had been laid down in *Semayne's Case* (2). *Semayne's Case* (2) decided that the privilege of inviolability exists only in favour of a person in connection with his own dwelling-house. What is the meaning of "dwelling-house?" It is a word in ordinary use, and we all know what it means. In *Semayne's Case* (2) it was resolved that "the house of every one is to him as his castle and fortress," and the learned editors of Smith's Leading Cases, in their note upon *Semayne's Case* (2), say (9th Edn.) at p. 115, that

> "the maxim that 'a man's house is his castle' only extends to his dwelling-house; therefore a barn, or outhouse, not connected with the dwelling-house may be broken open in order to levy an execution."

Lord Mansfield, C.J., in *Lee* v. *Gansel* (3), clearly adopted that view of the law (1 Cowp. at p. 6), and gives as the ground of it

> "that otherwise the consequences would be fatal, for it would leave the family within naked and exposed to thieves and robbers."

The same view of the law was evidently adopted also by Lord Campbell, C.J., in *Brown* v. *Glenn* (4), and by that most exact lawyer, Lord Blackburn, in *Hobson* v. *Thellusson* (5). The matter is one with which sheriffs all over the country have to

deal daily, and there is one consensus of opinion among those great judges that I have mentioned, and all text-book writers upon the subject, that the doctrine of the inviolability of a man's house extends only to his dwelling-house, and therefore a sheriff in executing a writ is entitled to break into premises which do not come within the meaning of the term "dwelling-house." The view of all lawyers has been uniform from the beginning, and we cannot give way to the argument which is now brought before us for the first time. The premises in this case were not a dwelling-house, whatever else they may have been, and the sheriff was therefore justified in breaking open the outer door. The appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The doctrine which forbids a sheriff from breaking into a dwelling-house in order to execute a writ of fi. fa. is very ancient, and proceeds upon the ground that a man and his family ought to be protected in the occupation of their dwelling-house. "Every man's house is his castle" is the maxim, but the privilege extends to dwelling-houses only, and therefore a barn or other building not connected with a dwelling-house, nor within the curtilage, may be broken open by a sheriff for the purpose of executing a writ of fi. fa. The leading authority on the subject is *Penton* v. *Brown* (1), decided in the reign of Charles II. The case has been referred to as good authority by every text-book writer since that date on the law applicable to sheriffs, and by Lord Mansfield, C.J., Lord Campbell, C.J., and Lord Blackburn. We cannot overrule a case which has such a long line of authorities in its favour. Therefore, a man is protected from the breaking open by the sheriff of the outer door of his dwelling-house, but he is not so protected in the case of barns or other buildings not within the curtilage, unconnected with his dwelling-house. In this case the forcible entry of the sheriff was justified, and the judgment of Vaughan Williams, J., was right. The appeal will be dismissed.

KAY, L.J.—I am of the same opinion. We have not now to deal with a case of a landlord distraining for rent, but of a sheriff executing a writ of fi. fa. As was observed by Lord Campbell, C.J., in *Brown* v. *Glenn* (4) (16 Q.B. at p. 257):

> "A distinction may reasonably be made between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes. There is another well-known distinction, that a landlord cannot distrain at all hours, whereas the sheriff is under no such restriction."

The question before us is whether the sheriff is entitled to break open the outer door of a workshop which is entirely unconnected with a dwelling-house. In *Penton* v. *Brown* (1) it was held that the door of a barn, which was not a dwelling-house nor within the curtilage, might be broken open by a sheriff acting under the mandate of the law, he being in a different position from a landlord distraining for his rent. That distinction is referred to by the editors of Smith's Leading Cases in their notes to *Semayne's Case* (2). They say (9th Edn.) at p. 115, that the maxim that

> " 'a man's house is his castle' only extends to his dwelling-house: therefore a barn, or outhouse, not connected with the dwelling-house may be broken open in order to levy an execution: *Penton* v. *Brown* (1); but not to make a distress for rent: *Brown* v. *Glenn* (4)."

It is admitted that, in every text book upon the subject, that doctrine is laid down as having been decided in *Penton* v. *Brown* (1). Then in *Brown* v. *Glenn* (4), Lord Campbell, C.J., says (16 Q.B. at p. 257):

> "In *Penton* v. *Brown* (1) it was decided on demurrer that the outer door of an outhouse might be broken open for the purpose of executing a fi. fa."

The question came again before the court in *Hobson* v. *Thellusson* (5), and there, as reported in the LAW JOURNAL, LORD BLACKBURN said (36 L.J.Q.B. at p. 305):

> "I do not think that the sheriff's officer was bound to go off at once and take a crowbar to break open the doors, although, no doubt, that might have been done, as the goods were in a warehouse, and not in a dwelling-house . . . He certainly might have broken the doors open and have seized the goods."

The question before the court was, whether the sheriff was negligent in not seizing the goods before ten o'clock, at which hour a certain deed was executed, and the court held that he was not negligent because he was not bound to break in at once.

It has been argued that the passage from LORD BLACKBURN'S judgment which I have read is not to be relied upon, because the report of the case in the LAW REPORTS is not quite the same. LORD BLACKBURN is there reported to have said this (L.R. 2 Q.B. at p. 648):

> "I think the officer was not bound to go to the office earlier than he did; and that he proceeded with due diligence; and that he was not bound to break open the door of the warehouse at once without further inquiry, in the absence of any direction from the execution creditor to proceed with the utmost dispatch."

It seems to me that those words come to the same thing. The effect of the judgments of LORD BLACKBURN and MELLOR, J., is that the sheriff was not bound to break in at once, and the judgments would in my opinion be irrational if the sheriff had no power at all to break in.

It has also been argued that *Penton* v. *Brown* (1) has been disapproved of by BOWEN, L.J., in *American Concentrated Must Corpn.* v. *Hendry* (6). But all that he says (62 L.J.Q.B. at p. 390) is,

> "In *Penton* v. *Brown* (1) it was indeed held that a sheriff, for purposes of execution, might break a barn which was in a field, as distinct from a barn which was parcel of a house, but the court agreed that if the barn had been adjoining to a parcel of the house, it could not lawfully have been broken. The law so laid down in *Penton* v. *Brown* (1) as to the sheriff's rights with regard to a detached outhouse in a field, appears to me to be a departure from older law."

He does not say that the decision in *Penton* v. *Brown* (1) is not law, nor that it ought now to be overruled. I think that the decision in *Penton* v. *Brown* (1) ought not now to be overruled, nor any alteration made in the long course of practice that has existed for the last 200 years and more. The judgment of VAUGHAN WILLIAMS, J., was right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Nicholson, Graham & Graham*, for *Richard Tucker*, Bridport; *Lovell, Son & Pitfield*, for *Symonds & Son*, Dorchester.

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

BOARD OF TRADE *v.* PROVIDENT CLERKS AND GENERAL GUARANTEE ASSOCIATION, LTD.

[QUEEN'S BENCH DIVISION (Lawrance and Kennedy, JJ.), April 10, 1895]

[Reported 72 L.T. 562; 39 Sol. Jo. 428]

B

Bankruptcy—Trustee in bankruptcy—Powers—Trustee appointed by Board of Trade—Power to give indemnity to agent—Distraint by agent for rent due to bankrupt's estate—Indemnity by trustee against consequences of illegal distress—Proceeds of distress retained by agent and not paid into Bankruptcy Estates Account—Liability of trustee and guarantors under bond for consequent loss to estate.

C

A trustee in bankruptcy appointed by the Board of Trade has no authority, without the sanction of the Board, to give a personal indemnity to his agent against the consequences of selling goods seized for rent due to the bankrupt's estate. When such goods are sold it is the statutory duty of the trustee to require that the proceeds of the sale should at once be paid into the Bankruptcy Estates Account. Accordingly, where loss was occasioned to the bankrupt's estate by the trustee's failure to obtain payment into the Bankruptcy Estates Account of the proceeds of a distress for rent levied by his agent,

D

Held: notwithstanding an indemnity given to the agent by the trustee, he and his guarantors were liable to the Board of Trade on a bond given by them guaranteeing to make good any loss or damage to the bankrupt's estate occasioned by the default of the trustee in the performance of his statutory duties.

E

Notes. For the law relating to bankruptcy see now the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321).

As to powers and duties of trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 382 et seq.; and for cases see 4 DIGEST (Repl.) 236 et seq.

F

Special Case stated by consent of the parties for the opinion of the court under R.S.C., Ord. 34.

Muir Mackenzie for the plaintiffs.
A. R. Kirby for the defendants.

Cur. adv. vult. G

April 10, 1895. **KENNEDY, J.,** read the following judgment of the court.—The claim of the plaintiffs in this Special Case is for a sum of £120 19s., due from the defendants upon a bond of Mar. 17, 1891, given to the plaintiffs by the defendants and George Hendry, the trustee in the bankruptcy of one Weissenfeld, appointed by the Board of Trade under s. 21 (6) of the Bankruptcy Act, 1883 [now s. 19 (6) of the Bankruptcy Act, 1914]. By the bond the defendants became jointly and severally bound to the Board of Trade in the sum of £300,

H

> "if the said trustee shall fail [in the duties required of him as trustee] and the said association shall make good any loss or damage occasioned by any such default made after the date hereof to the estate of the said bankrupt."

I

The plaintiffs sue the defendants upon this bond, and the question is whether the trustee has failed in the performance of his duties and loss or damage has been occasioned by his default to the estate of the bankrupt.

It is unnecessary for the purposes of this judgment to recapitulate in any detail the circumstances which are fully set forth in the Special Case. Shortly stated, the material points are these. Rent to the amount of about £562 was owing to the trustee as representing the bankrupt's estate. The trustee distrained by his agent, Sinclair, for this rent. Sinclair, in levying the distress, acted illegally by a forcible

breaking. The tenant commenced an action against the trustee and Sinclair for this illegality, claiming (inter alia) a return of the goods seized under the distress. The trustee, with the sanction of the Board of Trade, defended the action. He directed Sinclair to sell the goods seized, and Sinclair did so, but only upon the trustee giving him in writing his personal indemnity against the consequences. The goods were sold and realised £281 17s. The trustee was not authorised by the Board of Trade to give any indemnity. It was an act which, in our judgment, he could not properly do without that authority.

We are further of opinion that under ss. 74 and 75 of the Bankruptcy Act, 1883 [see now ss. 89, 88 of the Bankruptcy Act, 1914] and r. 295, it was the duty of the trustee, immediately the distress was realised, to require and procure the proceeds to be paid into the Bankruptcy Estates Account, and that in not doing so, but allowing his co-defendant to keep these proceeds under his control, the trustee failed to perform his statutory duty. The tenant, who, as we have said, was suing the trustee and Sinclair for their tortious conduct, applied, after the sale to STIRLING, J., for an order that the £281 17s. should be paid into court. The trustee appeared upon the summons and did not oppose, but explained that he was bound to pay the proceeds of the sale into the Bankruptcy Estates Account, and he gave an undertaking that the money when paid in should not be dealt with without notice to the plaintiff in the action. No order was made upon the summons. The trustee asked Sinclair for the £281 17s., but Sinclair refused to part with the money, and the trustee wrongly, in our opinion, took no steps to enforce payment of it. The action for wrongful distress was tried; judgment was given for the plaintiff for damages, and these were assessed by the official referee at £500. The successful plaintiff, towards satisfaction of his judgment, sought, by the appointment of a receiver, to get possession of the £281 17s., which was still under the control of Sinclair and his solicitor, but failed to do so, upon the ground in the Divisional Court, to which the matter had gone on appeal from the vacation judge who had made an order for a receiver, that the plaintiff in the action, having obtained judgment for damages, could not recover the money produced by the proceeds of the sale. The money was, in fact, used by Sinclair towards payment of the costs incurred to his solicitor in the action. In auditing the trustee's accounts the Board of Trade have surcharged him with this sum of £281 17s., and the accounts, being so surcharged, showed a balance of £120 19s. due from the trustee. This is the sum which the Board of Trade in the present action seeks to recover from the defendants. The trustee is now himself a bankrupt.

We are of opinion that the trustee did fail and make default in his statutory duties, and occasioned loss and damage thereby, and that the plaintiffs are entitled to the sum which they claim from the defendants under the bond. It is clear to us, and, apart from the consequences of the indemnity, it is not seriously disputed, that the trustee ought to have insisted upon payment in the Bankruptcy Estates Account of these moneys, which really represented pro tanto the rent due to the estate. The giving of the indemnity, as has been already stated, was not an act which the trustee could rightly do without the authority of the Board of Trade, which, as no committee of inspection was appointed, exercised the functions of a committee of inspection.

It is contended on behalf of the defendants that Sinclair, having got the indemnity, was entitled for his own security to retain the proceeds of the sale, which he consented to carry out only on the condition of receiving the indemnity, and that if the giving of the indemnity by the trustee was an unauthorised, and therefore an improper, act, yet that the Board of Trade, representing the creditors of the estate, cannot at the same time claim the proceeds of the sale and disaffirm the act of the trustee in giving the indemnity without which the sale would not have taken place. It appears to us that this argument is not well founded. Even assuming, with counsel for the defendants, that, as between the trustee and Sinclair, Sinclair, having got the trustee's personal indemnity, was entitled as

against him to hold the proceeds as security, which appears to us to be at least open to question, we do not see how the wrongful, because unauthorised, conduct of the trustee in making a bargain with his agent, can avail the trustee or the defendants in this action, as his guarantors, in answer to the claim of the Board of Trade, representing the creditors, that he was guilty of default in not getting payment of the proceeds of the distress into the Bankruptcy Estates Account. He cannot, and consequently his guarantors therefore cannot, be heard to plead, as an excuse for the loss of these moneys, that by an arrangement which he could not properly, as against the estate, enter into with his agent, he put it out of his power to pay into the funds of the estate moneys of the estate which came into the agent's hands. Indeed, this was the view of the trustee himself, as is clear from what passed on the hearing of the summons before STIRLING, J., and from his subsequent request to Sinclair to pay over these moneys.

It was further contended for the defendants that, if there was a default on the part of the trustee, it was not a "wilful" default. In our opinion the terms of the bond do not make the defendants liable only in the event of a "wilful" default; but, if they ought to be so construed, it appears to us that what the trustee did in this case may properly be so designated, and that the particulars set out in the special case are sufficient. The trustee knew that he had no authority to give the indemnity; he knew, and he stated to STIRLING, J., that the proceeds of the distress, when realised, ought to be paid by him into the Bankruptcy Estates Account; he requested Sinclair to hand them over to him for the purpose of their being paid into that account, and then he took no steps to enforce the payment which he knew and had thus openly acknowledged ought to be made, but left this asset of the estate in the hands of his agent and his agent's solicitor. It seems clear to us that the trustee failed, with is eyes open, and not either inadvertently or by any oversight, to perform his statutory duty; that money was lost to the estate thereby; that a just claim on the bond for £120 19s. is thereby created, and that the plaintiffs are entitled to recover that amount from the defendants.

Judgment for plaintiffs for amount claimed.

Solicitors: *Walter Murton; Wansey, Bowen & Co.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

CHATTERTON *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL

[Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), June 18, 1895]

[Reported [1895] 2 Q.B. 189; 64 L.J.Q.B. 676; 72 L.T. 858; 59 J.P. 596; 11 T.L.R. 462; 14 R. 504]

Libel—Privilege—Absolute privilege—Secretary of State—Official communication to under-secretary.

A written communication from a Secretary of State to his under-secretary, made by him in the course of carrying out his official duties as Secretary of State, is absolutely privileged. An action for libel founded upon such a communication cannot be maintained, and may be dismissed as vexatious.

Notes. Applied: *Isaacs* v. *Cook*, [1925] 2 K.B. 391. Referred to: *Szalatnay-Stacho* v. *Fink*, [1946] 1 All E.R. 303.

As to absolute privilege in affairs of state and official communications on state matters, see 24 Halsbury's Laws (3rd Edn.) 53, 54; and for cases see 32 Digest 110 et seq.

Cases referred to:

(1) *Anderson* v. *Hamilton* (1816), 2 Brod. & Bing. 156, n.; 8 Price, 244, n.; 129 E.R. 917; 22 Digest (Repl.) 386, *4155*.

(2) *Home* v. *Bentinck* (1820), 2 Brod. & Bing. 130; 8 Price, 225; 1 State Tr. N.S. App.A. 1348; 4 Moore, C.P. 563; 129 E.R. 907, Ex. Ch.; 32 Digest 111, *1431*.

(3) *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255; 42 L.J.Q.B. 63; 28 L.T. 134; 21 W.R. 544, Ex. Ch.; affirmed (1875), L.R. 7 H.L. 744; 45 L.J.Q.B. 8; 33 L.T. 196; 40 J.P. 20; 23 W.R. 931, H.L.; 32 Digest 102, *1339*.

Also referred to in argument:

Kinloch v. *Secretary of State for India* (1882), 7 App. Cas. 619; 51 L.J.Ch. 885; 47 L.T. 133; 30 W.R. 845, H.L.; 11 Digest (Repl.) 620, *475*.

Stace v. *Griffith* (1869), L.R. 2 P.C. 420; 6 Moo. P.C.C.N.S. 18; 20 L.T. 197; 16 E.R. 633, P.C.; 32 Digest 115, *1467*.

Grant v. *Secretary of State for India* (1877), 2 C.P.D. 445; 46 L.J.Q.B. 681; 37 L.T. 188; 25 W.R. 848; 32 Digest 124, *1556*.

Gidley v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275; 1 State Tr. N.S. 1263; 7 Moore, C.P. 91; 129 E.R. 1290; 1 Digest (Repl.) 754, *2933*.

Appeal from a decision of the Queen's Bench Division (Mathew and Day, JJ.) dismissing as vexatious an action brought to recover damages for libel.

The plaintiff alleged by his statement of claim that he was a captain in Her Majesty's Indian Staff Corps on half pay, and that in March, 1893, the defendant, the Secretary of State for India, conveyed in writing to Mr. G. Russell, M.P., untrue statements concerning the plaintiff's professional reputation. Mr. Russell was at that date the Parliamentary under-secretary to the defendant, and the alleged libel was contained in a letter sent to him by the defendant instructing him as to the answer to be given by him to a question asked in the House of Commons with regard to the plaintiff's treatment by the Indian military authorities and government.

The master struck out the action as vexatious and his decision was affirmed by the judge at chambers, and by the Queen's Bench Division. The plaintiff appealed.

The plaintiff in person.

J. R. Paget for the defendant.

LORD ESHER, M.R.—This is an action of libel brought against the Secretary of State for India in Council. It is said that the action is not brought against the Secretary personally, but against him as a corporation. It does not signify

whether that be so or not: the substance of the thing is this, that it is an action of libel brought against a high official of State in respect of a statement contained in a document sent by him to his under-secretary. The plaintiff's case shows that this document was written and sent by the defendant to his under-secretary in the course of carrying out his official duties as a Secretary of State. The Queen's Bench Division has held that the action cannot be maintained, on the ground that such an act as that which is the subject of the action cannot be inquired into by a civil court of law. It is beyond the powers of a civil court to hold any inquiry upon the matter. In all the reported cases upon the subject it has been laid down that a judge should stop the case, if such an action came before him for trial, because he would have no jurisdiction even to entertain the question. As the action cannot be maintained at all, I think it would be vexatious to allow it to go on.

What is the reason for the existence of this law? It does not exist for the benefit of the official. All judges have said that the ground of its existence is the injury to the public good which would result if such an inquiry were allowed as would be necessary if the action were maintainable. An inquiry would take away from the public official his freedom of action in a matter concerning the public welfare, because he would have to appear before a jury and be cross-examined as to his conduct. That would be contrary to the interest of the public, and the privilege is, therefore, absolute in regard to the contents of such a document as that upon which this action is founded. I shall not go through the reported cases since they are all to the same effect. The result of them is summed up thus by MR. FRASER in his book on LIBEL AND SLANDER (1st Edn.), p. 95:

> "For reasons of public policy the same protection would no doubt be given to anything in the nature of an act of State—for example, to every communication relating to State matters made by one Minister to another, or to the Crown."

I adopt that paragraph, which seems to me to be an exact statement of the law. This case comes within those words, and the plaintiff's action is not maintainable. I, therefore, think that the action must be dismissed as vexatious, and the judgment of the Queen's Bench Division affirmed.

KAY, L.J.—This is an action of libel brought in respect of a statement in a communication from the Secretary of State for India in Council to his Parliamentary under-secretary. Assuming for the purposes of argument that that statement is untrue and malicious, the question arises whether it is not absolutely privileged so that no action can be maintained upon it. The communication was made by the defendant to his Parliamentary under-secretary in order that it might be read as an answer to a question which the plaintiff had caused to be put to him in the House of Commons. That seems to me to be clearly an act of State. If an action of libel can be founded on such a matter as that, it seems to me that the government of the country could not be carried on . . . . . .

Could an action of libel, founded on such a statement as we have here, be brought against the Secretary of State personally? The nearest authority to the present case that I know of is *Anderson* v. *Hamilton* (1). LORD ELLENBOROUGH there said (2 Brod. & Bing. at p. 157, n.):

> "I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of Government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance. Then it is said the fact that there has been a complaint made against the defendant by the plaintiff to Lord Liverpool is the only fact sought to be put in evidence on this occasion; but it is not competent to the plaintiff to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the

A plaintiff must be entitled to the whole or none; and I think that the whole of this letter is not admissible, on account of the objections taken by the counsel for the defendant."

That decision seems to me to be to the effect that production of the letter containing the libel could not be enforced, nor could secondary evidence be given of its contents. The court would not allow the letter to be put in evidence, nor B secondary evidence be given of what it contained.

That was also the view taken by the court in *Home* v. *Bentinck* (2). That was an action of libel, brought against the president of a military court, appointed by the Commander-in-Chief to hold an inquiry into the conduct of an officer, in respect of a statement in the report thereupon made. The court held that neither could the report be received in evidence, nor could secondary evidence C of its contents be accepted, and it was absolutely privileged. DALLAS, C.J., says (2 Brod. & Bing. at p. 162) that the question was whether, if Sir Henry Torrens, who was then secretary to the Duke of York, the Commander-in-Chief, had been willing to produce the report,

"it would not have been the bounden duty of the learned judge before whom D the cause was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence."

He then refers to certain cases in which, for reasons of State and policy, information is not permitted to be disclosed, and he says :

E "What is the ground upon which these cases stand, except it be the ground of danger to the public good which would result from disclosing the sources of such information?"

That seems to me to be a direct authority for the proposition that for reasons of State policy a document of this kind is not one upon which an action is capable of being founded. The court will not allow the document to be put in evidence, F nor secondary evidence of it given, because to allow such a thing would be contrary to the public good. It is not denied that an action of slander cannot be founded upon a statement made in Parliament, and there can be no reason why a document from which that statement was made should be allowed to be used as the foundation of an action. There may be other reasons why this action might be called vexatious, because it must fail if it should come on for trial But the G ground upon which I base my judgment is that the document complained if is an act of State, and is, therefore, absolutely privileged. I think that the passage read by the Master of the Rolls from MR. FRASER'S book on LIBEL AND SLANDER accurately states the result of the cases on this point. I, therefore, agree that this appeal fails, and should be dismissed.

H **A. L. SMITH, L.J.**—This action has been dismissed as vexatious by the master, by the judge at chambers, and by the Divisional Court, and in my opinion it has been rightly dismissed. Two grounds have been suggested why this action ought to be dismissed. One, that it is a document passing between the Secretary of State and his under-secretary for the purpose of meeting a question that had been put I in the House of Commons; and, secondly, that it is a communication by the Secretary to his under-secretary made in the course of carrying out the duties of his office. The question is, whether that document is, or is not, absolutely privileged. I can find no case exactly covering the point; but it seems to me, looking at the ratio decidendi of *Home* v. *Bentinck* (2), *Anderson* v. *Hamilton* (1), and *Dawkins* v. *Lord Rokeby* (3), that, under the circumstances of this case, an absolute privilege attaches to the document complained of. But I am of opinion that it is sufficient ground for holding this document to be absolutely privileged to say that the communication from the Secretary of State for India to his under-

secretary was a document of State which came into existence through the carrying out by the defendant of his official duties. Consequently the document cannot be produced in evidence in a court of justice. The reason why it cannot be produced is that it would be contrary to the public welfare, and, though no objection to producing it were taken by the defendant, it would be the duty of the judge at the trial to intervene and forbid its being made use of. Moreover, it would also be his duty to forbid secondary evidence being given of its contents. The result is that, supposing this action were allowed to go on, it would be quite useless, because the alleged libel could not be produced, nor any evidence given of it. The judges of the Divisional Court, in the exercise of the inherent jurisdiction of the court, dismissed the action as vexatious on the ground that by no possible means could the plaintiff succeed in it. I entirely agree with that, and the appeal must be dismissed.

Appeal dismissed.

Solicitor: *Solicitor to the India Office.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

BARFF AND OTHERS *v.* PROBYN

[Queen's Bench Division (Charles, J.), June 21, 1895]

[Reported 64 L.J.Q.B. 557; 73 L.T. 118; 11 T.L.R. 467]

Landlord and Tenant—Fixtures—Tenant's fixtures—Right of tenant to remove—Removal of fixtures after expiry of tenancy, but while tenant still in possession and ejectment pending—Measure of damages to which landlord entitled—Value of fixtures as chattels.

The defendant's tenancy of a public-house (which was to be demolished at the end of the tenancy) expired on Sept. 29, 1893, but the defendant refused to give up possession, and on Oct. 27, 1893, the landlords began ejectment proceedings. Before the termination of those proceedings and while the defendant was still in possession of the premises he removed certain tenant's fixtures.

Held: (i) at the time the defendant removed the fixtures no tenancy, even at sufferance, existed between him and the landlords and he was a trespasser, and, therefore, notwithstanding that he was still in possession, he had lost his right to remove fixtures: *Weeton* v. *Woodcock* (1) (1840), 7 M. & W. 14, applied; (ii) the measure of damages to which the landlords were entitled was the value of the fixtures as chattels.

Notes. As to removal of fixtures, see 23 Halsbury's Laws (3rd Edn.) 494 et seq.; and for cases see 31 Digest (Repl.) 220 et seq.

Cases referred to:

(1) *Weeton* v. *Woodcock* (1840), 7 M. & W. 14; 10 L.J.Ex. 183; 151 E.R. 659; 31 Digest (Repl.) 222, *3592.*

(2) *Penton* v. *Robart* (1801), 2 East, 88; 102 E.R. 302; 31 Digest (Repl.) 212, *3453.*

(3) *Elwes* v. *Maw* (1802), 3 East, 38; 102 E.R. 510; 31 Digest (Repl.) 213, *3454.*

(4) *Leeder* v. *Homewood* (1858), 5 C.B.N.S. 546; 27 L.J.C.P. 316; 23 J.P. 56; 4 Jur.N.S. 1062; 141 E.R. 221; 31 Digest (Repl.) 220, *3568.*

(5) *Deeble* v. *M'Mullen* (1857), 8 I.C.L.R. 355; 31 Digest (Repl.) 204, **1098.*

(6) *Clarke* v. *Holford* (1848), 2 Car. & Kir. 540; 18 Digest (Repl.) 262, *123.*

Also referred to in argument:

Joyner v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 39 W.R. 583; 7 T.L.R. 509, C.A.; 31 Digest (Repl.) 373, *5042.*

Lyde v. *Russell* (1830), 1 B. & Ad. 394; 9 L.J.O.S.K.B. 26; 109 E.R. 834; 31 Digest (Repl.) 217, *3527.*

Mackintosh v. *Trotter* (1838), 3 M. & W. 184; 1 Horn. & H. 20; 7 L.J.Ex. 65; 150 E.R. 1108; 31 Digest (Repl.) 222, *3591.*

Meux v. *Jacobs* (1875), L.R. 7 H.L. 481; 44 L.J.Ch. 481; 32 L.T. 171; 39 J.P. 324; 23 W.R. 526, H.L.; 31 Digest (Repl.) 226, *3628.*

Re Roberts, Ex parte Brook (1878), 10 Ch.D. 100; 48 L.J.Bcy. 22; 39 L.T. 458; 43 J.P. 53, 286; 27 W.R. 225, C.A.; 31 Digest (Repl.) 222, *3597.*

Thompson v. *Pettitt and Robins* (1847), 10 Q.B. 101; 16 L.J.Q.B. 162; 11 Jur. 748.

Moore v. *Drinkwater* (1858), 1 F. & F. 134; 18 Digest (Repl.) 284, *310.*

Action by the plaintiffs, the freeholders and landlords of a public-house, the Five Bells, in Moorfields, Cripplegate, against the defendant, the assignee of a lease for the premises, for damages for wrongful removal and conversion by the defendant of certain fixtures.

The defendant was the assignee of a lease for twenty-one years from Sept. 29, 1872, granted by the plaintiffs' predecessors in title to one M., which expired on Sept. 29, 1893. In May, 1893, the plaintiffs agreed with one Cosh to grant him a building lease of the premises together with some adjoining property from Sept. 29 following, when the defendant's tenancy expired. Cosh was to take down the buildings on possession being given to him on the expiration of the defendant's term, and adapt them to other purposes. Negotiations took place between the defendant and Cosh (the incoming tenant) as to the purchase by Cosh of the fixtures of the public-house. On Sept. 27 the fixtures were valued at £148 9s. if the premises were to be carried on as part of a going concern, and at £26 17s. for breaking-up price. Cosh, however, in October, agreed to pay the defendant £90 for these fixtures, but failed to do so. The defendant's tenancy having expired on Sept. 29, the plaintiffs required him to give up possession but he declined to do so and remained on in possession, as Cosh had not paid him the £90 for the fixtures. On Oct. 27 a writ in an action of ejectment was served by the plaintiffs on the defendant, and the defendant then took up the position that he was entitled to remain in possession until Cosh paid him for the fixtures. That action terminated in possession being given up, before judgment, on Mar. 16, 1894, but the defendant had in the meantime removed the fixtures. The tenant had, therefore, removed the fixtures—which were taken to be "tenant's fixtures"—after the expiration of his tenancy on Sept. 29, 1983, but before he had given up possession on Mar. 16, 1894, and the question now was whether he was entitled so to remove the fixtures.

Robson, *Q.C.*, and *Corrie Grant* for the plaintiffs.

Shakespeare (*Jelf*, *Q.C.*, with him) for the defendant.

CHARLES, J.—The defendant's term had expired on Sept. 29, and the fact that the plaintiffs brought an ejectment against him showed their intention of no longer treating him as tenant. Yet the defendant had removed the fixtures after his tenancy had come to an end. *Penton* v. *Robart* (2) was relied on as an authority which enabled the tenant to do so, and if that case is looked at by itself it is difficult to distinguish it from the present. There the plaintiff had recovered judgment in ejectment against the tenant for the premises in question, yet, as the tenant was still in fact in possession, the court held that he had not abandoned his right to the fixtures. I was at first disposed to think that I ought to act upon that decision and leave the matter to the Court of Appeal; but, on reading the notes to *Elwes* v. *Mawe* (3) in 2 Smith, L. C. (9th Edn.) 182, I find that the decision in *Penton* v. *Robart* (2) has been modified by the decision of the court as delivered by ALDERSON, B., in *Weeton* v. *Woodcock* (1), where it was held that the tenant's right to remove the fixtures continues only during the original term, and during such further term as he has a right to consider himself tenant, and then ceases, although the possession of the tenant continues; and a similar view of *Penton* v.

Robart (2) was taken by WILLES, J., in delivering the considered judgment of the court in *Leader* v. *Homewood* (4), though during the course of the argument in that case VAUGHAN WILLIAMS, J., seems to have thought that the court in *Weeton* v. *Woodcock* (1) did not qualify *Penton* v. *Robart* (2), and on reading the judgment of WILLES, J., it seems clear to me that that learned judge thought it necessary that some tenancy, although a tenancy at sufferance, should subsist.

In the present case the inference of fact which I draw is, that at the time the defendant removed these fixtures the relation of landlord and tenant did not exist, and that he was in fact a trespasser, and was so treated by the landlords when they served upon him a writ of ejectment on Oct. 27. After that date certainly the defendant could not consider himself as tenant, and therefore, his case would come within the limitation laid down by ALDERSON, B., in *Weeton* v. *Woodcock* (1)

> "during such further period of possession by the tenant as he holds the premises under a right still to consider himself as tenant."

Penton v. *Robart* (2) has been commented upon with but qualified approval in the cases I have referred to, and has been altogether dissented from in the Irish case of *Deeble* v. *M'Mullen* (5). Under these circumstances I reluctantly feel it my duty to follow the general course of authority in favour of the plaintiffs, in preference to the view expressed in *Penton* v. *Robart* (2), and to hold that at the time the defendant removed the fixtures he was a trespasser, and that no tenancy, even at sufferance, existed between the defendant and the plaintiffs. I take this view reluctantly, as there is some hardship in the tenant losing the value of his fixtures; but I think on the whole that the plaintiffs' case has been established, and that they are entitled to judgment.

As to the measure of damages, the passage in MAYNE ON DAMAGES (5th Edn.), p. 387, was cited that,

> "in trover for fixtures which have been wrongfully removed, the plaintiff can only recover their value as chattels, though it may be less than their value was as fixtures."

The authority cited for that proposition is *Clarke* v. *Holford* (6). That was a case where the tenant was complaining of the wrongful removal of fixtures by the landlord; but it is obvious that the measure of damages which the plaintiff is entitled to in the present case, where the action is against the tenant, must be the same. As the premises were coming down and could not be used as a public-house, an incoming tenant would not have given more than the breaking-up or sale price. I think, therefore, the judgment should be for the plaintiffs for breaking-up price, that is, for £26 17s., and I give judgment for that sum, with costs on the High Court scale.

Judgment for plaintiffs.

Solicitors: *Baylis & Pearce; Timbrell & Deighton.*

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

FORD'S HOTEL CO., LTD. *v.* BARTLETT

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), November 29, December 2, 1895]

[Reported [1896] A.C. 1; 65 L.J.Q.B. 166; 73 L.T. 665; 44 W.R. 241]

Arbitration—Stay of legal proceedings—Step taken after appearance—Application for extension of time for delivering defence.

By the Arbitration Act, 1889, s. 4 [re-enacted by the Arbitration Act, 1950, s. 4] : "If any party to a submission . . . commences any legal proceedings in any court . . . against any other party to the submission . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings . . ."

Held: an application for an extension of time for the delivery of a defence is a "step" in the proceedings within the meaning of s. 4.

Decision of the Court of Appeal, [1895] 1 Q.B. 850, affirmed.

Notes. The Arbitration Act, 1889, has been repealed and replaced without amendment by the Arbitration Act, 1950. For s. 4 of the 1889 Act see now s. 4 (1) of the 1950 Act.

Referred to : *Zalinoff* v. *Hammond*, [1898] 2 Ch. 92.

As to stay of proceedings, see 2 Halsbury's Laws (3rd Edn.) 21 et seq., and for cases see 2 Digest (Repl.) 495-497. For the Arbitration Act, 1950, s. 4 (1), see 29 Halsbury's Statutes (2nd Edn.) 93.

Cases referred to in argument :

Reichel v. *Magrath* (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159; 54 J.P. 196, H.L.; Digest (Pleading) 84, *701.*

Chappell v. *North*, [1891] 2 Q.B. 252; 60 L.J.Q.B. 554; 65 L.T. 23; 40 W.R. 16; 7 T.L.R. 563, D.C.; 2 Digest (Repl.) 495, *444.*

Brighton Marine Palace and Pier, Ltd. v. *Woodhouse*, [1893] 2 Ch. 486; 62 L.J.Ch. 697; 68 L.T. 669; 41 W.R. 488; 37 Sol. Jo. 424; 3 R. 565; 2 Digest (Repl.) 496, *455.*

Ives and Barker v. *Willans*, [1894] 1 Ch. 68; 63 L.J.Ch. 78; 69 L.T. 710; 42 W.R. 396; affirmed, [1894] 2 Ch. 478; 63 L.J.Ch. 521; 70 L.T. 674; 42 W.R. 483; 10 T.L.R. 439; 38 Sol. Jo. 417; 7 R. 243, C.A.; 2 Digest (Repl.) 494, *439.*

Turnock v. *Sartoris* (1889), 43 Ch.D. 150; 62 L.T. 209; 38 W.R. 340, C.A.; 2 Digest (Repl.) 494, *438.*

Richards v. *Cullerne* (1881), 7 Q.B.D. 623, C.A.; 2 Digest (Repl.) 554, *883.*

Hampden v. *Wallis* (1884), 26 Ch. 746; 54 L.J.Ch. 83; 50 L.T. 515; 32 W.R. 808, C.A.; 16 Digest (Repl.) 72, *730.*

Spincer v. *Watts* (1889), 23 Q.B.D. 350; 58 L.J.Q.B. 383; 61 L.T. 711; 37 W.R. 676; 5 T.L.R. 570, C.A.; Digest (Practice) 499, *1737.*

Willesford v. *Watson* (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 21 W.R. 350, L.C. & L.JJ.; 2 Digest (Repl.) 495, *443.*

Appeal by the defendants from a decision of the Court of Appeal (Lopes and Rigby, L.JJ.), reported [1895] 1 Q.B. 850, reversing an order of Henn Collins, J., made in chambers by which he had dismissed an appeal by the plaintiff from an order of the master granting the defendants a stay of proceedings.

The action was brought for the price of work done under a building contract which contained an arbitration clause in case of any dispute arising. The defendants took out a summons at chambers for an extension of time for delivering

their defence, and obtained an order. They afterwards applied for and obtained an order for a stay of proceedings, which was granted by the master. The plaintiff appealed to HENN COLLINS, J., who dismissed the appeal, and then to the Court of Appeal, which allowed the appeal. The defendants appealed to the House of Lords.

Dodd, Q.C., A. Statham, and *Nagle*, for the appellants.
Murphy, Q.C., and *Boyle*, for the respondent.

LORD HALSBURY, L.C.—I cannot help thinking that this is a very plain case, and we have had at least as much time occupied in its consideration as the matter deserves.

Section 4 of the Arbitration Act, 1889, provides that a person who has by any contract agreed to go to arbitration may be compelled to observe that contractual obligation if some proceeding before the court is taken in order to stay the proceedings. In this provision there come the words which your Lordships have to construe, "before delivering any pleadings or taking any other step in the proceedings." The sole question upon which we have been engaged is whether a summons taken out in this form,

> "Let all parties concerned attend the master at chambers on Saturday, Mar. 9, 1895, at 10.30 a.m., on the hearing of an application on the part of the defendants that they may have one month's further time to deliver defence herein,"

is a "step in the proceedings." It seems to me that it is a "step in the proceedings." I am not going to give any definition of what "a step in the proceedings" may be; it is enough for this case to say that this is "a step in the proceedings."

There can be no doubt that what was in the mind of the legislature was this: One of the great scandals which induced the legislature to interfere by statutory provision was the delay of arbitrations; and another was the costs applicable to arbitrations, which had to be incurred notwithstanding that the proceedings did not go on, so that there were a great number of proceedings for which the parties had to pay, although they furnished no ultimate decision of their rights. The intention of the legislature in giving effect to the contract of the parties, and saying that one of them should be entitled to make an application to insist that the litigation should be conducted according to the original agreement was, that they should at once, and before any further proceedings were taken, specify the terminus a quo, and that if an application to stay proceedings was made under those circumstances, then that the court should enforce the contractual obligation to go to arbitration. That seems to me to be a very wise provision, that costs shall not be thrown away in beginning to litigate—that costs shall not be so absolutely useless as that the proceedings from which they arose shall not furnish any part of the materials upon which the judgment was ultimately to be arrived at. That was the evil against which this provision was levelled. When one remembers that this is a question now coming before your Lordships on appeal on a mere point of procedure upon which no less than six judges, I think, have expressed an opinion adverse to the contention of the appellants, and no one judge, as I understand, who has had the matter argued before him has expressed a different opinion, it is a strong thing, upon such a mere question of procedure, to come up to the highest Court of Appeal and discuss it over again.

I am not unmindful of what has been suggested, namely, that HENN COLLINS, J., made an order apparently founded on a different view of the statute; but one knows perfectly well what happens at chambers. There is no one able to tell us exactly what HENN COLLINS, J., did say, but we know that proceedings at chambers are conducted in a very hasty way sometimes; the judge merely says "Order," or "No order," and there is an end of the matter. All the judges before whom the question has been argued have expressed the opinion which I confess

that I entertain strongly myself, that this is a "step in the proceedings," and the party has lost his right to have the matter determined by the agreed arbitrator by taking a step which in its terms amounted to asking for further time in order to deliver his defence.

I have designedly avoided saying anything about the other point which one of the appellants' counsel attempted to argue, namely, that, apart from the Act of 1889, the court has inherent jurisdiction to stay proceedings in an action. Nothing appears to me more mischievous as a precedent than, when a case of this sort, involving simply a question of procedure, is taken on appeal from court to court on one ground, that the parties, when they come before the last Court of Appeal, should attempt to raise a question resting on wholly different grounds—a question not depending upon the statute at all, and one which has not been considered by any one of the judges before whom the case has come.

Under these circumstances I apprehend that your Lordships will not think it right to consider such a point at all. Confining myself to the one point which has been litigated here, I entertain no doubt whatever that the appeal ought to be dismissed with costs, and I move your Lordships accordingly.

LORD WATSON.—I am of the same opinion. The only question raised by this appeal is an exceedingly small one, and in my opinion it has been rightly decided by the learned judges in the Court of Appeal. I can see no reason to doubt that an order obtained upon a summons for extension of time for lodging a defence is a "step in the proceedings" by the defendant within the meaning of s. 4 of the Arbitration Act, 1889.

LORD MACNAGHTEN and **LORD MORRIS** concurred.

LORD SHAND.—I am also of opinion that the application by the appellants for an extension of time to deliver their defence, upon which an order giving fourteen days' time was obtained, was a "step in the proceedings." The proceeding in question was unlike that in the cases which have been mentioned, where agents, without coming into court at all, have given an extra-judicial and voluntary consent, because the proceeding took place judicially in chambers, which was the same as if it had been in court. It is true that the application came before a master, and not before the judge; but he was sitting as representing the judge, and the proceeding was therefore unquestionably judicial, and a proceeding in the cause.

I think further that the proceeding of presenting such a summons and supporting it before the master implied a statement to the effect that the appellants intended to defend the action. It was on that representation only that the order of court was obtained. Having regard to the provisions of the Arbitration Act, this appears to me to have been in effect an abandonment of the proposal to have the subject of the cause disposed of by arbitration. On these grounds I am of opinion with your Lordships that the appellants' summons, with what followed on it, was a proceeding in the cause, or a step in the judicial proceedings, and that the judgment of the Court of Appeal ought to be affirmed.

LORD DAVEY concurred.

Appeal dismissed.

Solicitors: *W. L. Cooper*, for *Morgan & Co.*, Chepstow; *Munns & Longden.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re AMBITION INVESTMENT BUILDING SOCIETY

[CHANCERY DIVISION (Vaughan Williams, J.), November 6, 7, 1895]

[Reported [1896] 1 Ch. 89; 65 L.J.Ch. 113; 73 L.T. 508; 44 W.R. 141; 2 Mans. 607]

Building Society—Shares—Withdrawal—Notice prescribed by rules—Cessation of operation of rules—Insolvency of society—Stoppage of business.

Where the rules of a building society provide that members shall be entitled to withdraw their shares on giving notice the rules cease to operate, not on the insolvency of the society, but on stoppage of its business or on it becoming recognised that stoppage must take place.

The rules of a building society provided for withdrawal of shares on giving one month's notice. On Jan. 28, 1891, a report and balance sheet issued by the directors showed a surplus of only some £203, and stated that no new business had been done in 1890 and that the directors were of opinion that the society should be dissolved and a meeting called to discuss this question. On Feb. 5, 1891, a circular was issued by the society convening a special meeting on Feb. 12 to consider resolutions to dissolve the society, and at that meeting resolutions dissolving the society were passed. Mrs. L., a non-borrowing member, had given a notice of withdrawal which matured on Feb. 7 or 10, viz., between the date of the circular and the special meeting, and between Feb. 5 and Feb. 12 other members had given notices of withdrawal which did not mature until after the date of the special meeting.

Held: neither the report nor the circular recognised the necessity of stopping business, but merely contemplated that the members would decide that question one way or the other, and the necessity for stopping business was not recognised until the resolutions of Feb. 12; accordingly, Mrs. L.'s notice had matured before a stoppage of business or the recognition of the necessity for stoppage and she was entitled to be paid in full before the other non-borrowing members who must be paid pari passu without any priorities.

Re Sunderland 36th Universal Building Society (1) (1890), 24 Q.B.D. 394; and *Barnard* v. *Thomson* (2), [1894] 1 Ch. 374, applied.

Notes. The law relating to building societies is contained in the Building Societies Acts, 1874 to 1940 (2 HALSBURY'S STATUTES (2nd Edn.) 623 et seq.), as amended and supplemented by the Building Societies Act, 1960 (40 HALSBURY'S STATUTES (2nd Edn.) 45).

Approved and Applied: *Re United Citizens' Investment Trust, Ltd.*, [1931] All E.R. Rep. 324.

As to withdrawals, see 3 HALSBURY'S LAWS (3rd Edn.) 586; and for cases see 7 DIGEST (Repl.) 491.

Cases referred to:

(1) *Re Sunderland 36th Universal Building Society* (1890), 24 Q.B.D. 394 L.J.Q.B. 217; 62 L.T. 293; 38 W.R. 509; 6 T.L.R. 199; sub nom. *King* v. *Rawlings*, 54 J.P. 613, D.C.; 7 Digest (Repl.) 491, *88*.

(2) *Barnard* v. *Tomson*, [1894] 1 Ch. 374; 63 L.J.Ch. 488; 70 L.T. 306; 8 R. 585; 7 Digest (Repl.) 481, *23*.

(3) *Re Blackburn and District Benefit Building Society* (1883), 24 Ch.D. 421; 52 L.J.Ch. 894; 49 L.T. 730; 32 W.R. 159, C.A.; affirmed sub nom. *Walton* v. *Edge* (1884), 10 App. Cas. 33; 54 L.J.Ch. 362; 52 L.T. 666; 49 J.P. 468; 33 W.R. 417; 1 T.L.R. 96, H.L.; 7 Digest (Repl.) 542, *401*.

(4) *Carrick* v. *North British Building Society* (1885), 22 Sc.L.R. 833.

(5) *Tennent* v. *City of Glasgow Bank* (1879), 4 App. Cas. 615; 40 L.T. 694; 27 W.R. 649, H.L.; 9 Digest (Repl.) 266, *1683*.

Also referred to in argument:

Brownlie v. *Russell* (1883), 8 App. Cas. 235; 48 L.T. 881; 47 J.P. 757, H.L.; 7 Digest (Repl.) 503, *160.*

Summons taken out by the liquidators of the Ambition Investment Building Society to determine the priorities of the members in respect of surplus assets.

The building society was established in 1886, and was registered under the Building Societies Act, 1874.

The rules of the society provided (r. 3) that an annual general meeting should be held in February, at which a balance-sheet, with a report from the directors, should be laid before the members; (r. 16) that holders of shares, on which not less than six months subscription had been paid, and in respect of which no advance had been made should be "investing members," and the holders of shares on which an advance had been made should be "borrowing members." Rule 21 was as follows:

> "Withdrawal.—Any member may withdraw all or any of his shares upon giving one month's notice in writing to the secretary, when such member shall be entitled to receive back his net monthly subscriptions, with such portion of the profits realised as may have been posted to his credit, together with such interest as the directors, in their opinion, consider the state of the society's business will allow, such interest to be calculated up to the end of the month preceding the date of such notice. If more than one member shall give notice to withdraw, they shall be paid in rotation according to priority of notice; provided always that widows and children of deceased members shall have precedence."

Rule 30 provided for the dissolution of the society on the resolution of three-quarters of the members present at a special general meeting convened for that purpose.

On Jan. 28, 1891, the directors issued a balance-sheet which showed a surplus of £203 16s. 3d., and a report which stated that during 1890 the society had done no new business; that in their opinion it ought to be dissolved; and that a meeting would be called to discuss the question. The principal asset shown by the balance-sheet was a sum of £9,000 odd outstanding on loans to borrowing members on the security of leasehold property in respect of which a loss considerably exceeding the sum of £203 16s. 3d. had been sustained. On Feb. 5, 1891, a circular was issued by the secretary, under the direction of the directors, convening a special meeting for Feb. 12, following immediately after the conclusion of the annual general meeting, at which resolutions would be proposed to dissolve the society and to appoint liquidators. On Feb. 12, 1891, the special meeting was held, and resolutions dissolving the society and appointing liquidators were passed. The liquidators carried on the business of the society, realised the assets, and paid the outside creditors. In May, 1895, an order was made to continue the voluntary winding-up under the supervision of the court. Meanwhile, on Jan. 10, 1891, Mrs. Lark, a non-borrowing member of the society, had given notice of withdrawal which matured between the issue of the circular and the passing of the resolutions to wind-up. On Feb. 5, 1891, Miss Abrey had given notice of withdrawal. On Feb. 6 and 12, 1891, nine other members had given a similar notice. It appeared from the evidence that at the date of the circular the sum of £9,000 odd due from the borrowing members was worth about £1,000 less than the nominal amount.

J. Henderson for Mrs. Lark.

Chester Jones for Miss Abrey.

Hansell for members who had given notice after the issue of the circular.

Fawcus for the liquidators and for members who had given no notice of withdrawal.

VAUGHAN WILLIAMS, J.—This is a case which raises questions as to the priorities of the non-borrowing members of the Ambition Investment Building Society. The society has dissolved and has paid all its outside creditors in full,

and there is a surplus left, and the question is as to the priorities of these non-borrowing members inter se. It may be taken that the material dates are these: On Jan. 28, 1891, a report and balance-sheet were issued by the directors of the society, and on Feb. 5 a circular was issued by the secretary by the direction of the officers of the society, convening a special meeting to take place on Feb. 12, immediately after the conclusion of the annual general meeting, to consider resolutions to the effect that the society should be dissolved; and on Feb. 12 the special meeting was held, and the society was dissolved. There are various classes of non-borrowing members who are represented before me. A certain number of non-borrowing members had given notice of withdrawal, and they say that the giving of their notices under the circumstances of this case gave them a right of priority in the distribution of the assets of the society among the members inter se remaining after payment in full of the outside creditors of the society. One of these claimants is a lady named Mrs. Lark. It appears that she gave a notice of withdrawal which matured on Feb. 7 or 10 (it does not matter in the least which), that is, on some day between the issue of the circular convening the meeting and the holding of the meeting itself. In the case of all the other members claiming priority their notices did not mature until after the resolutions for dissolution had been passed on Feb. 12. For the judgment which I am about to deliver it is immaterial to consider the particular dates of their notices as in the case of Mrs. Lark.

Sometimes it is not an assistance to me to have a number of cases cited because it is difficult to reconcile them, but in the present case it is not so. It seems to me that the cases which have been cited to me form a continuous and uninterrupted current of authority, no one of them in any way contradicting or conflicting with the others. The last of these cases was *Barnard* v. *Tomson* (2). I do not propose to go into the facts of that case at any length, because when one comes to look at the judgment of NORTH, J., it is clear that he is only recognising and carrying out the principles which were laid down in the judgment delivered by MATHEW, J., in *Re Sunderland 36th Universal Building Society* (1). The view taken by NORTH, J., is that the line ought to be drawn at the time when a stoppage of the business has actually taken place, or it is recognised that the business must be stopped. In the case before him a report had been made by the accountants which had been rendered necessary by reason of certain defalcations of an officer of the society. It was a case in which undoubtedly the society had sustained great losses, and in which it might very well be a question whether the society ought not to dissolve and stop business. But the officers of the society in their report to the members had not recognised the necessity of stopping business; on the contrary, they showed that, after consideration, they thought on the whole the society had better go on. The final clause of their report stated that "There is no reason why the society should not with careful, judicious, and economical management, have a good future before it." This being a society in which a question had obviously been raised as to the desirability of stopping business, and the officers having reported against it, NORTH, J., says this ([1894] 1 Ch. at p. 390):

> "The result is, that I can find nothing whatever prior to the instrument of dissolution, to indicate such a state of things as would put an end to the operation of the existing rules upon the principles laid down in the cases to which I have referred. I have no materials for drawing a line earlier than the date of the instrument of dissolution. It seems to me, therefore, that all the notices to withdraw are good down to that time."

What were the materials for which NORTH, J., looked, and which he says he could not find? I understand from his judgment that there had neither been a stoppage of business in fact, nor a recognition by the officers of the society that there must be a stoppage of business. He does not confine himself to the question whether the society was solvent or insolvent. That is not the question he put to himself. It seems to me plain that the question he put to himself was this, "has there been a stoppage in fact, or a recognition by the officers of the fact that there must be a

A stoppage?" There had not been a stoppage, and as to recognition by the officers of the fact that there must be a stoppage, they, although they considered the financial position of the society sufficiently grave, after they had considered the question, in the result reported against an immediate dissolution. NORTH, J., in saying that follows another decision—that of COLERIDGE, C.J., and MATHEW, J., in *Re Sunderland 36th Universal Building Society* (1).

B Let us see what the judges decided in that case. After stating that the persons who had given notice of withdrawal claimed that until a winding-up order had been actually made they were entitled to withdraw, and so to constitute themselves creditors of the societies, and that the liquidator on the other hand insisted that the societies were known to be insolvent on Feb. 17, and that the right which members would otherwise have had of quitting the societies was then at an end, C and after referring to the rule as to withdrawal, they say (24 Q.B.D. at p. 403):

> "We are of opinion that this rule [i.e., the rule as to withdrawing members] was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It would be altogether unreasonable to suppose that it was D intended in the event of insolvency to permit one set of members to escape liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be still solvent."

E There has been a good deal of argument before me as to what is the meaning of that judgment. In particular a question has been necessarily raised as to what the judges meant when they spoke of the society being no longer able to carry on its business, and of its being notorious that it could not meet its liabilities. I do not think the judges had the slightest intention in that portion of their judgment of defining what were the conditions the happening of which would bring to an end the F right of withdrawal. All that they meant to do by their judgment was to hold that in the particular case before them these conditions were present; that there was in fact a society unable to carry on its business, and that it had become notorious that the society could not meet its liabilities. I do not understand them to lay down any such rule as that the right to withdraw is dependent on the knowledge either of the person giving notice of withdrawal or of the officers of the society of G the insolvent condition of the society. I only understand them to say that those conditions were present in that case, and that being present the society must be considered as having stopped business or resolved to stop business at that date which they were then dealing with.

When I look at *Walton* v. *Edge* (3), in the House of Lords, and *Carrick* v. *North British Building Society* (4), the cases on which COLERIDGE, C.J., and MATHEW, J., H say their judgment is based, I find in them both that the real question propounded by the judges to themselves was "had there been a stoppage of business or anything that was equivalent to a stoppage of business," and they held that wherever there had been a stoppage of business, or anything equivalent to it, the right of withdrawal is determined. But it does not seem to me that insolvency, or even insolI vency known to the officers of the society, is equivalent to a stoppage of business, and I propose to deal with the present case on that basis. LORD SHAND, in *Carrick* v. *North British Building Society* (4), when he is dealing with it says (22 Sc.L.R. at p. 840):

> "In the case of *Tennent* v. *City of Glasgow Bank* (5), in which a number of authorities were cited and considered as to the effect of the stoppage of a business on the declared insolvency of the company, it was held that no change could thereafter be made in reference to the rights or status of the members of the company, so that at least the rights of creditors might be preserved."

That seems to me to show that he recognised that the condition which would determine the right to withdraw was the stoppage of business or its equivalent. A

I asked counsel for members who had given notice after the issue of the circular whether he would look at r. 21, and tell me what were the words he would introduce in order to give to the rule the construction which he says it ought to bear. The words he suggested were these: "Provided that this rule shall have no application when the state of the finances and business of the society is such that it cannot continue as a going concern, i.e., is no longer commercially solvent." I do not accept that proviso. I am not bound to invent a proviso for myself; but, if I had to do so I should be more inclined to insert this: "Provided that this rule shall have no application where the society has stopped business, or it is recognised by its officers that it must stop business." When it is considered who are the persons for the regulation of whose mutual rights r. 21 was passed, it seems plain that stoppage of business or recognition of the fact that stoppage of business is inevitable is the proper point at which to draw the line, and not insolvency. Let us remember what are the relations of these persons. They have in common put their capital into an adventure or concern which it was hoped would yield a profit. There is a proviso for withdrawal of capital. How long is the right to withdraw capital to continue? It must continue as long as the adventure continues, or its continuance is contemplated. But from the moment the adventure has come to an end, or it is recognised by the adventurers themselves or their officers that it must come to an end, every principle of justice requires that all who have joined in the common adventure shall in common bear the loss. That is the moment at which the rule ought to cease to operate—when the common adventure has come to an end, or it is recognised either by the members personally or by their officers that it must come to an end. From that time there ought to be no applications for withdrawal. B C D E

I have only further to ask myself the question, Had that point been arrived at in any of these cases? To my mind it clearly had been arrived at at the date of the resolution for dissolution Feb. 12; it does not seem arguable that the right of withdrawal continued after that. But when had it arrived prior to that date? It did not arrive simply because the society was insolvent. A company which is insolvent may still in the hands of sanguine adventurers carry on its business. It did not arrive when the directors published their report on Jan. 28, because, although the directors did not in this case, as in the case before North, J., positively recommend the continuance of the business, they do clearly put it before the members as a matter in which it was perfectly reasonable for the members either to go on or to dissolve. Therefore, there was no recognition by that report of the necessity of stopping business. That being so, the next point is the issue of the circular. The issue of the circular carries it no further than the report. The report contemplated that the members would be called together to decide this question in one way or another, and the fact that the meeting was convened to consider it leaves the matter exactly where the report left it. F G

Under these circumstances, the conclusion I have come to is, that in Mrs. Lark's case there was not before the maturing of her notice on Feb. 7 or 10 either a stoppage of business or a recognition of the necessity for it, and she is entitled to be paid in full before the other non-borrowing members, and they must be paid pari passu without any priorities. I regard this society much as a partnership. An outgoing partner would be entitled to his costs out of the funds. These proceedings are the necessary complement of the dissolution, and the costs of all parties will come out of the funds. H I

Solicitors: *Lewis & Son; P. Rutland.*

[*Reported by* W. Ivimey Cook, Esq., *Barrister-at-Law.*]

Re O'GORMAN. Ex parte BALE

[Queen's Bench Division (Wright, J.), May 2, 1899]

[Reported [1899] 2 Q.B. 62; 68 L.J.Q.B. 650; 80 L.T. 501; 47 W.R. 543; 43 Sol. Jo. 480; 6 Mans. 204]

Bankruptcy—Proof—Debts provable—Damages awarded to petitioner against co-respondent.

Where a husband in divorce proceedings is awarded damages against the co-respondent, the co-respondent comes under a liability to the husband for which the husband can prove in the co-respondent's bankruptcy, but subject to the control of the court as to the application of the amount of the dividend received. This is so where the decree awarding the damages had been granted at the date of the receiving order, but the Divorce Court had not at that date made an order for payment of the damages to the petitioner.

Notes. The provisions as to damages for adultery are now contained in the Matrimonial Causes Act, 1950, s. 30; the provisions as to committal for the non-payment of judgment debts, in the Debtors Act, 1869, s. 5 (as amended by the Bankruptcy Act, 1883, s. 169 (i), and Fifth Schedule and by the Administration of Justice Act, 1956, s. 40); the provisions as to what debts are provable in bankruptcy, in the Bankruptcy Act, 1914, s. 30; and the provisions as to the effect of making a receiving order, in the Bankruptcy Act, 1914, s. 7.

Referred to: *Re McGreavy, Ex parte McGreavey* v. *Benfleet U.D.C.*, [1950] All E.R. 30.

As to which creditors may present a bankruptcy petition, see 2 Halsbury's Laws (3rd Edn.) 286 et seq.; as to debts provable in bankruptcy, see ibid. 464 et seq., and for cases see 4 Digest (Repl.) 134, 345. For the Matrimonial Causes Act, 1950, s. 30, see 29 Halsbury's Statutes (2nd Edn.) 416. For the Debtors Act, 1869, s. 5 (as amended by the Bankruptcy Act, 1883), see 2 Halsbury's Statutes (2nd Edn.) 294. For the Administration of Justice Act, 1956, s. 40, see 36 Halsbury's Statutes (2nd Edn.) 479. For the Bankruptcy Act, 1914, ss. 7, 30, see 2 Halsbury's Statutes (2nd Edn.) 336, 364.

Cases referred to:

(1) *Wood* v. *Wood and Stranger* (1868), L.R. 1 P. & D. 467; 37 L.J.P. & M. 25; 18 L.T. 110; 16 W.R. 568; 4 Digest (Repl.) 345, *3134*.

(2) *Re Muirhead, Ex parte Muirhead* (1876), 2 Ch.D. 22; 45 L.J.Bcy. 65; 34 L.T. 303; 24 W.R. 351, C.A.; 4 Digest (Repl.) 133, *1200*.

(3) *Re Sacker, Ex parte Sacker* (1888), 22 Q.B.D. 179; 58 L.J.Q.B. 4; 60 L.T. 344; 37 W.R. 204; 5 T.L.R. 112, C.A.; 4 Digest (Repl.) 121, *1082*.

(4) *Patterson* v. *Patterson and Graham* (1870), L.R. 2 P. & D. 189; 40 L.J. P. & M. 5; 23 L.T. 568; 19 W.R. 232; 27 Digest (Repl.) 558, *5096*.

Also referred to in argument:

Re Fryer, Ex parte Fryer (1886), 17 Q.B.D. 718; 55 L.J.Q.B. 478; 55 L.T. 276; 34 W.R. 766; 2 T.L.R. 860; 2 Morr. 231, C.A.; 5 Digest (Repl.) 1108, *8955*.

Re Graham, Ex parte Langridge (1871), 19 W.R. 951; 4 Digest (Repl.) 344, *3118*.

Re Newman, Ex parte Brooke (1876), 3 Ch.D. 494; 25 W.R. 261, C.A.; 4 Digest (Repl.) 346, *3139*.

Re Hawkins, Ex parte Hawkins, [1894] 1 Q.B. 25; 69 L.T. 769; 42 W.R. 202; 1 Mans. 6; 10 R. 29, D.C.; 4 Digest (Repl.) 329, *2987*.

Kerr v. *Kerr*, ante p. 865; [1897] 2 Q.B. 439; 66 L.J.Q.B. 838; 77 L.T. 29; 46 W.R. 46; 13 T.L.R. 534; 41 Sol. Jo. 679; 4 Mans. 207, D.C.; 4 Digest (Repl.) 329, *2988*.

Judgment Summons calling on the debtor to show cause why he should not pay the sum of £1,250, the amount of damages awarded to the petitioner in a case tried

in the Divorce Court in which the debtor was the co-respondent, or in default be committed. A

The damages were awarded on Feb. 27, 1897, and were ordered to be paid into court. On Oct. 6, 1897, the debtor filed his own petition in bankruptcy, and on the same day a receiving order was made. On Jan. 15, 1898, an order was made ordering the damages to be paid to the petitioner. There was evidence that the debtor was earning a large weekly salary. It was admitted that if the petitioner could B prove for the amount of the damages awarded him the order asked for could not be made.

Carrington in support of the application.
Cosmo Rose-Innes for the debtor.

C

WRIGHT, J.—This is a case of great difficulty and importance. I find that judges of great bankruptcy experience have refused to express any opinion on the point, but, as I do not think I could obtain any further light by consideration, I will decide it now.

It seems to me that where a husband comes as a petitioner into the Divorce Court and obtains his decree with damages against the co-respondent, he does acquire D a right against the co-respondent to do as he pleases with the damages so awarded him, subject to the order of the court. He ought, therefore, in some sense to be said to be a creditor of the co-respondent in respect of the damages, although he is bound to apply them as ordered by the court, and that is a view which is in accordance with the decision of LORD PENZANCE in *Wood* v. *Wood and Stanger* (1).

It does not, however, follow that because a petitioner who has been awarded E damages against a co-respondent is in some sense a creditor of the co-respondent after the decree, that he can be a petitioning creditor, or that he has a right of proof in bankruptcy. It was decided in *Re Muirhead* (2) that such a person cannot be a petitioning creditor in respect of damages which the Divorce Court has ordered to be paid to him on his undertaking to pay them into the registry to abide the further order of the court. But in deciding that case COCKBURN, C.J., uses language con- F fining himself to the question before him, which was whether there was a good petitioning creditor's debt, and he decided that there was not, because the petitioner was only to receive the money for the purpose of paying it into court, and he likens him to a conduit-pipe of the court, or to a receiver. MELLISH, L.J., agreed with him, and at the close of his judgment said (2 Ch.D. at p. 28):

> "I do not mean at all to express any dissent or express any opinion as to G the effect of such an order for the purpose of enabling a proof to be made. As at present advised, I should rather think that, there being a sum presently payable, and an order for its payment, it would be in some shape provable in bankruptcy, and that the mere uncertainty as to who was ultimately to receive it, and for whose benefit it was ultimately to be applied, would not prevent its being a provable debt." H

Then comes *Re Sacker* (3), where it was held that a receiver appointed in an action in the Chancery Division was not a "creditor" entitled to present a bankruptcy petition; but that case does not carry the matter any further than the decision in *Re Muirhead* (2), for although LORD ESHER, M.R., uses language (22 Q.B.D. at p. 184) which says that a petitioner and receiver is not a "creditor," yet to the best of I my judgment he only means a good petitioning creditor. FRY, L.J., says (ibid. at p. 185):

> "Whether the receiver could prove in respect of this sum in the bankruptcy of Sacker it is not necessary now to consider. As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him by a party to the action. There may, no doubt, be exceptional cases in which a receiver can bring an action in his

own name—when, for instance, he is the holder of a bill of exchange. In that case he can maintain an action, not because he is a receiver, but because he is the holder of the bill. So, too, if he is possessed of chattels as receiver, and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them, as being the person in possession of them, quite independently of the fact that he is a receiver. And there may be other cases in which, having an independent cause of action, the fact that he is a receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver."

This may apply to a person who has obtained a decree for damages against a co-respondent in the Divorce Court, and so the matter appears to be left open, for *Patterson* v. *Patterson and Graham* (4) does not help me, and I must give my decision in the absence of authority.

It seems to me that when a husband takes divorce proceedings against his wife and obtains his decree with damages against the co-respondent, although the damages are subject to the control of the court, the co-respondent is under a liability to the petitioner in respect of the damages for which the petitioner can prove in the co-respondent's bankruptcy. This application, therefore, cannot be sustained.

It is then said that as the order for the payment of the damages to the petitioner was not made till after the date of the receiving order, and, therefore, at the date of the receiving order, the petitioner had no interest in the damages and cannot prove for them in the bankruptcy. If I am right in the view I have taken on the other part of the case, the same result follows. At the date of the receiving order the Divorce Court had not made an order for the payment of the damages to the petitioner, but the decree awarding the damages had been granted, and, in my judgment, that put the petitioner in a position to make a proof for the damages in the co-respondent's bankruptcy, subject, of course, to any order of the Divorce Court for application of any money received under it. This is a most difficult question, and it is one on which I entertain the greatest doubt.

Application refused.

Solicitors : *Amery, Parkes & Powell; Wilson, Wallis & Co.*

[*Reported by* J. ANWYL THEOBALD, ESQ., *Barrister-at-Law.*]

Re BASSETT. Ex parte LEWIS

[QUEEN'S BENCH DIVISION (Vaughan Williams, J.), December 3, 1895]

[Reported [1896] 1 Q.B. 219; 65 L.J.Q.B. 144; 73 L.T. 736; 44 W.R. 240; 40 Sol. Jo. 157; 2 Mans. 524]

Bankruptcy—Set-off—Costs—Appeal to High Court—Costs of appeal in bankruptcy—Costs of appeal to Chancery Division—Same parties.

Costs incurred in bankruptcy proceedings are to be kept distinct from those incurred in other proceedings in the High Court, and, therefore, the costs of an appeal to the High Court from the county court in bankruptcy cannot be set off against the costs of an appeal to the High Court from the county court on the Chancery side, even though the parties to the two appeals are the same.

Notes. Applied: *Re Drummond, Ex parte Ashmore*, [1909] 2 K.B. 622. Considered: *Welch* v. *Royal Exchange Assurance* (*No. 2*), [1939] 3 All E.R. 305. Referred to: *Scott* v. *Peak Hill Goldfields* (1908), Times, Nov. 16.

As to set-off in proof of debts in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 480 et seq.; and for cases see 4 DIGEST (Repl.) 567 et seq.

Cases referred to in argument:

Re Adams, Ex parte Griffin (1879), 12 Ch.D. 480; 48 L.J.Bcy. 107; 41 L.T. 515; 28 W.R. 208, C.A.; 4 Digest (Repl.) 192, *1748*.

Barker & Co. v. *Hemming* (1880), 5 Q.B.D. 609; 49 L.J.Q.B. 730; 43 L.T. 678; 28 W.R. 764, C.A.; Digest (Practice) 902, *4424*.

Pelton Bros. v. *Harrison*, [1892] 1 Q.B. 118; 61 L.J.Q.B. 144; 65 L.T. 845, C.A.; Digest (Practice) 944, *4850*.

Blakey v. *Latham* (1889), 41 Ch.D. 518; 60 L.T. 624; 37 W.R. 569; 42 Digest 284, *3193*.

Edwards v. *Hope* (1885), 14 Q.B.D. 922; 54 L.J.Q.B. 379; 53 L.T. 69; 33 W.R. 672, C.A.; 42 Digest 284, *3192*.

Application by Joseph Lewis, the liquidator of the Bassett Plaster Co., Ltd., that a sum of £30 deposited by him at the time of entering an appeal in bankruptcy as security for the costs of the appeal might be paid out to him.

On Feb. 7, 1894, Lewis applied by motion to the Warwickshire county court for an order against John Bassett, the managing director of the Bassett Plaster Co., Ltd., to pay over to Lewis as liquidator of the company a sum of £189 13s. 11d. received by Bassett on behalf of the company and retained by him on account of an alleged claim against the company. In that motion Bassett was ordered to pay over the sum claimed forthwith with costs and on appeal by Bassett to the Divisional Court of the Queen's Bench Division, his appeal was dismissed, and Bassett was ordered to pay the costs. On Aug. 13, 1894, Lewis presented a petition against Bassett in the Warwickshire county court; this petition was dismissed with costs, and on appeal to the Divisional Court sitting in Bankruptcy, the appeal was dismissed, with costs, against Lewis. The costs in the two proceedings were taxed by the master, and he ordered that the costs due from Lewis to Bassett in the bankruptcy appeal in which Bassett was successful should be set off against the costs due to Lewis from Bassett in the other appeal in which Bassett had failed. Lewis now applied that the £20 deposited as security for his appeal in bankruptcy might (in consequence of the master's order setting off the costs) be paid out to him.

Muir Mackenzie for the applicant.
F. C. Willis for J. Bassett.

VAUGHAN WILLIAMS, J.—I am of opinion that this set-off ought not to be allowed. It would be a most just thing to allow it here, but I cannot do so. Up to

the passing of the Judicature Acts the point would not have been arguable that the costs of an appeal like this on the Chancery side of the county court could be set off against costs of an appeal on the Bankruptcy side. Has then the Judicature Act altered the bankruptcy rule? There is indeed no express alteration, but a power is given to taxing masters to allow a set-off of costs. That power does not apply to the costs of two independent proceedings such as these, and relates only to the common law side. Then is there anything in the fact that both these sets of costs were incurred in the Divisional Court when sitting to hear appeals from the county court? I think not. The costs of the appeal from the county court in the company matter ought not to be deducted from the costs incurred in the bankruptcy matter. The costs of the bankruptcy proceedings should be kept distinct, they are special proceedings, they are strictissimi juris, and the costs of them should be dealt with on that footing. They may have the effect of altering a debtor's status. The set-off cannot be allowed.

Application refused.

Solicitors: *Harvey & Capron*, for *E. C. Newey*, of Birmingham; *F. Hatton*, for *Goodrich-Clarke & Smith*, of Birmingham.

[*Reported by* WALTER B. YATES, ESQ., *Barrister-at-Law.*]

ROBB *v.* GREEN

[COURT OF APPEAL (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), July 10, 1895]

[Reported [1895] 2 Q.B. 315; 64 L.J.Q.B. 593; 73 L.T. 15; 59 J.P. 695; 44 W.R. 25; 11 T.L.R. 517; 39 Sol. Jo. 653; 14 R. 580]

Master and Servant—Duty of servant—After service—Use of information improperly obtained during service.

The defendant was employed as manager of the plaintiff's business. While so employed, he surreptitiously copied from the plaintiff's books a list of names and addresses of the plaintiff's customers, with the intention of using it for his own benefit after he had left the plaintiff's employment and set up a similar business on his own account. Having left the plaintiff's employment, he so used the list.

Held: it was an implied term of the defendant's contract of service that he would act with good faith towards his master: his conduct was a breach of the implied term; and the plaintiff was entitled to damages and an injunction.

Dictum of BOWEN, L.J., in *Lamb* v. *Evans* (1), [1893] 1 Ch. at p. 229, applied.

Notes. Applied: *Worthington Pumping Engine Co.* v. *Moore* (1902), 19 T.L.R. 84. Considered: *Barr* v. *Craven* (1903), 89 L.T. 574; *Kirchner & Co.* v. *Gruban*, [1908-10] All E.R. Rep. 242. Applied: *Measures* v. *Measures*, [1910] 1 Ch. 336; *Amber Size and Chemical Co.* v. *Menzel*, [1913] 2 Ch. 239. Considered: *Wessex Dairies, Ltd.* v. *Smith*, [1935] All E.R. Rep. 75. Applied: *Bents Brewery Co.* v. *Hogan*, [1945] 2 All E.R. 570. Considered: *Hivac, Ltd.* v. *Park Royal Scientific Instruments, Ltd.*, [1946] 1 All E.R. 350. Referred to: *London Electric Supply Corpn.* v. *Westminster Electric Supply Corpn.* (1913), 11 L.G.R. 1046; *Putsman* v.

Taylor, [1927] 1 K.B. 637; *Riber* v. *Marsden-Smith* (1952), 69 R.P.C. 230; *Nichrotherm Electrical Co.* v. *Percy*, [1957] R.P.C. 207; *Lister* v. *Romford Ice and Cold Storage Co.*, [1957] 1 All E.R. 125. A

As to the duty of a servant to his master, see 25 HALSBURY'S LAWS (3rd Edn.) 462 et seq.; and for cases see 34 DIGEST 117 et seq.

Cases referred to: B

(1) *Lamb* v. *Evans*, [1893] 1 Ch. 218; 62 L.J.Ch. 404; 68 L.T. 131; 41 W.R. 405; 9 T.L.R. 87; 2 R. 189, C.A.; 34 Digest 121, *927*.

(2) *Helmore* v. *Smith* (1886), 35 Ch.D. 449; 56 L.J.Ch. 145; 56 L.T. 72; 35 W.R. 157; 3 T.L.R. 139, C.A.; 34 Digest 121, *924*.

(3) *Yovatt* v. *Winyard* (1820), 1 Jac. & W. 394; 37 E.R. 425, L.C.; 28 Digest (Repl.) 854, *844*. C

(4) *Morison* v. *Moat* (1851), 9 Hare, 241; 20 L.J.Ch. 513; 18 L.T.O.S. 28; 15 Jur. 787; 68 E.R. 493; on appeal (1852), 21 L.J.Ch. 248; 16 Jur. 321, L.JJ.; 28 Digest (Repl.) 854, *849*.

(5) *Prince Albert* v. *Strange* (1849), 1 Mac. & G. 25; 1 H. & Tw. 1; 18 L.J.Ch. 120; 12 L.T.O.S. 441; 13 Jur. 109; 41 E.R. 1171, L.C.; 28 Digest (Repl.) 741, *19*.

(6) *Louis* v. *Smellie*, ante p. 875; 73 L.T. 226; 11 T.L.R. 515; 39 Sol. Jo. 654, C.A.; 34 Digest 122, *941*. D

Also referred to in argument:

Pearson v. *Pearson* (1884), 27 Ch.D. 145; 54 L.J.Ch. 32; 51 L.T. 311; 32 W.R. 1006, C.A.; 43 Digest 85, *898*.

Re Irish, *Irish* v. *Irish* (1888), 40 Ch.D. 49; 58 L.J.Ch. 279; 60 L.T. 224; 37 W.R. 231; 5 T.L.R. 39; 34 Digest 122, *938*. E

Reuter's Telegram Co. v. *Byron* (1874), 43 L.J.Ch. 661; 28 Digest (Repl.) 854, *850*.

Nichol v. *Martyn* (1799), 2 Esp. 732, N.P.; 34 Digest 167, *1306*.

Appeal by the defendant from a decision of HAWKINS, J., reported [1895] 2 Q.B. 1, at the trial of the action without a jury. F

The plaintiff was a dealer in live game and eggs, and in 1890 he engaged the defendant at a yearly salary as manager of a game farm. The contract of service was contained in three letters, in none of which was any reference made as to the names of the plaintiff's customers, nor about keeping their names secret or confidential. The defendant, as manager of the plaintiff's farm, had access to the G books of the business, and he surreptitiously, without the knowledge of anyone, copied from these books a list of names and addresses of the plaintiff's customers and their keepers. In 1893, the defendant quitted the plaintiff's service, and set up a business of his own as a dealer in live game and eggs. He then used for the purposes of his business the list of names he had copied from the plaintiff's books. The plaintiff brought an action claiming damages, and an injunction restraining the H defendant from using the information he had so obtained. HAWKINS, J., awarded the plaintiff £150 damages, ordered the defendant to deliver up to the plaintiff to be destroyed the list of names and addresses taken from the plaintiff's books, and granted an injunction restraining the defendant from making use of the information obtained by him by copying and extracting such names and addresses.

I

J. W. M'Carthy for the defendant.

R. M. Bray (*Murphy*, *Q.C.*, with him) for the plaintiff.

LORD ESHER, M.R.—The defendant had been a servant of the plaintiff, and had had access to an order-book of the plaintiff which contained a long list of the names of his customers with their addresses. Then the defendant, whilst in the plaintiff's service, took a copy of the list surreptitiously, that is to say, at times when he thought he would not be observed, and he took the copy, not for the purpose

of using it for the advantage of the master he was serving, but for the purpose of keeping it, unknown to his master, and using it after he had left his master's service. His object in making and using the copy of the list of customers was to induce them to give up dealing with the plaintiff and to get them as customers of his own. What view should be taken of that act of the defendant with regard to the plaintiff, done while he was in the plaintiff's service? Would not any person of ordinary honesty say that it was a dishonest act by a servant towards his master? Was it not a dereliction by the defendant of his duty to act with good faith to the plaintiff? It seems to me that Hawkins, J., was right in holding that the defendant had committed a breach of the trust reposed in him as a servant of the plaintiff, because he had no right to copy things out of the business books belonging to the plaintiff for the purpose of using his copy against his master after leaving his service.

It is impossible not to say that it was a wrong thing to do and a breach of trust. But we must also decide whether it was a breach of contract. There was a contract in writing made between the plaintiff and defendant for the service of the plaintiff by the defendant, but there is nothing in the writing to show that a term that the servant shall act in good faith towards his master cannot be implied. Can the court imply such a term and add it to the contract? In my opinion, a stipulation to that effect is to be implied in every contract of service where there ought to be such faithful service. That stipulation must have been in the minds of both parties when making the contract of service. A master would not take a servant into his employ if the servant refused to agree to act honestly, and a servant must know that his master, who is going to engage him, relies on the faithful performance by him of the duties arising out of the confidential relations between them. This stipulation must have been in the minds of both the plaintiff and the defendant when they entered into the contract of service, and it is, therefore, a part of that contract. Bowen, L.J., in *Helmore* v. *Smith* (2) and in *Lamb* v. *Evans* (1), was clearly of the same opinion. He says in the latter case ([1893] 1 Ch. at p. 229):

> "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorises us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile."

Now, a contract of service is a transaction of confidence and trust, and if a stipulation of faithful performance cannot be implied, the contract would be futile.

The rule laid down by Bowen, L.J., seems to me to be an exceedingly good one, and the circumstances of the employment, that is to say, of the formation of the relations of master and servant, made this stipulation a term in the contract. In certain matters a servant is always in a confidential position as regards his master. Hawkins, J., was, therefore, right in holding that the defendant has committed a breach of his contract with the plaintiff, and in awarding damages to the plaintiff. There was a breach of confidence, and a breach of contract which produced damage to the plaintiff. Besides the damages the plaintiff is also entitled to an injunction restraining the defendant from further breaches of his contract. Whether the form of the injunction which has been granted is right or not, it is unnecessary to say now. That is a question which will be decided should it hereafter become necessary to make any application to the court for the purpose of enforcing the injunction. The appeal must be dismissed.

KAY, L.J.—The defendant is appealing against the three parts of the judgment of Hawkins, J., namely, against the judgment for £150 damages, against the order for the delivery up of the list copied out by the defendant, and against the injunction restraining him from making use of the list. The learned judge found as a fact that

the defendant, whilst in the plaintiff's service, surreptitiously copied out of the plaintiff's books a list of customers dealing with the plaintiff with their addresses, and that he did this intending to use it, after leaving the plaintiff's service, in a rival business which he was going to set up so that he might try to draw these customers from the plaintiff and get them himself. The judge has held that that was done surreptitiously and in breach of the defendant's duty towards the plaintiff.

The granting of an injunction on the ground of a breach of the confidential relations existing between the plaintiff and the defendant is a very old method of relief. In *Yovatt* v. *Winyard* (3), which was decided in 1820, the plaintiff, who was the proprietor of certain veterinary medicines, employed the defendant as a journeyman under an agreement according to which he was to be instructed in the general knowledge of the business, but was not to be taught the mode of composing the medicines. After the defendant had left the plaintiff's service it was discovered by the plaintiff that the defendant, while in his service, had surreptitiously got access to his books of recipes and copied them, and had afterwards begun to sell the medicines. LORD ELDON granted an injunction restraining the defendant from using the recipes on the ground of there having been a breach of trust and confidence. The ground on which, in these matters, the court was granted an injunction is given by TURNER, V.-C., in *Morison* v. *Moat* (4). He says (9 Hare at p. 255):

> "The plaintiff's case was rested in argument upon the ground that the defendant had obtained this secret by breach of faith or of contract on the part of Thomas Moat . . . The true question is whether, under the circumstances of this case, the court ought to interpose by injunction, upon the ground of breach of faith or of contract. That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded on trust or confidence—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred, but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

Later the Vice-Chancellor refers (ibid. at p. 257) to the opinion expressed by LORD COTTENHAM in *Prince Albert* v. *Strange* (5), that a breach of trust, confidence, or contract would, of itself, entitle the plaintiff to an injunction. Then we come to *Lamb* v. *Evans* (1), where BOWEN, L.J., distinctly puts it on the ground that an implied contract arises from the confidential relations created between a master and his servant.

Whatever be the true ground, whether breach of confidence or breach of contract, the injunction must go. There was a clear breach of confidence here, since the defendant surreptitiously copied his master's books. As to any difficulty in the terms of the injunction, that will be set right when, if ever, any question arises about enforcing it.

As to the order for the delivery up to the plaintiff of the copy of the list made by the defendant, there can be no difficulty, because the making of that copy was clearly a breach of confidence. Then there is the question about the damages. That depends on whether there was any breach of contract, and it is clear from the judgments of BOWEN, L.J., that have been referred to, that there was an implied contract of faithful service, which the defendant has undoubtedly broken. The plaintiff is, therefore, entitled to damages, and the appeal must be dismissed.

A. L. SMITH, L.J.—I am of the same opinion, and I think that the judgment of the learned judge in the court below must be supported on the ground that the defendant has committed a breach of contract. This is a case of a contract of

service which created the relation of master and servant between the plaintiff and the defendant, and I agree that, in that contract, a term should be implied that the servant should act with fidelity towards his master. That implication seems to me to be a necessary one for the support of the contract. The law has been so laid down in *Lamb* v. *Evans* (1) and in *Louis* v. *Smellie* (6).

That being a term implied in the contract, the question is whether the defendant has acted with good faith towards the plaintiff. The learned judge states in his judgment that the defendant admitted that the copy was written by him when nobody saw him, and that his object was to use the names, and he confessed that he had regarded what he did as unfair and dishonourable, and that probably his master would have turned him away had he known of his misconduct. I do not agree with the opinion which the defendant expressed about this contract, that he did not think his employment was confidential, or that he was bound to protect his master's interest, as it was not expressly so said. I think that the defendant has acted with the worst faith towards his master. The judgment for the plaintiff was, therefore, right, and this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Rooper & Whately; Church, Rendell, Todd & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* DOBREE AND ANOTHER

[QUEEN'S BENCH DIVISION (Darling and Channell, JJ.), December 11, 1899]

[Reported [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 48 W.R. 413; 16 T.L.R. 80; 44 Sol. Jo. 103]

Estate Duty—Passing of property—Property deemed to pass—Money received under a policy of assurance—"Interest purchased or provided"—Beneficial interest arising—Finance Act, 1894 (*57 & 58 Vict., c.* 30), *s.* 2 (1) (*d*).

By an indenture of settlement made in pursuance of an agreement on his marriage, F. J. A. assigned a policy of insurance on his own life to trustees, covenanting to keep up such policy, on trust that they should receive the proceeds for the benefit of his wife for life and otherwise subject to the trusts therein contained. F. J. A. died in October, 1894, having kept up the premiums on the policy, the proceeds of which were received by the surviving trustees.

Held: estate duty was payable on the proceeds as constituting an "interest purchased or provided by the deceased" which accrued or arose on the death of the deceased within the meaning of the Finance Act, 1894, s. 2 (1) (d).

Notes. Considered: *A.-G.* v. *Hawkins*, [1901] 1 K.B. 285. Followed: *A.-G.* v. *Murray*, [1903] 2 K.B. 64. Considered: *Tennant* v. *Lord Advocate*, [1939] 1 All E.R. 672. Distinguished: *D'Avigdor-Goldsmid* v. *I.R. Comrs.*, [1953] 1 All E.R. 403; *Re Barbour's Life Assurance Policies, Westminster Bank, Ltd.* v. *I.R. Comrs.*, [1955] 3 All E.R. 41. Considered: *Re Barbour's Life Assurance Policies, Westminster Bank, Ltd.* v. *I.R. Comrs.*, [1956] 1 All E.R. 627; *Public Trustee* v. *I.R. Comrs.*, [1960] 1 All E.R. 1. Referred to: *Sanderson* v. *I.R. Comrs.*, [1956] 1 All E.R. 14; *Public Trustee* v. *I.R. Comrs.*, [1958] 2 All E.R. 720.

As to interests provided by the deceased, see 15 HALSBURY'S LAWS (3rd Edn.) 25 et seq.; and for cases see 21 DIGEST (Repl.) 34 et seq. For the Finance Act, 1894, see 9 HALSBURY'S STATUTES (2nd Edn.) 347.

Case referred to : A

(1) *Earl Cowley* v. *I.R. Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest (Repl.) 11, *36.*

Also referred to in argument :

Lord Advocate v. *Fleming*, [1897] A.C. 145; 66 L.J.P.C. 41; 61 J.P. 692; 13 T.L.R. 216; sub nom. *Lord Advocate* v. *Robertson*, 76 L.T. 125; 45 W.R. 674, H.L.; 21 Digest (Repl.) 139, *791.* B

Information by the Attorney-General claiming estate duty.

In September, 1866, a marriage was solemnised between Falconer John Atlee and Mary Dobree MacCall. Shortly before the marriage Falconer John Atlee effected a policy of assurance in La Nationale Insurance Office of France on Sept. 25, 1866, C for 37,537 francs (£1,501 10s.) on his own life, and payable on his death to Mary Dobree MacCall, subject to a yearly premium of £50 payable by him during his life. By an indenture, dated Sept. 19, 1867, Falconer John Atlee assigned the policy to four persons, of whom the defendants were the survivors as trustees for the purposes of an indenture of settlement of Sept. 20, 1867, made between Falconer John Atlee of the first part, Mary Dobree Atlee, his wife, of the second part, J. F. D Atlee of the third part, George MacCall of the fourth part, and R. O. Maughan, E. S. Claremont (both since deceased), and the defendants of the fifth part, whereby in pursuance of an agreement made previous to the marriage Falconer John Atlee assigned the policy of assurance to the parties thereto of the fifth part on the trusts thereinafter declared concerning the same. By that settlement Falconer John Atlee covenanted with the trustees to keep up the policy and pay the premiums E thereon during his life, and he did in fact keep up the same, and all premiums thereon were paid by him, and the moneys payable under the policy at his death were received by the defendants as the surviving trustees of the settlement of Sept. 20, 1867. It was declared by the settlement that the moneys to be received under the policy should be held by the trustees on trust for Mary Dobree Atlee for life; and the settlement contained a joint power of appointment by Falconer John F Atlee and Mary Dobree Atlee in favour of their children over the trust funds, including the proceeds of the policy. By a joint appointment, dated Jan. 30, 1871, Falconer John Atlee and Mary Dobree Atlee appointed that part of the trust funds, including the proceeds of the policy, should be held in trust for their son, George Gordon Falconer Atlee, subject to the life interest of Mary Dobree Atlee. Falconer John Atlee died on Oct. 2, 1894, leaving Mary Dobree Atlee him surviving. It was G alleged by the Crown that estate duty has become payable under s. 2 (1) (d) or the other provisions of s. 1 and s. 2 of the Finance Act, 1894, in respect of moneys received under the policy of assurance as property passing on the death of Falconer John Atlee within the meaning of those sections.

The Attorney-General (*Sir Richard Webster*, *Q.C.*), *the Solicitor-General* (*Sir* H *Robert Finlay*, *Q.C.*), and *Vaughan Hawkins* for the Crown.

Haldane, *Q.C.*, and *Danckwerts* for the defendants.

DARLING, J.—I think that our judgment must be for the Crown. The matter arises in this way: On a marriage in September, 1866, between a Mr. Atlee and a Miss MacCall, Mr. Atlee effected a policy of assurance, and he kept up that policy I by means of paying a premium of £50 a year during his lifetime. In September, 1867, Mr. Atlee assigned that policy to four trustees, and they were the trustees for purposes of an indenture of settlement dated September, 1867. By that assignment he covenanted to do what he had already been doing, to pay the premiums so as to keep the policy alive, and that he did during his lifetime. Owing to an appointment in 1871, the policy became held in trust for a son of this marriage, a Mr. George Gordon Falconer Atlee, subject to a life interest which remained in Mrs. Atlee, who survived her husband, who created the policy.

In those circumstances the Crown say that estate duty is payable in respect of something which Mrs. Atlee has received, viz., what she received in respect of this policy owing to the death of her husband, and it is said that the case comes within the Finance Act, 1894, s. 2 (1) (d). Section 2 provides:

> "Property passing on the death of the deceased shall be deemed to include the property following, that is to say, . . . (d): Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Omitting the words which cannot apply to this, one has to consider whether what Mrs. Atlee got, or what the trustees got, on the death of Mr. Atlee can be described as

> "any interest purchased or provided by the deceased, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

It is said by counsel for the defendants that no beneficial interest passed at all on the death of Mr. Atlee; that all that he ever had was in the hands of trustees by virtue of the earlier settlement, and that he never had a "beneficial interest"; that something passed to Mrs. Atlee on his death, but it was not a beneficial interest; that what passed was, it is true, a benefit, an advantage, but then that is not taxed by the Act. Nothing is taxed unless it comes within the words

> "beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

I think that it is material, to see exactly what this means, to look at s. 15 of the Act. In s. 2 (1) (d) not only interests are dealt with, but annuities are dealt with, and s. 15 enacts:

> "Estate duty shall not be payable in respect of a single annuity not exceeding £25 purchased or provided by the deceased, either by himself alone or in concert or arrangement with any other person, for the life of himself and of some other person and the survivor of them, or to arise on his own death in favour of some other person."

This is not an "annuity," and all that is excepted there is an annuity, and not every annuity, but only an annuity of the value of not more than £25. But supposing everything in this case had been the same, except that the amount payable by the insurance company on the death of Mr. Atlee was not a lump sum, but an annuity during her life. What would have been the difference? All the requirements of s. 15 would be satisfied except that the amount would probably have been more than £25. What is there to show that sub-s. (1) (d) does not apply if an annuity has not been stipulated for, but a lump sum, all the other words being the same? I must say I can see nothing. It appears to me that s. 15 shows that what was done here results in a taxable beneficial interest arising on the death of the person who has insured his life for the benefit of his widow; that would certainly have been the case if the money paid by the insurance company had been secured to be paid in the way of an annuity. I cannot see anything which shows that this is not a beneficial interest arising on the death of Mr. Atlee simply because it was payable as a lump sum, whereas it apparently was considered by the legislature that it would be a beneficial interest arising on the death of Mr. Atlee if it had been, not a lump sum, but an annuity.

Counsel for the defendants contends further that, however this might have been, even if it would have been within sub-s. (1) (d) on the kind of reasoning that I have used, it is taken out of sub-s. (1) (d), and, indeed, altogether excused from taxation by virtue of s. 3 of the Finance Act, 1894. That section provides that

"estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made or such lease or annuity granted for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit." A B

I do not think that this case comes within that provision. It seems to me that what was aimed at there was not a kind of thing that has happened here at all. What was aimed at was this: If a person has bought from another something, and has paid for that a price—a "consideration in money or money's worth"—but has not the immediate benefit of his purchase, and is not to get the immediate benefit of his purchase, except on the death of his vendor, then the legislature has simply said that in such a case no duty shall be payable on the death of the vendor. I do not think that s. 3 is intended to include such a transaction as this, which is not "property passing on the death of the deceased" by reason only of a bona fide purchase of the man under whose disposition the property passes. It seems to me that counsel's way of reading s. 3 and applying it to this case would be to read the word "from" in that section precisely as though it were the word "by," to turn the section about and give it an operation which I cannot think it was ever intended to have. C D

For these reasons our judgment must be for the Crown.

CHANNELL, J.—I am of the same opinion. I think that our judgment must be for the Crown on the ground that the duty which they claim is given by the Finance Act, 1894, s. 2 (1) (d), and I think that it is not prevented from becoming due under the facts of the particular case by s. 3 of the same Act. E

I confess that there is to my mind a little difficulty in fully following the exact literal words of LORD MACNAGHTEN'S judgment in *Earl Cowley* v. *I.R. Comrs.* (1), as to cases falling within s. 1 and s. 2. It is quite true that, if one can arrive at the conclusion that the case falls within s. 1, then s. 2 may be said to be exclusive; one does not want s. 2. But one of the operations of s. 2 seems to me clearly to be to sweep into s. 1 some cases which might be doubtful on the construction of s. 1, but as to which s. 2 includes in clear words, and therefore brings them in to be subject to the duty whether they were in s. 1 on the true interpretation or not. The result of it is, if one comes to the conclusion that they were in s. 1, one would not want s. 2. I think that is what LORD MACNAGHTEN must have meant. At any rate it was not necessary to express any opinion contrary to that in the case before him. F G

In the present case the difficulty whether or not a policy of insurance at all (I am not dealing with any particular policy, but any policy) would come within s. 1 of the Finance Act is that on the death the property which the deceased had becomes more or less changed. He has got a policy which no doubt carries with it a right for somebody to receive at his death a certain sum of money; when his death happens, the sum of money is payable; and consequently that is a case in which two doubts may arise: first, whether it was within s. 1 at all, and, if it was, whether what was supposed to pass and be subject to the duty would be the value of the property which the deceased had—that is, the policy—which means, I suppose, the surrender value of the policy, or the principal value of the money. On those matters doubts might be entertained. It seems to me that s. 2 contains by reference to the incorporated Acts a distinct provision in reference to policies of insurance—i.e., by incorporating the clause of s. 11 (1) of the Customs and Inland Revenue Act, 1889, which expressly deals with policies of insurance. Section 11 of the Act of 1889 was an amendment of s. 38 (2) of the Customs and Inland Revenue Act, 1881, and s. 38 of the Act of 1881 was dealing with gifts. It made gifts inter vivos, under certain circumstances, liable to duty. On that section a doubt must have arisen between 1881 and 1889 as to what was the effect of a person giving policy moneys accruing on his death to somebody by keeping up the policy for his H I

benefit, and it was considered that that was a case which would come in and be liable to duty as a gift, and accordingly, the third clause of s. 11 (1) of the Act of 1889 was passed, and it provides that where the policy of insurance is wholly kept up for the benefit of a donee, it is to be liable to the account duty.

"Donee" is a word which conveys a somewhat similar meaning to "volunteer," which is in the previous portion of the section. That is how the legislation stood with reference to the account duty. Then there comes the Finance Act, 1894, which is giving a different kind of duty, called the estate duty, but it is giving it—at any rate it is intended to give it—by sub-s. (1) (c) in respect of property as to which the account duty would be payable, and accordingly s. 38 of the Act of 1881 and s. 11 of the Act of 1889 are incorporated into s. 2 as covering property which is to be deemed to pass on the death for the purposes of estate duty; and at the same time a further amendment is made in those sections, and the further amendment is by cutting out the word "voluntary," the word "volunteer" and the reference to a "voluntary settlement."

That being so, one would expect, when the legislature was doing that, that they should also alter the word "donee" in the portion of s. 11 of the Act of 1889 which specially dealt with policies of insurance, because there would be no reason why, when they were making duty payable in cases where the person receiving the benefit was not merely a volunteer, they should keep in the word "donee" in the other section. We find that they do not expressly enact that, but they enact a new section and sub-section—namely, this sub-s. (1) (d), which deals with any annuity. An annuity, of course, had been one of the things which had been to a certain extent defined in those other sections, and it had been dealt with in the case of joint annuities, viz., annuities passing by survivorship. It goes on to bring in other interests, and it seems to me that sub-s. (1) (d) practically has the result—so far as regards policies of insurance—of taking away the effect of that word "donee" in the incorporated section. One would think that they might have done it, and I should think they would have done it, by express words if it had not been that it had been intended to sweep in, not merely policies of insurance, but other interests besides; and accordingly one finds apt words used for bringing in a policy of insurance which had been kept up for the benefit of the person who was not the donee, because there was some kind of consideration—the thing had been kept up for his benefit.

Accordingly it seems to me one would have no difficulty, so far, in saying that sub-s. (1) (d) applied, and applied to cases such as is before us; and s. 15 of the same Act throws very great light on it and greatly assists that construction. That brings us round to this: that in this particular case the policy moneys are made subject to duty by s. 2 (1) (d), provided only that there is nothing else which exempts them. Then we have to consider the question of the true construction of s. 3, which counsel for the defendants contends takes this particular policy out of the operation of the previous section. Section 3 (1) provides:

> "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes."

Suppose one applies that to the case of the policy of insurance, then, if one looks on the word "property" as referring to the policy of insurance, undoubtedly this policy of insurance (the right to it) did not pass on the death of the deceased at all; it passed on the settlement a good many years before. If, however, one reads the word "property" as referring to the £1,500 payable under it, then that passed on the death of the deceased because it became payable, and in that sense it passed; and it passed also on the death of the deceased, partly at any rate, by reason of a contract with the insurance company. The £1,500 was purchased by the premiums and it became payable on the death, and therefore counsel contends that the case in question comes within this section.

I am not sure that there may not be some policies of insurance and policy moneys which might come within s. 3 (1). If a person insured the life of somebody else (he must, of course, have an insurable interest), and paid his premiums, and that other person died, that money might possibly be supposed to come within some of the other sections. I do not know whether it would, I do not myself think it would, but if it did, I think this s. 3 would prevent the duty being payable, and in that case one would have to read "the person under whose disposition the property passes" as covering the insurance company. In the case before us it is quite impossible to say it passed only by reason of the contract with the insurance company. It passes by reason of a considerable number of other circumstances. It seems to me that s. 3 is a general section which cannot be read so as to alter the effect of the specific sections which went before and which deal with policy moneys and policies of insurance, and, as I think, deal with them because they would have been of an ambiguous character if not specially dealt with.

On these grounds it seems to me that one is bound to say that this duty is given by sub-s. (1) (d), and that it is not prevented being given by s. 3.

Judgment for the Crown.

Solicitors: *Solicitor of Inland Revenue; J. L. Tomlin & Son.*

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* DE PRÉVILLE

[Court of Appeal (A. L. Smith, Henn Collins and Vaughan Williams, L.JJ.), December 12, 20, 1899]

[Reported [1900] 1 Q.B. 223; 69 L.J.Q.B. 283; 81 L.T. 690; 48 W.R. 193; 16 T.L.R. 125]

Estate Duty—Passing of property—Property deemed to pass—Gift inter vivos—Surrender of life interest—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 2 (1) (*c*).

Where a tenant for life of settled property has voluntarily surrendered his life interest in favour of the remainderman and dies within twelve months of such surrender, no estate duty is chargeable on the life estate of the deceased under the Finance Act, 1894, s. 2 (1) (c).

Notes. The Finance Act, 1940, s. 43 (9 Halsbury's Statutes (2nd Edn.) 470), would apply to preserve the claim for estate duty (if any) which would arise in connection with the death of a life tenant but for the determination of his or her life interest within the five years preceding the death. This case is authority that prima facie (and subject to statute, e.g. the Finance Act, 1957, s. 38; 37 Halsbury's Statutes (2nd Edn.) 279) the subject-matter of a gift must be in existence at the date of the death of the donor if the gift is to attract duty.

Considered: *A.-G.* v. *Lane Fox*, [1924] 2 K.B. 498; *A.-G.* v. *Farrell* (1930) 99 L.J.K.B. 605; *A.-G.* v. *Llewelyn*, [1935] 1 K.B. 94; *Sneddon* v. *Lord Advocate*, [1954] 1 All E.R. 255. Referred to: *A.-G.* v. *Montagu* (1903), 72 L.J.K.B. 258; *A.-G. v. De Trafford* (1933), 150 L.T. 24; *A.-G.* v. *St. Aubyn*, [1950] 1 All E.R. 79.

As to estate duty on gifts, see 15 Halsbury's Laws (3rd Edn.) 17 et seq.; and for cases see 21 Digest (Repl.) 22 et seq. For the Finance Act, 1894, see 9 Halsbury's Statutes (2nd Edn.) 347, and for the Customs and Inland Revenue Act, 1881, s. 38, see ibid. p. 332.

A Cases referred to:

(1) *A.-G. v. Beech*, [1898] 2 Q.B. 147; 67 L.J.Q.B. 585; 78 L.T. 584; 62 J.P. 371; 46 W.R. 435; 14 T.L.R. 380, C.A.; affirmed [1899] A.C. 5368 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L.; 21 Digest (Repl.) 10, *35*.

B (2) *A.-G.* v. *Earl Grey*, [1898] 2 Q.B. 534; 67 L.J.Q.B. 947; 79 L.T. 235; 47 W.R. 37; 14 T.L.R. 585, C.A.; affirmed sub nom. *Earl Grey* v. *A.-G.*, [1900-3] All E.R. Rep. 268; [1900] A.C. 124; 69 J.L.Q.B. 308; 82 L.T. 62; 48 W.R. 383; 16 T.L.R. 202, H.L.; 21 Digest (Repl.) 23, *86*.

(3) *Earl Cowley* v. *I.R. Comrs.*, post p. 1181; [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest (Repl.) 11, *36*.

C (4) *Partington* v. *A.-G.* (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370, H.L.; 21 Digest (Repl.) 180, *1069*.

(5) *Mersey Docks and Harbour Board* v. *Lucas* (1881), 51 L.J.Q.B. 114, C.A.; affirmed (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest (Repl.) 47, *179*.

D **Appeal** by the defendant from an order of the Queen's Bench Division (DAY and LAWRANCE, JJ.), made on an information by the Attorney-General, reported [1899] 2 Q.B. 238.

The Divisional Court held that the Crown was entitled to estate duty under the Finance Act, 1894, on the life estate of a deceased tenant for life of settled property who had surrendered his life estate to the remainderman and died within twelve E months of such surrender. The facts appear in the judgment of A. L. SMITH, L.J.

Butcher, Q.C., and *Ashton Cross* for the defendant.

The Attorney-General (Sir Richard Webster, Q.C.), *the Solicitor-General (Sir Robert Finlay, Q.C.)* and *Vaughan Hawkins* for the plaintiff.

Cur. adv. vult.

F Dec. 20, 1899. The following judgments were read.

A. L. SMITH, L.J. The real point on which the decision of this case turns is whether s. 2 of the Finance Act, 1894, imposes estate duty on a life estate which, prior to the passing of that Act, would not have had to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, on the death of the G tenant for life.

The facts are short. On and prior to Feb. 5, 1896, Georgiana Anne de Préville was tenant for life of real property situate in the county of Leicester, of which her son, the defendant, was tenant in tail, and on the day above named the mother and son executed a disentailing deed, by which the estate tail was barred, and the son thereupon became owner in fee of the property. On Dec. 11, 1896, ten months H after the execution of this deed, the mother died. The question is whether the life estate of the mother, which had passed to her son ten months before her death, is liable to estate duty on her death.

It has been held in this court, affirmed in the House of Lords in the *A.-G.* v. *Beech* (1), that where the owner of a life estate has conveyed that estate to a donee more than twelve months before the death of the donor, estate duty on the life estate I is not payable by the donee on the death of the donor, for the reason that by the Finance Act it is only the estate which passes on death which is liable to estate duty, and that when the donor, the tenant for life, died, nothing passed on which the estate duty could operate, for the life estate had already passed to the donee before the death of the donor. It is now said by the Crown that that decision does not apply, because in the present case the tenant for life died within twelve months of the gift, and not twelve months after the gift, as in the former case, and it is argued that upon this ground, by reason of the provisions of the remarkable s. 2 (1) (c) of the Finance Act, 1894, this case is different from *A.-G.* v. *Beech*

(1), and that estate duty is leviable on the life estate on the death of the tenant for life. The Crown admits that if s. 2 (1) (c), of the Finance Act, 1894, does not impose this duty on the life estate on the death of the tenant for life, there is no other section which does.

Section 2 (1) (c) provides:

> "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

In *A.-G.* v. *Earl Grey* (2) I expanded this composite section, and I will do so again so far as material to this case. It then reads as follows: "Property passing on the death of the deceased shall be deemed to include property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, which, as amended, enacts that real or personal property to be included in an account shall be property of the following description—viz., any real or personal property taken under a disposition made by a person dying on or after June 1, 1881, purporting to operate as an immediate gift inter vivos, which shall not have been bona fide made twelve months before the death of the deceased." Section 38 of the Act of 1881 is one of a group of sections under the heading "Stamps" which relates to the taking out of probate and letters of administration of the estate and effects of deceased persons—i.e., of property which deceased persons die possessed of, or leave behind them, and it seems to me that this group of sections has nothing to do with property a deceased person has not left behind him, excepting cases in which a deceased person would have left property behind him had he not given it away before he died. It is only as regards such cases that an account is to be rendered. Section 38 being one of the sections in this group, what is its true reading? Does it mean that a life estate—which of necessity comes to an end on the death of the tenant for life, and which never under any circumstances can come into an account on the death of the tenant for life—is nevertheless to be brought into an account if the deceased has given it away less than twelve months before death, or is its true reading that, if there be property which would come into an account on death if it had not been given away, that property must be brought into an account if the deceased has given it away less than twelve months before death?

Considering that the group of sections in the Act of 1881 is dealing with the property of which deceased persons in fact die possessed, or would have died possessed if they had not given it away, in my opinion it is not the true reading of s. 38 that property must be brought into an account no matter whether it would or would not have had to be brought into an account if it had not been given away within twelve months of the death. It is only to be brought into an account if it would have had to be so brought but for the gift. In my judgment this section is to prevent persons giving away property less than twelve months before death which otherwise would have to be included in an account, and thus escape the duty. It is not disputed by the Crown that the life estate in the present case could never have been included in an account, for on the death of the owner of this life estate, even if it had not been given to the son, it ipso facto came to an end, and there was, therefore, nothing whatever to bring into an account.

For these reasons s. 2 (1) (c) in my judgment does not bring about what is contended for by the Crown, and, as before stated, there is no other section which does so. I need not discuss *Cowley* v. *I.R. Comrs.* (3), for it has no bearing on the point which I have to decide, and I think that the Crown is wrong. I cannot agree with the Divisional Court, though on what ground that court decided in favour of

A the Crown I do not know, for it has not told us. I think this appeal must be allowed.

HENN COLLINS, L.J.—I regret very much that the Divisional Court has not given any reasons for its decision in this case, for I must confess that I have had very serious misgivings whether the property in question does not come within the B express words of s. 38 of the Customs and Inland Revenue Act, 1881, and therefore, in a taxing Act, must be held liable for the duty.

It seems to me that prima facie the life estate here is property, and it was taken under

> "a voluntary disposition made by a person, purporting to operate as an immediate gift inter vivos, by way of transfer, delivery, declaration of trust, C or otherwise."

It seems to me to come prima facie within those words, and the question is whether, in construing a taxing Act, it would be justifiable to apply what might be regarded as the general spirit of the Act as against the express words of the section. May not the Act have done this—have enacted that, if any person chooses in his life-D time to give away that which would not have survived his death, if he had not given it away, he must do so at the risk of estate duty having to be paid on it if he dies within twelve months of the gift? However, that point has been dealt with in the judgment that has just been delivered, and more fully in the judgment prepared by my brother WILLIAMS, which I have had the advantage of seeing, and I am content to adopt the reasoning of those judgments on the point. I therefore E agree in the decision which is pronounced by the other members of the court.

VAUGHAN WILLIAMS, L.J.—The decision in this case depends, it seems to me, on the meaning of the word "property" in s. 38 (2) (a) of the Customs and Inland Revenue Act, 1881. Does property there mean any property, irrespective of the interest of the deceased therein? Or is it limited to property in which the deceased F had an interest which by its nature might continue after the death of the deceased—i.e., property capable of devolution as estate of a deceased, or, in other words, an interest not limited to determine with the life of the deceased?

LORD CAIRNS, in *Partington* v. *A.-G.* (4), speaking of the construction of revenue statutes, says (L.R. 4 H.L. at p. 122):

> "As I understand the principle of all fiscal legislation, it is this: If the person G sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. . . . In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

On the other hand, a taxing Act is to be construed on the same principle and by H the same rules as any other Act: *Mersey Docks and Harbour Board* v. *Lucas* (5), 51 L.J.Q.B. at p. 118, per BRETT, L.J. For instance, I suppose that if on the ordinary rules of construction general words would be limited on the ejusdem generis doctrine by preceding particular words, this construction would be applied in a taxing statute equally with any other statute.

I In the present case there is nothing to be found in the Customs and Inland Revenue Act, 1881, limiting the ordinary legal meaning of the word "property"; but the statute refers to antecedent legislation—that is to say, to the statutes beginning with the Stamp Act, 1815, and coming down to the Customs and Inland Revenue Act, 1880, granting the Crown certain duties in respect of the value of the estate and effects of deceased persons, and provides for an inventory or account being made by the executor or administrator of such estate and effects, and s. 38 deals with what shall be included, and says in effect that it shall include not only property forming part of the estate and effects of the deceased at his death, but

also property which he has parted with within three (now twelve) months before his death. Must not this mean, according to the ordinary rules of construction, property of the same kind as that dealt with in the antecedent legislation? That is to say, property in which the deceased had such an interest that, if he had not parted with it by a gift within twelve months before his death, it would have been estate and effects of the deceased, and therefore have been included in the property on the value of which the duty was granted?

It is clear in the antecedent legislation that no duty was granted in respect of property the interest of the deceased in which terminated with his life, for the duty was in respect of property as being estate and effects, of a deceased; and must not the word "property" in subsequent legislation be read in the same sense? On the whole, I think it must, and I find nothing in the Finance Act, 1894, generally, or in s. 2 (1) (c), to enlarge the sense in which the word "property" is used in the probate duty legislation and the account to be rendered thereunder. The Probate Duty Acts prior to 1881 dealt with property capable of devolution as part of the estate and effects of a deceased at death; for it dealt with property which in fact devolved as such estate at death. Then comes the statute of 1881, which says that the tax shall apply to property which does not in fact devolve at death, but, shortly before death, is transferred by what purports to be a gift inter vivos, but which property, the statute says, shall be taxed in the same manner as property in fact devolving at death. Surely, according to the ordinary rules of construction, the word "property" in the statute of 1881 must be limited to property in its nature capable of devolution as part of the estate and effects of a deceased. Thus to construe the word "property" in s. 38 (2) of the Customs and Inland Revenue Act, 1881, is only to apply the ordinary rule of construction, that words in the same and in cognate connected Acts must be presumed to have the same meaning.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Kingsford, Dorman & Co.*, for *Smith, Mammatt, Hale & Quarrell*, Ashby-de-la-Zouch.

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

R. *v.* DAVIES

[Court for the Consideration of Crown Cases Reserved (Lord Russell of Killowen, C.J., Hawkins, Grantham, Wright and Henn Collins, JJ.), May 15, 1897]

[Reported [1897] 2 Q.B. 199; 66 L.J.Q.B. 513; 76 L.T. 786; 13 T.L.R. 405; 41 Sol. Jo. 511; 18 Cox, C.C. 618]

Gaming—Unlawful game—Unlawfulness—Question of law for judge.

The question whether or not a game is unlawful is one of law for the judge and not one of fact for the jury.

Notes. The Gaming Houses Act, 1854, has been repealed. The present provisions relating to gaming are contained in Part II of the Betting and Gaming Act, 1960 (40 Halsbury's Statutes (2nd Edn.) 345).

Considered: *R.* v. *Kirby, Parker and Patrick* (1927), 20 Cr. App. Rep. 12; *R.* v. *O.K. Social and Whist Club, Ltd.* (1929), 45 T.L.R. 570; *R.* v. *Salisbury*, [1939] 1 All E.R. 250. Referred to: *Martin* v. *Benjamin*, [1907] 1 K.B. 64; *R.* v. *Mortimer*, [1911] 1 K.B. 70; *Bracchi* v. *Rees* (1915), 79 J.P. 479; *R.* v. *Hendrick* (1921), 37 T.L.R. 447; *R.* v. *Brennand* (1930), 47 T.L.R. 22; *R.* v. *Tompson*, [1943] 2 All E.R. 130.

A As to games, gaming, and gaming houses, see 18 Halsbury's Laws (3rd Edn.) 185 et seq.; and for cases see 25 Digest (Repl.) 446 et seq.

Case Stated by Cheshire Quarter Sessions.

The defendant James Davies, was charged before a Court of Summary Jurisdiction, with an offence under s. 4 for the Gaming Houses Act, 1854 [repealed], and William Wild and Thomas Baker, with aiding and abetting him in the commission of the offence. They elected to be tried by a jury, and an indictment was accordingly preferred against all three defendants. The first and fifteenth counts charged Davies with being the occupier of a certain house and room, and unlawfully opening such house and room for the purpose of unlawfully gaming; and the third count charged that he, being the occupier of a certain house, did unlawfully use the said house for the purpose of unlawful gaming being carried on therein. The seventh count charged him with so using a room in the house. Other counts charged Wild and Baker with aiding and abetting Davies, but the jury acquitted both these defendants.

The facts stated in the Case were as follows. Wild was a publican and kept the Grove Inn, Stockport. On Dec. 6, Davies being in the inn at closing time, invited Wild, Baker, and one Chappell, to play cards at his house. On arriving at Davies' house the four played whist. Subsequently they played at a game called "German Bank," and again at another called "Nap." The game of "German Bank" was described by witnesses to the jury, and the Chairman in his charge put the following questions to the jury:

(i) Was the defendant Davies the occupier of the house and room?—Answer: Yes. (ii) Did he open them on the occasion in question for the purpose of unlawful gaming?—Answer: No. (iii) Did he use them on the occasion for the purpose of unlawful gaming?—Answer: Yes. (iv) Was the game of "German Bank" as played on the occasion an unlawful game?—Answer: Yes. (v) Was the house used as a "common gaming house," or was it on the evidence only used on the occasion in question for the purpose of playing an unlawful game?—Answer: It was used as such only on the occasion."

Upon these findings a verdict of Guilty was entered against Davies upon the third and seventh counts, and of acquittal upon the rest.

Honoratus Lloyd for the Crown.

The defendant was not represented.

LORD RUSSELL OF KILLOWEN, C.J.—We think that this conviction cannot be supported. These persons were not strangers but friends. Being together in a public-house when closing time comes, there is a proposition that they shall have a game of cards, and they go, taking refreshments with them, to Davies' house. They begin to play whist, and they play whist for some time, until Chappell, being dissatisfied with his partner, refuses to continue the game, when they play "German Bank." As to what "German Bank" is, is not clearly stated in the case but looking at the Gaming Houses Act, 1854, it would be monstrous to say that the defendant had opened or used his house for the purpose of unlawful gaming. It seems impossible to say that the room was "used" within the meaning of the statute. Again the jury were asked "is German Bank an unlawful game?" That was not a question of fact for the jury, but of law for the judge. The jury found no verdict, but merely answered the questions left to them. The duty of a jury is to determine the question "Guilty" or "Not guilty," and, although it is not unusual to ask questions of the jury, unquestionably it is proper to get the verdict of the jury "Guilty" or "Not guilty," on the direction of the judge.

HAWKINS, GRANTHAM, WRIGHT, and **HENN COLLINS, JJ.,** concurred.

Solicitors: *Philpot & Son*, for *Clerk of the Peace*, Cheshire.

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

A

BUCKLER *v.* WILSON

[Queen's Bench Division (Lord Russell of Killowen, C.J., Pollock, B., and Wright, J.), August 1, December 7, 1895]

B

[Reported [1896] 1 Q.B. 83; 65 L.J.M.C. 18; 73 L.T. 580; 60 J.P. 118; 44 W.R. 220; 12 T.L.R. 94; 40 Sol. Jo. 146]

Food and Drugs—Offence—Justices "having jurisdiction in the place" of the offence—Jurisdiction of county justices.

Food and Drugs—Samples for analysis—Purchase otherwise than for the purpose of analysis—Need for purchaser to comply with provisions as to samples taken for analysis—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict.*, *c.* 63), *s.* 14.

C

The appellant, under a contract for the regular supply of butter, supplied butter which was later found to contain a quantity of margarine, but it was not bought with the intention of submitting it to analysis. It was delivered in a borough which did not have a separate court of quarter sessions, and the appellant was convicted by the county justices of an offence under the Margarine Act, 1887. On appeal, the question arose whether the county justices were "justices having jurisdiction in the place where the article was actually delivered," and further whether a prosecution could be brought as the appellant had not been notified forthwith that the purchaser intended to have the butter analysed in accordance with the Sale of Food and Drugs Act, 1875, s. 14 [repealed and replaced in different terms by the Food and Drugs Act, 1955, s. 93].

D

E

Held: (i) the county justices had jurisdiction as there was no separate court of quarter sessions in the borough; and (ii) it was not necessary to notify the appellant of an intention to have the butter analysed, as the Sale of Food Drugs Act, 1875, s. 14, applied only where the purchaser bought with the intention of obtaining an analysis, and not to a contract for the delivery of provisions which might extend over a considerable period of time, nor to cases where provisions were purchased from time to time in small bulk without any suspicion at the time of purchase of any deceit being practised by the seller.

F

Enniskillen Union Guardians v. *Hilliard* (1) (1884), 14 L.R.Ir. 214, applied.

Parsons v. *Birmingham Dairy Co.* (2) (1882), 9 Q.B.D. 172, not followed.

G

Notes. The Sale of Food and Drugs Act, 1875, the Sale of Food and Drugs Act Amendment Act, 1879, the Margarine Act, 1887, and s. 27 of the Poor Law Amendment Act, 1867, have been repealed. The provisions as to samples taken for analysis, formerly contained in the Sale of Food and Drugs Act, 1875, s. 14, have been replaced by the Food and Drugs Act, 1955, s. 93. The provisions as to the time limit for prosecutions, formerly contained in the Food and Drugs Act Amendment Act, 1879, s. 10, have been replaced by the Food and Drugs Act, 1955, s. 108 (1), and the provisions as to the place of proceedings, formerly contained in the Sale of Food and Drugs Act, 1875, s. 20, have been replaced by the Food and Drugs Act, 1955, s. 108 (2). The provisions as to evidence of analysis, formerly contained in the Sale of Food and Drugs Act, 1875, s. 21, have been replaced by the Food and Drugs Act, 1955, s. 110. The provisions as to standards for butter and margarine formerly contained in the Margarine Act, 1887, have been replaced (see Food Standards (Butter and Margarine) Regulations, 1955, s. 1, 1955 No. 1899 and Food Standards (General Provisions) Order 1944, S.R. & O. 1944 No. 42 art. 1 (as substituted by S.R. & O. 1944 No. 654)). The provisions as to magistrates' jurisdiction in petty sessions are now contained in the Magistrates' Courts Act, 1952, s. 2, and in the case of county boroughs, in the Justices of the Peace Act, 1949, s. 16.

H

I

Distinguished: *Monro* v. *Central Creamery Co.*, [1912] 1 K.B. 578. Referred to: *Tyler* v. *Kingham*, [1900] 2 Q.B. 413; *R.* v. *Beacontree Justices*, *R.* v. *Wright*, [1914-15] All E.R. Rep. 1180.

As to sampling, see 17 HALSBURY'S LAWS (3rd Edn.) 470 et seq.; as to prosecutions, see ibid. 589 et seq.; as to standards for butter and margarine, see ibid. 580; and as to jurisdiction in petty sessions, see 25 HALSBURY'S LAWS (3rd Edn.) 118-119. For cases see 25 DIGEST (Repl.) 74-75. For the Food and Drugs Act, 1955, ss. 93, 108, 110, see 35 HALSBURY'S STATUTES (2nd Edn.) 177, 188, 191; for the Magistrates' Courts Act, 1952, s. 2, see 32 HALSBURY'S STATUTES (2nd Edn.) 424; and for the Justices of the Peace Act, 1949, s. 16, see 28 HALSBURY'S STATUTES (2nd Edn.) 857.

Cases referred to:

(1) *Enniskillen Union Guardians* v. *Hilliard* (1884), 15 Cox, C.C. 643; 14 L.R.Ir. 214; 25 Digest (Repl.) 75, **8.*

(2) *Parsons* v. *Birmingham Dairy Co.* (1882), 9 Q.B.D. 172; 51 L.J.M.C. 111; 46 J.P. 727; 30 W.R. 748, D.C.; 25 Digest (Repl.) 74, *37.*

Also referred to in argument:

Rouch v. *Hall* (1880), 6 Q.B.D. 17; 50 L.J.M.C. 6; 44 L.T. 183; 45 J.P. 220; 29 W.R. 304; 25 Digest (Repl.) 109, *292.*

Smart & Son v. *Watts*, [1895] 1 Q.B. 219; 64 L.J.M.C. 89; 71 L.T. 768; 59 J.P. 54; 43 W.R. 379; 11 T.L.R. 144; 39 Sol. Jo. 135; 18 Cox, C.C. 62; 15 R. 154, D.C.; 25 Digest (Repl.) 109, *296.*

Barnes v. *Chipp* (1878), 3 Ex.D. 176; 47 L.J.M.C. 85; 38 L.T. 570; 26 W.R. 635; 25 Digest (Repl.) 108, *291.*

Harris v. *Williams* (1889), 6 T.L.R. 47, D.C.; 25 Digest (Repl.) 72, *14.*

Case Stated by the justices for Lindsey, in the county of Lincoln.

On the hearing of an information preferred before the justices it was proved that the appellant, a grocer in the borough of Louth, had entered into a contract with the guardians of the poor of the Louth Union for the supply to them of "good fresh butter, English;" that on Saturday, Dec. 8, 1894, the appellant, under his contract, delivered 39lb. of butter (or margarine) at the union workhouse in Louth; that on the following Monday, Dec. 10, 1894, the butter (or margarine) was examined by the workhouse visiting committee, and 1lb. of it was, on the same day, in the absence of the appellant, divided into three parts, each part being wrapped in a separate paper. One part was taken by the master of the workhouse to the appellant's shop at Louth, and, the appellant not being there at the time, the master left it with a letter, of which the following is a copy:

"Dec. 10, 1894.—At a meeting of the house committee of the Louth Union this morning the butter supplied by you was examined, and a pound of it cut into three parts; one of such parts will be sent to an analyst, one will be kept by the guardians, and the third I have been instructed to bring to you.—I am, Sir, most respectfully yours,

JOHN T. CROWSON, Master."

The butter or margarine was sold by retail otherwise than in a package duly branded or durably marked in the manner prescribed by s. 6 of the Margarine Act, 1887, and the appellant did not deliver the same to the purchaser in or with a paper wrapper on which was printed in capital letters, not less than a quarter of an inch square, "Margarine." It was also proved that by the directions of the guardians one of the sealed samples of butter (or margarine) was sent by post (registered) to Dr. Muter, public analyst for the administrative county of the Parts of Lindsey, and a certificate from him was produced in which he stated that the sample of butter received from the guardians of the Louth Union for analysis, in his opinion, contained seventy-five parts of butter and twenty-five parts of margarine.

On the above facts it was contended for the appellant before the justices, that the justices, being county justices, had no jurisdiction to determine the case on the ground that the workhouse of the Louth Union and the place where the goods were supplied from and delivered to the purchasers, and the place where the defendant lived and carried on business, were situated within the borough of Louth, and that the proceedings should have been taken before the magistrates for the borough of Louth, and that s. 20 of the Sale of Food and Drugs Act, 1875, applied. In answer to this the respondent contended that the justices had jurisdiction on two distinct grounds: (i) that the borough of Louth being one of the parishes comprised in the Louth Union, s. 27 of the Poor Law Amendment Act, 1867, applied to these proceedings; and (ii) that, as no separate court of quarter sessions had been granted to the borough of Louth, the county justices have concurrent jurisdiction (5 & 6 Will. 4, c. 76, s. 111, repealed, but re-enacted in s. 154 of the Municipal Corporations Act, 1882). It was also contended for the appellant that the summons had not been legally issued, and that the Margarine Act, 1887, required the same steps to be taken as were required in proceedings under the Sale of Food and Drugs Acts, 1875 and 1879, and that this had not been done, as the alleged offence was committed on Dec. 8, 1894, and the summons issued and served on Jan. 18, and returnable and heard on Jan. 23, 1895, and therefore, more than twenty-eight days after the purchase, contrary to the provisions of s. 10 of the Act of 1879, applying to the purchase of perishable articles for test purposes. In answer to this objection it was contended for the respondent: (i) that s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, did not apply to proceedings under the Margarine Act, 1887; (ii) that butter is not a perishable article within the meaning of the Sale of Food and Drugs Act, 1875; and (iii) that the butter (or margarine) in question was not purchased for "test purposes." It was also contended for the appellant that it was necessary to the proceedings that there should be notification forthwith, as required by s. 14 of the Sale of Food and Drugs Act, 1875, and also that there ought to have been an offer to divide the article in the presence of the defendant or his agents then and there, that each part should be marked and sealed, and that the letter of Dec. 10, 1894, was not a sufficient notification as to analysis. To this objection it was contended for the respondent that s. 14 did not apply to these proceedings, inasmuch as the butter (or margarine) was not purchased "with the intention of submitting the same to analysis."

The justices were of opinion (i) that, as justices for the Parts of Lindsey in the county of Lincoln, they had concurrent jurisdiction with the borough justices in the borough of Louth (such borough not having a separate court of quarter sessions), and that they had also jurisdiction under s. 27 of the Poor Law Amendment Act, 1867; (ii) that the Margarine Act, 1887, does not require the same steps to be taken as are required in proceedings under the Sale of Food and Drugs Acts, 1875 and 1879; (iii) that butter is not a "perishable article" within the meaning of the Sale of Food and Drugs Act; (iv) that the butter (or margarine) was not purchased for "test purposes"; and (v) that s. 14 of the Sale of Food and Drugs Act, 1875, does not apply to these proceedings for the reason that the article was not purchased "with the intention of submitting the same to analysis." The justices convicted the appellant, and imposed a fine of £5, and a sum of £1 15s. 6d. for costs.

The questions for the opinion of the court were: (i) Whether the justices had jurisdiction to hear and determine the case; (ii) Whether the Margarine Act, 1887, required the same steps to be taken as were required in proceedings under the Sale of Food and Drugs Acts, 1875 and 1879; (iii) Whether s. 14 of the Sale of Food and Drugs Act, 1875, was applicable, the article not having been purchased with the intention of submitting the same to analysis.

Bonsey for the appellant.

Stanger, Q.C., for the respondent.

Cur. adv. vult.

Dec. 7, 1895. **LORD RUSSELL OF KILLOWEN, C.J.,** read the following judgment of the court in which, after stating the facts as set out, he proceeded: The first point raised by the appellant was that the justices, being county justices, had no jurisdiction to hear and determine the case, on the ground that, under s. 20 of the Sale of Food and Drugs Act, 1875, the proceedings should have been commenced before the magistrates for the borough of Louth, in which was situate the workhouse "where the article sold was actually delivered to the purchaser." The section runs thus:

> "When the analyst, having analysed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner."

It should first of all be noticed that the section merely says "may take proceedings," but, further, I think that under s. 27 of the Poor Law Amendment Act, 1867, and s. 111 of 5 & 6 Will. 4, c. 76 (repealed, but in substance re-enacted in s. 154 of the Municipal Corporations Act, 1882), the justices clearly had jurisdiction. [HIS LORDSHIP stated that, as the justices had found as a fact that the article was not perishable, and that it had not been bought for test purposes, it was unnecessary for the prosecution to be brought within twenty-eight days under the Sale of Food and Drugs Act Amendment Act, 1879, s. 10, and continued]:

I now come to the substantial question raised by the appellant—viz., whether compliance with s. 14 of the Sale of Food and Drugs Act, 1875, is necessary as a condition precedent to a prosecution under the Act. Proceedings under the Margarine Act, 1887, are by s. 12 of that Act to be the same as prescribed by ss. 12 to 28 inclusive of the Sale of Food and Drugs Act, 1875. Section 14 of the latter Act is as follows:

> "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller, or his agent selling the article, his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent."

It is clear that if that section is applicable to this case its provisions were not complied with, and the conviction by the magistrates is wrong. But is it so applicable? I think not, for the margarine in question was not purchased by the guardians "with the intention of submitting the same to analysis." It was delivered to them, as the case states, under a contract for the regular supply to them of good fresh butter.

But the appellant's contention is, that a prosecution for an offence against the Act can only be maintained where a sample has been purchased whether by an officer under the Act or by a private individual with a view of submitting the same to analysis. With this contention I do not agree, though it must be confessed the question is by no means free from the difficulty which constantly arises in construing many Acts of Parliament—namely, the difficulty of reconciling several different and loosely-drawn sections. I cannot think, having regard to the scope of the Margarine Act and to the Sale of Food and Drugs Act and to the offences set out in s. 6 of the latter and ss. 6 and 7 of the former Act, that it was the intention of the legislature that a prosecution should be confined within such narrow limits as those contended for. For example, by s. 7 of the Margarine Act,

"every person dealing with, selling, or exposing, or offering for sale, or having in his possession for the purpose of sale any quantity of margarine contrary to the provisions of the Act shall be liable to conviction for an offence against the Act."

Could anything be wider than this? And yet can it in reason be said to be necessary that, for the purposes of a prosecution for "exposing, or offering for sale, or for having in his possession for the purpose of sale," a sample shall have been purchased for the purpose of analysis and analysed as described in the Sale of Food and Drugs Act, 1875, s. 14? The Margarine Act does not limit the initiation of a prosecution to the purchase of a sample with a view to analysis; and, having regard to the offences the Margarine Act was aimed at and to its preamble, I cannot think it was so intended.

The chief difficulty is raised by ss. 20 and 21 of the Sale of Food and Drugs Act, 1875, which, dealing generally with proceedings under the Act, certainly at first sight seem to imply that the formalities prescribed by s. 14 have taken place. It seems to me, however, that the effect of s. 21 is merely to make the production of a certificate of an analyst under s. 14 of itself sufficient evidence of the facts therein stated. There is nothing in the Act to prevent the proof of an offence by other satisfactory evidence, nor is it necessary that the purchaser should obtain the certificate of the "public analyst" except where he purchases "with an intention" of submitting to analysis. Section 12 merely gives him the right on certain payments to claim an analysis from the public analyst. Finally, it may be pointed out that by s. 28 of the Sale of Food and Drugs Act, 1875, nothing in the Act is to "take away any other remedy against an offender under this Act."

On this part of the case two decisions were cited to us—one, *Parsons* v. *Birmingham Dairy Co.* (2), in which FIELD and CAVE, JJ., not expressly, but inferentially, decided that s. 14 applies to every purchaser, whether purchasing with the intention of obtaining an analysis or not; the other, *Enniskillen Union Guardians* v. *Hilliard* (1), in which DOWSE, B., and ANDREWS, J., expressly dissented from that decision. I wish to say that I agree with the reasoning of the learned judges in the Irish case, and I entirely adopt the view of the Act expressed by them. It seems to me that to adopt the contention of the appellant in this case would be to largely restrict the operation of a salutary Act, and to exclude that class of cases of which the present is an example, where there is a contract for the delivering of provisions within the Act, which may extend over a considerable period of time, and also the class of cases in which provisions are purchased from time to time in small bulk without any suspicion at the time of purchase of any deceit being practised by the seller. I cannot think this is the true construction of the Act. The appeal will, therefore, be dismissed, with costs.

Appeal dismissed.

Solicitors: *E H. Wyles*, for *John Barker*, Grimsby; *Kime & Hammond*, for *Porter Wilson*, Louth.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

O'NEIL *v.* ARMSTRONG, MITCHELL & CO.

[Court of Appeal (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), July 18, 25, 1895]

[Reported [1895] 2 Q.B. 418; 65 L.J.Q.B. 7; 73 L.T. 178; 11 T.L.R. 548; 8 Asp.M.L.C. 63; 14 R. 703]

Master and Servant—Contract of service—Alteration in nature through act of master—Performance by servant made dangerous—Servant's right to repudiate—Right to wages.

The captain of a torpedo boat, built in England for the Japanese government, who was an officer in the Japanese navy, engaged the plaintiff, a British subject, to serve in the vessel on the voyage from England to Japan at an agreed wage for the whole voyage. While the vessel was on the voyage, the Japanese government declared war against China, which, besides making the voyage dangerous, also made it illegal under the Foreign Enlistment Act, 1870, for the plaintiff to continue to serve on board the ship. The plaintiff, having been warned of these matters, left the vessel at Aden.

Held: in the circumstances, the plaintiff was entitled to leave the vessel before the completion of the voyage and to recover the full amount of the agreed wage.

Decision of the Divisional Court, [1895] 2 Q.B. 70, affirmed.

Notes. Considered: *Austin Friars Steam Shipping Co.* v. *Strack*, [1905] 2 K.B. 315; *Lloyd* v. *Sheen* (1905), 93 L.T. 174; *Browning* v. *Crumlin Valley Collieries, Ltd.*, [1926] All E.R. Rep. 132. Referred to: *Connelly* v. *Sibery* (1905), 69 J.P. 115; *Palace Shipping Co.* v. *Caine*, [1907] A.C. 386; *St. Enoch Shipping Co.* v. *Phosphate Mining Co.*, [1916] 2 K.B. 624.

As to the performance of a servant's duty as a condition precedent to the recovery of remuneration, see 25 Halsbury's Laws (3rd Edn.) 475-476; and as to breach of contract, generally, see 8 Halsbury's Laws (3rd Edn.) 202 et seq. For cases see 34 Digest 80-82.

Case referred to:

(1) *Appleby* v. *Myers* (1867), L.R. 2 C.P. 651; 36 L.J.C.P. 331; 16 L.T. 669, Ex. Ch.; 12 Digest (Repl.) 696, *5334*.

Also referred to in argument:

Cutter v. *Powell* (1795), 6 Term. Rep. 320; 101 E.R. 573; 34 Digest 88, *649*.

Dyke v. *Elliott*, *The Gauntlet* (1872), L.R. 4 P.C. 184; 8 Moo.P.C.C.N.S. 428; 26 L.T. 45; 20 W.R. 497; 1 Asp.M.L.C. 211; 17 E.R. 373; sub nom. *R.* v. *Elliott*, 41 L.J.Adm. 65, P.C.; 15 Digest (Repl.) 877, *8445*.

Burton v. *Pinkerton* (1867), L.R. 2 Exch. 340; 36 L.J.Ex. 137; 16 L.T. 419; 31 J.P. 615; 15 W.R. 1139; 2 Mar.L.C. 547; 34 Digest 81, *597*.

Appeal by the defendants from a decision of the Divisional Court (Lord Russell of Killowen, C.J., and Charles, J.), reported [1895] 2 Q.B. 70, affirming the decision of the county court judge, holding that the plaintiff was entitled to recover the whole of the agreed wage for the voyage from England to Japan.

The defendants built a torpedo boat, called the *Tatsuta*, in the Tyne for the Japanese government. By the contract the *Tatsuta* was to be delivered to the Japanese government in the Tyne. By a subsequent contract the defendants agreed to have the *Tatsuta* taken to Japan for an agreed sum. The defendants engaged Captain Strannach to navigate the *Tatsuta* to Japan. Captain Strannach engaged a crew, one of whom was the plaintiff, whose wages were to be £30 for the voyage. Of this sum £8 was to be paid five days after sailing, and was so paid. When the *Tatsuta* sailed from the Tyne, Captain Strannach hoisted the Japanese flag,

and a pennant, and continued to fly the Japanese flag until the vessel reached Aden. The meaning of this was that he took command as a captain in the navy of the Japanese government, and therefore, although the captain was for some purposes in the employ of the defendants, he was not solely in their employ, but was also in the service of the Japanese government. His exact position, however, was not clearly proved, although the county court judge described him as "the agent, representative and servant of the Japanese government." Japan was then at peace, but she declared war against China before the *Tatsuta* reached Gibraltar. There news of the declaration of war was conveyed to Captain Strannach. When the vessel reached Aden, she was boarded by the captain of a Queen's ship, who read the proclamation of neutrality under the Foreign Enlistment Act, 1870, and warned the crew, who were British subjects, of the risks they would run and the penalties they might incur by continuing to serve on the ship. Captain Strannach told the crew that "the run was at an end," and that he would take them on under a new agreement for a month. He also said that he had a private telegram, and alone knew whither the vessel would proceed. The plaintiff and other members of the crew refused to continue the voyage, and left the ship. The governor at Aden provided them with money to pay their passage home to England, it being impossible for them to get employment on another ship at Aden.

The plaintiff sued the defendants to recover £22, the balance of his agreed wages, £8 having been paid in advance. Before the trial of the action it had been agreed between the parties that the defendants would be liable if and so far as Captain Strannach would be liable if he were the defendant. The county court judge gave judgment for the plaintiff for the sum of £22, the balance of his agreed wages. The Divisional Court, on appeal, affirmed the judgment of the county court judge. The defendants appealed, with leave.

Joseph Walton, *Q.C.*, *A. Lyttelton*, and *G. J. Talbot* for the defendants.
Sir Walter Phillimore and *S. T. Evans* for the plaintiff.

LORD ESHER, M.R.—In this case an action was brought by a seaman who entered into a contract with the captain of a ship to serve on the ship on a voyage from Newcastle to Japan. It has been agreed that this action is to be tried as if the seaman had brought it against the captain. The plaintiff's case, therefore, is that the defendants employed him to be a seaman in the ship on a voyage from Newcastle to Japan; and that during the voyage the Japanese government, which they were serving, declared war against China, and he would have thereby had to continue the voyage on board a ship of war; and that that altered his position, and exposed him to two risks, one at the hands of the Chinese, and the other at home for breach of the Foreign Enlistment Act, 1870, by continuing upon a Japanese warship after Japan was at war and he knew of that fact. That is the plaintiff's case. If it is true, it cannot be denied that, by the action of the Japanese government, the voyage was altered and the plaintiff had a right to quit the ship without forfeiting any of his agreed wages. The dispute at the trial was, whether the captain was the servant of the Japanese government or of the defendants. The learned county court judge found in favour of the seaman, and there has been an appeal to the Divisional Court, and now to this court. The appeal is really upon a question of fact. There is no doubt as to the law. If the ship was a Japanese warship under the command of a captain in the service of the Japanese government, the plaintiff is right.

This ship was built by the defendants for Japan, to be a war vessel of the Japanese government, and an agreement was made that the defendants should have her taken to Japan. To carry out that agreement, the defendants made an agreement with the captain to take the ship to Japan and there deliver her to the Japanese. He was to command the ship and take her to Japan. If that were all, and if the captain had proceeded to carry out that contract, the ship would not have been a Japanese war vessel, but would have been under the sole control of the defen-

dants' captain, and the declaration of war would not have enabled the English government to stop the ship at Aden, and, if the plaintiff left the ship before the end of the voyage, he could not recover at all.

But, in my opinion, agreeing with the county court judge and the Divisional Court, I think that more has been established as to the relation between the captain and the Japanese government than is contained in the agreements. Enough was established before the county court judge to justify his finding. In the Divisional Court the court said: "But we think enough was established as to his relation to that government to render further inquiry unnecessary." The captain did enter into the relation of being a captain acting for the Japanese government. The inference is irresistible that he did so with the knowledge and consent of the defendants and of the Japanese government.

The relation, therefore, was established between the captain and the Japanese government, as found by the Divisional Court. What enabled them so to find was the fact that the captain immediately adopted the ship as a Japanese man-of-war, and acted as the captain of a Japanese warship flying the Japanese flag and hoisting a pennant. The meaning of that was that he took command as a captain in the navy of the Japanese government. The nautical meaning of those acts is well known. He could not say in a plainer manner that he was in the service of the Japanese government. The defendants knew all this, and all parties agreed that the captain should take command as a captain of the Japanese government. There was no harm in that so long as the Japanese were not at war. A British seaman might serve on such a ship when his employers were not at war. But the Japanese declared war, and thereby the captain went to war also. He had made an agreement with the seaman which was lawful when it was made; but, upon the declaration of war, the seaman became liable to penalties because he was an English subject on board a foreign ship of war during war. Therefore, when war was declared by the government under which the captain was serving, and that was made known to the seaman, he was in danger, and was not bound to go any further.

The employers of the captain converted a harmless voyage into a dangerous voyage, and thereby entitled the seaman to say that the ship had been turned into a ship of war at war, and that he would not continue the voyage. That is the ground of the judgments of the courts below, and I cannot disagree with the decision of the county court judge or that of the Divisional Court, where it was said:

> "The exact position, however, of the captain was not clearly proved, and, although the judge in his judgment describes him as the agent, representative, and servant of the Japanese government, we are informed that no admission of the accuracy of this description was made by the defendants at the trial. But we think enough was established as to his relation to that government to render further inquiry unnecessary."

The seaman, therefore, was entitled to leave the ship, and to recover all his wages. The appeal fails, and must be dismissed.

KAY, L.J.—This is a case of some difficulty, not on account of any question of law, but upon the facts. I will refer only to the most important facts. The ship was built as a torpedo boat for the Japanese government, and became the property of the Japanese government when she was at Newcastle. The contract for building the ship having been completed, a new contract was made to send the ship to Japan, and the Japanese paid the defendants a lump sum for that service. Thereupon the defendants agreed with a captain to take the ship out to Japan. The captain engaged a crew, including the plaintiff, to work the ship on the voyage to Japan. In the contract with the plaintiff it was agreed that he was to be paid £30 for the whole voyage to Japan, of which £8 was to be payable five days after sailing, and the remainder on the completion of the voyage. The ship left Newcastle for Japan. It is not denied that she had the Japanese flag flying all the way to Aden. That

flag must have been flying with the knowledge of the defendants, and probably by the direction of the agent of the Japanese government. At Gibraltar the captain had news of the declaration of war. At Aden, the consequence of proceeding with the voyage was made plain—that the crew would be involved in war, and would be liable to the penalties of the Foreign Enlistment Act. The plaintiff in his evidence gave an account of what passed between the captain and the crew at Aden. The captain said he had his private instructions; that the run was finished; and that he would engage them at monthly wages. There is no contest as to that evidence. There was, therefore, a complete alteration of the nature of the voyage, making the remainder of the proposed voyage very risky; there were the risks of war, and of punishment under the Foreign Enlistment Act, 1870.

The law applicable to the case is quite plain. It is laid down in the words of BLACKBURN, J., in *Appleby* v. *Myers* (1), where he says (L.R. 2 C.P. at p. 661):

> "The plaintiffs having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract."

Upon the evidence the captain put an end to the contract which he had made, and the case seems to come exactly within the words of BLACKBURN, J., which I have quoted. The completion of the voyage was prevented by the captain. Further, the nature of the voyage was so altered that the seaman had a right to say that he would not go on if the captain was in the service of the Japanese government, because the Japanese government by their own act had made the nature of the voyage different.

Was the captain the servant of the Japanese government? It is said that he was engaged by the defendants under a written contract. That, however, was not all. The Japanese flag was hoisted. Therefore, although the captain was, for some purposes, in the employ of the defendants, he was not solely in their employ, but was also in the service of the Japanese government. By the act of the Japanese government the seaman became entitled to say that he would not proceed further, and the completion of the voyage was prevented, for the purpose of this case, by the act of the defendants. The plaintiff is, therefore, entitled to recover the whole of his wages. No argument has been pressed here as to the further damages. I think that the decision of the county court judge and of the Divisional Court was right, and that the appeal must be dismissed.

A. L. SMITH, L.J.—This case is to be treated as if the action were brought against the captain. The plaintiff had made a contract to serve on the ship from Newcastle to Japan. He sues in this action to recover the whole of his agreed wages for the voyage. He served only as far as Aden, and there left the ship because of the war which had been declared between Japan and China.

The sole question is whether there was evidence in this case on which the court could hold that the captain of the ship was, when he took her out of Aden, in the service of the Japanese government. The completion of the voyage was prevented by the Japanese government declaring war, the nature of the voyage being quite changed by that act. I think that the judgment of the county court judge proceeded upon the assumption that the captain was in the service of Japan, and the Divisional Court said that that was to be inferred from the evidence. If the case depended solely upon the contract with the defendants, I would have said that there was no evidence that the captain was in the service of Japan, but that he was in the service of the defendants only. The case does not, however, rest solely upon the written contract. There is more than that. The captain went on board the ship, which then belonged to Japan, and was a war vessel; he at once flew the Japanese flag, and sailed under that flag as far as Aden on the way to Japan. When the ship reached Aden, war had commenced between Japan and China. There is evidence

A as to what happened at Aden, and what the captain said to the crew. He said that the run was at an end, and that he had a private telegram, which must have been from the Japanese government.

I think that there was ample evidence that the captain was a captain of the Japanese government at the time when the voyage was frustrated by the act of the Japanese government. The appeal, therefore, must be dismissed.

B

Appeal dismissed.

Solicitors: *P. G. Robinson*, for *Smith*, Newcastle-on-Tyne; *Crossman & Pritchard*, for *Dees & Thompson*, Newcastle-on-Tyne.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

C

D

SANDGATE URBAN DISTRICT COUNCIL *v.* KENT COUNTY COUNCIL

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Watson, Lord Shand, Lord Davey and Lord Ludlow), November 18, 22, 24, 25, 1898]

E

[Reported 79 L.T. 425; 15 T.L.R. 59]

Highway—Maintenance—Contributions by county council—"Annual payment"—Works necessary for protection of highway—Sea wall—Use for pleasure not inconsistent with path along top of wall being part of highway—Local Government Act, 1888 (51 *&* 52 *Vict.*, *c.* 41), *s.* 11 (2).

F The obligation to keep up a road includes an obligation to do works and repairs necessary to preserve the road. Thus a sea wall and groynes necessary to prevent a road running along the sea shore from being periodically injured by inroads from the sea, though not forming part of the road, are works of maintenance and repair for which a county council may be chargeable under the Local Government Act, 1888.

G The words "annual payment towards the costs of maintenance and repair" in s. 11 (2) of the Local Government Act, 1888 [see now Highways Act, 1959, s. 237 (1) (a)], **held** to mean a payment to be made annually in respect of the expenditure of the particular year, not a fixed sum to be arrived at by taking the average expenditure over a series of years.

H The fact that a footpath along the top of a sea wall is used as a promenade or esplanade for the purposes of pleasure is not inconsistent with its being part of the highway.

Notes. Section 11 (2) of the Local Government Act, 1888, has been repealed. Annual payments towards the cost of the maintenance of a road are provided for in s. 237 of the Highways Act, 1959.

I Considered: *A.-G.* v. *Staffordshire County Council*, [1905] 1 Ch. 336; *Manchester Corpn.* v. *Audenshaw U.D.C.*, [1928] All E.R. Rep. 314. Applied: *Reigate Corpn.* v. *Surrey County Council*, [1928] All E.R. Rep. 592. Referred to: *A.-G. and Taylor & Son, Ltd.* v. *Todmorden Borough Council*, [1937] 4 All E.R. 588.

As to meaning of highway and parts of highway repairable, see now 19 HALSBURY'S LAWS (3rd Edn.) 12 et seq., 117 et seq.; and for cases see 26 DIGEST (Repl.) 271 et seq., 384. As to contributions by county councils, see 19 HALSBURY'S LAWS (3rd Edn.) 28, 29; and the Highways Act, 1959, s. 237, s. 238 (39 HALSBURY'S STATUTES (2nd Edn.) 665-667). For cases see 26 DIGEST (Repl.) 286-288.

Case referred to: A

(1) *R.* v. *Greenhow (Inhabitants)* (1876), 1 Q.B.D. 703; 45 L.J.M.C. 141; 35 L.T. 363; 41 J.P. 7, D.C.; 26 Digest (Repl.) 405, *1114.*

Also referred to in argument:

R. v. *Paul (Inhabitants)* (1840), 2 Mood. & R. 307, N.P.; 26 Digest (Repl.) 411, *1168.* B

R. v. *Bamber* (1843), 5 Q.B. 279; 1 Dav. & Mer. 367; 13 L.J.M.C. 13; 2 L.T.O.S. 121; 8 J.P. 121; 114 E.R. 1254; sub nom. *Bamber* v. *R.*, 8 Jur. 309; 26 Digest (Repl.) 405, *1112.*

R. v. *Hornsea (Inhabitants)* (1854), Dears. C.C. 291; 2 C.L.R. 596; 23 L.J.M.C. 59; 22 L.T.O.S. 337; 18 J.P. 135; 18 Jur. 315; 2 W.R. 274; 6 Cox, C.C. 299, C.C.R.; 26 Digest (Repl.) 407, *1137.* C

R. v. *Lordsmere (Inhabitants)* (1886), 54 L.T. 766; 51 J.P. 86; 2 T.L.R. 623; 16 Cox, C.C. 65, C.C.R.; 26 Digest (Repl.) 397, *1037.*

Leek Improvement Comrs. v. *Stafford Justices* (1888), 20 Q.B.D. 794; 57 L.J.M.C. 102; 52 J.P. 403; 36 W.R. 654; 4 T.L.R. 526, C.A.; 26 Digest (Repl.) 286, *125.*

R. v. *Landulph (Inhabitants)* (1834), 1 Mood. & R. 393, N.P.; 26 Digest (Repl.) D 383, *920.*

R. v. *High Halden (Inhabitants)* (1859), 1 F. & F. 678; 26 Digest (Repl.) 383, *918.*

R. v. *Henley (Inhabitants)* (1847), 2 New Mag. Cas. 354; 10 L.T.O.S. 110; 2 Cox, C.C. 334; 11 J.P. Jo. 804; 26 Digest (Repl.) 382, *914.*

Appeal from a decision of the Court of Appeal (Lord Esher, M.R., A. L. Smith E and Rigby, L.JJ.) reversing a decision of the Divisional Court (Cave and Lawrance, JJ.) upon a Case Stated by an arbitrator appointed by the Local Government Board under s. 11 (4) of the Local Government Act, 1888 [repealed].

The appellants were the highway authority for the district of Sandgate, and in the year 1893 their predecessors, the Local Board of Sandgate, made a large claim against the respondents, the Kent County Council, under s. 11 of the Local F Government Act, 1888, in respect of the costs alleged to have been incurred by them during the four years ending Mar. 25, 1893, in the maintenance, and repair, and reasonable improvement of such part of the main road running from Folkestone to Hythe as was within their district. The part of the road referred to was within the urban district of Sandgate, and lay along the sea front and abutted upon the foreshore. The claim was repudiated by the county council, and the difference was G referred to the arbitration of the Local Government Board, and by an order of the Local Government Board under s. 63 of the Local Government Act, 1888, Mr. Thomas Codrington, a member of the Institute of Civil Engineers, was appointed to act as arbitrator. The arbitrator published his award in the form of a Special Case on Jan. 1, 1897. By the award, some items of which were in favour of each party, the county council were ordered to pay £6,188 to the urban district council. H The Special Case was heard by the Divisional Court on Mar. 19, 1897, and judgment was given on April 6, 1897, confirming the award both as to the amount awarded to the urban district council and as to the residue of the award in favour of the county council, and the court directed that each party should pay their own costs. Both parties appealed, and the appeals were heard together on June 24 and 25, 1897, and judgment was given on June 25, 1897, in favour of the county council on both I appeals, directing the arbitrator to reject the whole claim of the urban district council and to award entirely in favour of the county council.

The road in question was a part of a road running from Folkestone to Hythe, and in the year 1883, when it became a main road, there was, between the carriage road and the sea, what was then, and still was known as the "Esplanade." It had been made at various times, and was of various widths. Beyond that there was a piece of land between the esplanade and the carriage road, which was laid out ornamentally and planted with shrubs. As long ago as 1867 the local board had repaired and

improved it for the purposes of a promenade by regulating the width, kerbing and paving the same throughout. Throughout the entire length it was faced by a sea-wall, the outer edge of the esplanade being on top of the sea-wall. This sea-wall had been erected at different times and under different circumstances, and besides protecting the esplanade and ornamental grounds from the inroads of the sea, it helped to protect parts of the carriage road also.

Dickens, *Q.C.*, *Cunningham Glen*, and *Drake Brockman* for the urban district council.

Macmorran, *Q.C.*, and *Bray*, *Q.C.*, for the county council.

THE EARL OF HALSBURY, L.C.—In this case, before I deal with the merits of the appeal, I wish to say a word or two upon the subject of the form of the award, because I think that scant justice has been done to the arbitrator in regard to the form in which this Case is stated. I think, with great respect for those who think otherwise, that they have not sufficiently considered the complex nature of the problem which the arbitrator was called upon to solve. At common law all parishes were bound to repair their own roads. But when county councils were established, the duty was cast upon them of maintaining and keeping in repair the main roads in their counties. To that there was added a further provision, that if any local authority thought proper to claim the right of dealing with their own roads they might do so. But the legislature did not, even in such a case, cast the whole cost of the maintenance of their roads on the particular district; the county council is to make a contribution for the purpose. In those circumstances it is obvious that the question of amount is a matter which, unless settled by agreement, can hardly be determined by the ordinary courts of law. The legislature accordingly provided that on failure of the parties to agree on the contribution of the county council it should be determined by the Local Government Board.

There was a road bordering on the sea, in some places close to the sea, and in some parts further off; in respect of some part of the road it was contended, and found by the arbitrator, that it was part of the main road, and therefore, it was beyond doubt within the jurisdiction of the arbitrator to award the contribution with respect to the maintenance and repair of that part of the main road. Other questions appear to have been raised whether when a thing was not actually part of the main road, but became necessary for the support of the main road, so that the road could not exist as a main road without it, but would be in a continual state of disrepair, the county council could be called upon to repair it, and further it was apparently successfully contended that the main road parted from the sea shore at a point which was not either the main road itself, or connected with, or forming part of the support in maintenance of it, and that if the local authority thought proper to spend money upon it there, they must pay for it themselves. That was the sort of problem that the arbitrator had to solve, and it is manifest from the mere statement of these facts that he had to go into them with great minuteness. [HIS LORDSHIP discussed the form of the award, and continued.]

Let me deal with what I may call the merits of the appeal. The first and main question is, of course, whether the road or any part of it, and if so, what part, is part of the main road? Subject to the question of the amount to be allowed, which is a question of fact for the arbitrator, he has found in terms, with respect to a considerable part of it, that it is part of the main road, and therefore, so far as that part of the award is concerned, it is conclusive against the county council, and perfectly according to law. Then there comes another part as to which he finds that it is not part of the main road strictly speaking, but is so necessary to the maintenance of the main road, that unless that construction was there the main road might be washed away. It was argued before the arbitrator that in point of law the expenses, as regards that part, were not recoverable because it was not part of the main road. To my mind that contention is absurd. Is it common sense to say that where the obligation is to maintain the road and keep it in repair, you can,

by neglect, allow that duty to be so disregarded that in time the road may be washed away, so that your liability or obligation ceases? Such a proposition is, to my mind, absolutely monstrous. The obligation at common law, and the same obligations have been handed on to the various bodies which in turn have received by statute the obligations and duties in respect of roads, is absolute, that they must keep in repair the roads in their parish. Can anything be more clear than this, that the obligation is absolute in the first instance on the proper body whoever it be? Over and over again it has been decided that where a person is bound ratione tenuræ to repair a main road, and becomes insolvent, the obligation immediately falls upon the parish, and that the parish, or the authority whatever it is, is bound to take upon itself the repair. You cannot, for reasons of public policy which are obvious enough, allow the roads to get out of repair. The obligation has always been held to be absolute and everlasting, and you cannot get rid of it except by statute.

Then the proposition appears to be this, that if you take a main road, not merely the via trita, but that part of it which is said to be dedicated to the public, your jurisdiction must be limited to, and does not go an inch beyond that which is the highway. If that be so, if you want to cut a gutter to prevent the road from being flooded, or to take a culvert under it, where is your culvert to start? Have you no jurisdiction to dig a hole to allow the water to go through the culvert, so as to preserve the road? The truth is that you might put forward half a dozen hypotheses to show that such a construction of the law would reduce the whole thing to an absurdity, and render the administration of the road authority absolutely impossible. I have no hesitation in saying that, assuming a thing to be necessary for the preservation of the road, and assuming that the local authority is under obligation to keep up the road, the law of England is that you shall keep up that road by whatever means are appropriate and necessary to do it. Of course, I do not omit to notice the cases where the road itself has been destroyed, but as BLACKBURN, J., said in *R.* v. *Greenhow* (*Inhabitants*) (1), it is always a question of more or less; it is not because a part of the road is washed away that the road is destroyed. In that case the whole road was for a considerable distance overlaid with earth which had fallen from a hill, but the line of the road was ascertainable, and it was said, and it appears to me obviously good sense, that whenever you are dealing with any general proposition you may bring it so near to the line as to make it an absurdity. In that particular case BLACKBURN, J., thought that the obligation upon the parish was not got rid of, although it would involve considerable work to remove the obstruction, which for the moment had destroyed the passage way along the road.

The question which arose with respect to the groynes appears to be susceptible of the same answer. The arbitrator has found that these groynes are necessary for the maintenance of the road, and, as it appears to me, quite rightly. Then the proposition is this: You cannot do anything of this sort to maintain the road; you must allow it to go out of repair every year, although that would involve extraordinary and unnecessary expense to the parish or local body, whatever it might be; you must do that because your only power is to repair the road. In that argument I think that the word "maintenance" appears to have escaped the attention of those so arguing: the "maintenance" of the road is quite as much a part of the duty as the "repair." Therefore, it appears to me that it follows the same line of thought, and that the award is perfectly good.

As regards the determinations of the arbitrator so far as questions of fact are concerned, we have no power to criticise them. The one question of law which, as it appears to me, is really open upon this award, is the question about the annual contribution. It appears to me to have been sufficiently answered in the course of the discussion here. It is suggested that, though the contribution is not perhaps intended to be a fixed sum, still that you must take it over an average of years. That might or might not have been a very good way to arrive at it. I do not say the contrary, but my answer is, that there is no foundation for it in the statute. The statute reasonably read seems to me to provide that it is to be a reasonable sum

de anno in annum in each of these cases to be determined each year. I can see good reasons why the legislature should have so enacted, but I am content with saying that, whatever the reasons were, the legislature has so enacted; and it appears to me, therefore, that it is the only rule which can be applied to this case. Under these circumstances, it appears to me that the original judgment of the Queen's Bench Division was right, and that the judgment of the Court of Appeal ought to be reversed.

I cannot help saying further that, if any such question as it was sought to raise here by mixing up the facts that have been found with the law, was open to the court, there would be an end to arbitrations altogether. It has been the policy of our law to treat awards as final and conclusive between the parties. There are familiar grounds known to every lawyer upon which an award can be impeached, but the remarkable thing in this case is that no such question is raised, and it seems to me that if your Lordships were to give the least countenance to such a proceeding as this, it would be fatal, not only to the law of arbitration generally, but certainly, having regard to the complex questions which civil engineers have to deal with in these matters, it would render it absolutely hopeless to determine questions of this sort between a local authority and a county council. For these reasons I move your Lordships that the judgment of the court below be reversed.

LORD WATSON.—I agree with the Lord Chancellor in thinking that the single question of law raised in the argument in this appeal relates to the accounting between the two parties, raising the question whether the actual sum is to be ascertained annually having regard to the outlay of the urban district council, the sum expended by the urban district council, or is it to consist of a more or less definite sum which is to be payable from year to year, irrespective, apparently, of the cost to which the urban district council may have been put in that year. Upon the rest of the case I concur generally in all the observations that have been made by the Lord Chancellor, and it is matter of great regret that the courts have been solicited to entertain a great number of questions with which they have nothing whatever to do. Those questions are as much barred by the decision of the arbitrator on points of fact as if he had been a separate tribunal of equal jurisdiction with the court itself. It was said that a question of law is involved. There is no such question. There would have been one if the law had been in the condition assumed by the county council, that no part of a high road could ever be used for purposes of recreation. The use of the esplanade for any jus spatiandi or purposes of amusement is in no way inconsistent with its being a part of the road. The matter of amount of valuation assessed by the arbitrator is as much within his exclusive jurisdiction as the other questions of fact.

LORD SHAND.—I have also come to the conclusion that the judgment of the Court of Appeal cannot be sustained. On the important question that has been argued before us the judgment of that court proceeds on the view that what is called the esplanade was in point of fact a promenade made for a pleasure walk or lounge for the benefit of Sandgate, its inhabitants, and those who are interested in promoting its welfare, and that it was not a path made as part of the public road. The conclusion to which the Court of Appeal came upon that subject is admitted to be sound so far as regards one part of this road, but I think that their judgment as to the other part cannot be sustained, because the arbitrator has expressly said that

> "the footway or esplanade which intervenes between the sea wall and the carriage-way was and is part of the road,"

and again he says,

> "the sea wall, whether part of the road or not, was, previous to its destruction by the sea, in extent and circumstance such that its destruction involved the destruction of some part of the road;"

and

"the erection of this wall was necessary for the protection of the road."

It appears to me that these findings by the arbitrator upon this matter of fact dispose of the view that this esplanade was a mere pleasure ground and not a path forming part of the road, and therefore that the judgment of the Court of Appeal cannot be affirmed. [His Lordship proceeded to criticise the form of the award and Special Case, and expressed an opinion that it should have been remitted to the arbitrator to be re-stated, and continued:] At the same time I am not prepared to say, upon a critical examination of such loose statements by the arbitrator as we have here, that I differ from your Lordships who have preceded me in regard to the motion which has been made.

With regard to the other question, I mean as to the clause of the statute which provides for an annual payment, I agree with the conclusion at which your Lordships have arrived. The words of the statute are these:

"The council shall make to such authority an annual payment towards the cost of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road."

There is no suggestion there of that annual payment being estimated upon an average. If the legislature intended that, it has certainly not expressed it, and I agree with your Lordships in thinking that this expression "annual payment" is intended to indicate the moneys that are laid out for that particular year, and not upon an average of years. In conclusion I have only to say that I hope that this case will not be accepted as a precedent for future cases which may come for the decision of the court submitted by arbitrators under the statute.

LORD DAVEY.—I entirely agree with the motion which has been made, and if it were not that we are differing from an unanimous judgment of the Court of Appeal, I should not have felt it necessary to add anything to what has been already said, but I will shortly state the reasons why I differ from the conclusions come to by the Court of Appeal.

Two questions seem to have been decided by that court, first, that the footway, which is called the esplanade, was not part of the main road; and, secondly, that there was no liability in the urban district council to construct a sea wall for the protection of the road, and therefore, that they could not charge the expense of that construction against the county council. With regard to the first question, we have the express finding of the arbitrator that

"the footway or esplanade which intervenes between the sea wall and the carriageway was and is part of the road."

That is a question of fact, and the view of the Court of Appeal, as it seems to me, can only be supported either on the ground that under no circumstances could the footway which is called the esplanade be part of the main road, which appears to me to be quite untenable as a general proposition, or that it appears on the face of the case that there was no evidence upon which the arbitrator could properly find that it was part of the main road. The latter point was the point which was pressed upon the House by the learned counsel for the county council but when we turn to the findings of fact in the Special Case it appears to have no foundation whatever.

With regard to the sea wall I understand the Case to mean that, in the opinion of the arbitrator, it is also part of the road, but whether I am right or not, it is perfectly clear that he considers as a fact that the sea wall was necessary for the protection of the road, and whether it is part of the road, or necessary for the protection of the road, in my opinion the cost of it might equally well be chargeable to the county council. It has no doubt been decided in the courts that where a road has altogether disappeared and is no longer existent, as, for example, where the

site of the old road has become part of the bed of the sea, or possibly the bed of a river, there is no liability to replace the road, for the reason which has been mentioned, that an essential allegation or averment in an indictment for non-repair of a road is that "there was and is a road from the point A. to B." and there is, therefore, no liability on a road authority to make a new road under those circumstances. And it must also be said that there is no liability upon the road authorities, which could be enforced either by indictment or otherwise, to do any particular work. Their liability, either at common law or by statute, is general, to repair and maintain the highway, leaving it to them to find out the best, or at any rate adequate, means of discharging that liability.

But no such question is raised here. The question here is whether the construction of the sea-wall and the groynes, which seem to me to stand in the same position, was a reasonable way of performing the duty imposed by statute on the urban district council of maintaining the road in a proper state of repair. The site of this road is exposed to inroads from the sea, and it appears from the statements in the Special Case that the experience of some years past has shown that the sea, unless it is kept out by adequate works, will break over the road and cut it up, and render it temporarily impassable, or reduce it to a state in which it requires continuous and constantly recurring repairs. I agree that it would be contrary to common sense to say that it would not be a reasonable and economic mode of keeping the road in repair, and, indeed, one might almost say the only way of maintaining and keeping the road in repair, to construct a work which would protect the road from damage arising from the inroads of the sea. At any rate, it appears to me to be purely a question of fact. The arbitrator finds that it was necessary for the protection of the road, and we are bound by his statement of facts. On these grounds I feel bound to say that the decision of the Court of Appeal cannot be supported, and that the judgment of the Queen's Bench Division ought to be restored. With regard to the construction of the Act as to the annual payment I have nothing to add to what has already fallen from your Lordships.

LORD LUDLOW.—I venture to say, with great respect for the court below, that I think that this award, when fairly and fully considered, has been somewhat too severely, and somewhat undeservedly found fault with in the court below. I presume that awards are not to be examined with a homœopathic minuteness, but ought to be read with a willing mind, and I think that if this award is so read, it is not very difficult to understand what was in the mind of the arbitrator. I consider that this case is entirely concluded by the findings of fact, which cannot be disturbed and cannot be reviewed. I am, therefore, unable to agree with the judgment of the Court of Appeal, and I think that Cave, J., was perfectly right when he said that the award ought to stand.

I have only one more observation to make, and that is with regard to the words "annual payment." It was contended before us that "annual payment" had reference to an amount to be arrived at over a series of years. I cannot adopt that view. I think that what was meant was this: A payment to be made annually in respect of the expenditure to be ascertained in the particular year. Probably the idea which the legislators had in their minds was this, that by so enacting any difficulty with regard to the rate that might be made being retrospective would be avoided. I entirely agree with the motion that has been made.

Appeal allowed.

Solicitors: *White, Borrett & Co.*, for Messrs. *Brockman*, Folkestone; *Prior, Church & Adams*, for *Warner & Turner*, Maidstone.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

Re JONES. CHRISTMAS *v.* JONES

[CHANCERY DIVISION (Kekewich, J.), March 26, April 2, 1897]

[Reported [1897] 2 Ch. 190; 66 L.J.Ch. 439; 76 L.T. 454; 45 W.R. 598] B

Executor—Administrator—Costs, charges and expenses—Right to payment out of estate—Liability to be charged with interest on balances paid away.
Administrator—Action by next of kin—Order for costs obtained by administrator—Right to set off sum due for costs against shares due to next-of-kin.

An executor or administrator is entitled to have his costs, charges and expenses out of the estate if they have been incurred without impropriety or fraud or anything which may be termed monstrous. Where he has, without impropriety, paid away balances found by certificate to have been in his hands he will not be ordered to pay interest on such balances. Where an administrator has obtained an order for costs in an action against him brought by the next-of-kin, he is entitled to set off the sum due for costs against the shares due to the next-of-kin. C D

Notes. Referred to: *Re England's Settlement Trusts, Dobb* v. *England*, [1918] 1 Ch. 24.

As to liability of executor or administrator to account, see 16 HALSBURY'S LAWS (3rd Edn.) 477; and for cases see 24 DIGEST (Repl.) 747 et seq. E

Cases referred to:

(1) *Cotterell* v. *Stratton* (1872), 8 Ch. App. 295; 42 L.J.Ch. 417; 28 L.T. 218; 37 J.P. 4; 21 W.R. 234, L.C. & L.JJ.; 35 Digest 696, *4393*.
(2) *Taylor* v. *Taylor* (1875), L.R. 20 Eq. 155; 44 L.J.Ch. 718; 23 W.R. 719; 23 Digest (Repl.) 402, *4736*.
(3) *Whitaker* v. *Rush* (1761), Amb. 407; 27 E.R. 272; 40 Digest (Repl.) 409, *41*.
(4) *Middleton* v. *Pollock, Ex parte Nugee* (1875), L.R. 20 Eq. 29; 44 L.J.Ch. 584; 33 L.T. 240; 23 W.R. 766; 24 Digest (Repl.) 802, *7920*. F
(5) *Cooper* v. *Cooper* (1874), L.R. 7 H.L. 53; 44 L.J.Ch. 6; 30 L.T. 409; 22 W.R. 713, H.L.; 24 Digest (Repl.) 937, *9488*.

Also referred to in argument:

Re Love, Hill v. *Spurgeon* (1885), 29 Ch.D. 348; 54 L.J.Ch. 816; 52 L.T. 398; 33 W.R. 449, C.A.; 24 Digest (Repl.) 915, *9188*. G
Turner v. *Hancock* (1882), 20 Ch.D. 303; 51 L.J.Ch. 517; 46 L.T. 750; 30 W.R. 480, C.A.; 35 Digest 669, *4054*.
Easton v. *Landor* (1892), 62 L.J.Ch. 164; 67 L.T. 833; 37 Sol. Jo. 64; 2 R. 176, C.A.; 43 Digest 983, *4238*.
Re Beddoe, Downes v. *Cottam*, [1893] 1 Ch. 547; 62 L.J.Ch. 233; 68 L.T. 595; 41 W.R. 177; 37 Sol. Jo. 99; 2 R. 223, C.A.; 43 Digest 998, *4389*. H
Medlicot v. *Bowes* (1749), 1 Ves. Sen. 207; 27 E.R. 985, L.C.; 40 Digest (Repl.) 432, *233*.
Bishop v. *Church* (1751), 2 Ves. Sen. 371; 28 E.R. 238, L.C.; 24 Digest (Repl.) 674, *6629*.
Re Willis, Percival & Co., Ex parte Morier (1879), 12 Ch.D. 491; 49 L.J.Bcy. 9; 40 L.T. 792; 28 W.R. 235, C.A.; 24 Digest (Repl.) 802, *7923*. I
Re Knapman, Knapman v. *Wreford* (1881), 18 Ch.D. 300; 50 L.J.Ch. 629; 45 L.T. 102; 30 W.R. 395, C.A.; 23 Digest (Repl.) 447, *5155*.

Summons by the plaintiff in an administration action, that the defendant be ordered to pay interest on £614 7s. 4d., being the balance found due from him; and also the costs of the plaintiff and other parties attending the proceedings; and that a sum of money in court might be distributed as specified in a schedule.

The action was brought by the plaintiff, Harry William Christmas, against the defendant, David Jones, the administrator of the estate of, and the son of Eleanor Jones, who died intestate, for an account of the share of Eleanor Jones in the estate of her son, James Wright Jones, which had come into the hands of the defendant as administrator. James Wright Jones had acquired an estate in the Transvaal, South Africa, which was supposed to be worth £20,000. The succession to it was regulated by Roman Dutch law, and the defendant took two journeys to South Africa to realise the estate. In an account which the defendant delivered pursuant to an order in the action he claimed to be allowed (item 5) £60 in repayment of advances for the maintenance of Eleanor Jones, and £500 (items 14 to 36) for expenses incurred in the realisation of the estate of James Wright Jones in South Africa. In the account the defendant admitted that he had received £708 9s. 5d. in respect of the estate, and he claimed to be allowed £706 7s. 11d. for expenses.

In 1891 an action was brought against the defendant as sole executor of his father James Jones, who died in 1880, by John Jones and Mrs. Elizabeth Williams, the brother and sister of the defendant, to revoke the probate of the will of James Jones. This action failed, and, on Mar. 10, 1893, an order was made by the Probate Court that John Jones and Mrs. Williams should pay the defendant the costs of that action—£268 15s. 9d., but this sum had not been paid. By an indenture made Jan. 13, 1893, Mrs. Elizabeth Williams assigned to the plaintiff her interest under the intestacy of her mother, Eleanor Jones. On Jan. 2, 1895, John Jones assigned his share under the intestacy of his mother, Eleanor Jones, to one William Parker. By his certificate in the present action, made May 17, 1895, the chief clerk found that the defendant, as legal personal representative of Eleanor Jones, had received £708 9s. 5d. in respect of her share in the estate of James Wright Jones, and that the defendant was entitled to be allowed £93 11s. 10d., leaving a balance due from him of £614 17s. 7d. Items 5 and 14 to 36 of the account were disallowed. A summons to vary the certificate was taken out by the defendant, and was dismissed with costs. Pursuant to an order made July 12, 1895, the balance—£614 17s. 7d.—found due from the defendant was paid into court, and an inquiry was directed as to what balances had been in his hands as administrator of Eleanor Jones, and during what periods and under what circumstances. By his certificate, made May 21, 1896, the chief clerk found that the defendant, as administrator, had in his hands £602 4s. 6d. from Mar. 31, 1893, to Jan. 31, 1894, and of £614 17s. 7d. from Jan. 31, 1894, to Aug. 15, 1895.

C. E. E. Jenkins for the plaintiff and for the assignees.
Warrington, Q.C., and *Rolt* for the defendant.

KEKEWICH, J.—It is quite possible that, if the defendant is allowed all his costs, charges, and expenses, and all his costs as between solicitor and client of this action, this estate, already small, will be made much smaller, and I agree with the plaintiff's counsel that it is not an inaccurate use of language to describe that as "shocking." The estate was supposed to be £20,000, but afterwards it turned out to be about £708, and thus the beneficiaries will in any event get very much less than they anticipated. But what I have to consider is a question of very much greater moment. If I disallow the administrator these costs, to which, according to the rules and practice of the court, he is fairly entitled, that would be far more shocking, because it would not only be against the rule and practice of the court but directly contrary to honesty.

A man who fulfils the difficult duties of administrator or executor and trustee, is, in common sense and common justice, entitled to be recouped to the very last penny everything that he expends honestly and properly—that is to say, without impropriety—in his character of administrator, executor, and trustee; and the question I have to consider is whether these costs which the administrator here claims have been incurred by him without impropriety in that character. The plaintiff's counsel puts his case well enough, and says this man comes in with

a claim against the estate which he is unable to support; that he claims, as an outsider—and that as such he would come in as an ordinary creditor, and as regards these costs he ought to fail, and to pay the costs with which otherwise the estate will be saddled. But, if the costs are not those of an outsider, but are costs incident to the performance of his duty of administrator, then I have only to consider whether he has incurred those costs properly—that is to say, without impropriety. What is the meaning of that? A B

Of course, if an action is brought for the purpose of making the executor or administrator liable for breach of trust, and he is proved to have committed a breach of trust and costs are incurred by resisting the action and in bringing the breach of trust home to the executor, then it is only right that the executor should pay them as part of the penalty for the breach of trust. Again, if an executor brings in any claims strictly in his capacity of executor, which the court can see from the evidence, documentary, or arising out of cross-examination or otherwise, or by a sort of intuitive process, or general view of the case, are not honestly brought forward, then the court, notwithstanding the general rule, may fairly deprive the executor of his costs, and if he is convicted of dishonesty, may order the executor to pay the costs incurred. And again, apart from dishonesty, I say also that the court may visit the executor with costs, or deprive him of his costs, where the claim is of a monstrous character—that is to say, one which no reasonable man could say ought to have been put forward, even although the executor may have believed it, and a solicitor may have prepared the case, and counsel may have argued it. In a case of that kind the court has quite sufficient power to deprive an executor of costs, or even to order him to pay the costs occasioned to the estate. But, subject to those exceptions to the general rule and practice of the court, there is no doubt that the general rule prevails, and that an executor, even though he makes a mistake, and endeavours to charge against an estate items which the law will not allow him to charge, and the endeavour to prove them has failed, and a summons to vary the certificate has been refused with costs, still the executor or administrator is entitled to have his costs out of the estate if incurred without impropriety or fraud or anything which can be termed monstrous. C D E F

To apply those rules to the case in hand: first, as to item 5; the sum of £60 advanced for the maintenance of Eleanor Jones; any man might fairly infer that that was money which should be repaid. There is no impropriety and no monstrosity in that claim. Then as to items 14 to 36 of the account, expenses incurred in South Africa; those expenses were honestly incurred, and there was no impropriety and nothing monstrous on the part of the defendant, though the claim was not sustained. It seems to me that under these circumstances I have no discretion. If I had, I should certainly exercise it by allowing these costs. I think the defendant is entitled to them because he acted honestly. These are expenses which were not incurred in the first instance in his character of administrator; but he has now come here in his character of administrator to sustain his claim, and all I am now considering is whether his reasonable costs of trying to sustain it ought to be allowed. It seems to me, on the principle of several cases which have been cited, and upon the general rule laid down by Lord Selborne, L.C., in *Cotterell* v. *Stratton* (1), and the general practice of the court under the general order, that I am bound to do that; and if it is a matter for my discretion, I think I ought to do it, and not a bit the less because I shall very much lessen the money coming to the beneficiaries interested in the estate. I think, therefore, I must allow the defendant all his costs of the action, including his costs, charges, and expenses. It will be necessary, in sending the matter to the taxing master, to explain that the costs, charges, and expenses are not to include item 5 or items 14 to 36 in the account. These items must not be brought in as costs, charges, and expenses. G H I

The other question is equally important in administration actions, and that is whether the executor is to be charged with interest on the balances found by the

certificate. The order is this: there is an inquiry whether the defendant, as administrator of Eleanor Jones, has had part of the estate in his hands, and if so, for what periods and under what circumstances. The plaintiff's counsel says that, in resisting the claim for interest, the defendant is seeking to vary the chief clerk's certificate. I do not agree with that argument. The inquiry precisely follows form No. 6 in SETON'S JUDGMENTS AND ORDERS (5th Edn.), vol. 2, at p. 983. That is the form of order always directed when the court intends to hold an even hand respecting the liability of an executor for interest on balances such as these. That is shown by the insertion of the words "under what circumstances." It is to be decided hereafter whether the circumstances are such that the court has to fix the executor with interest. In form 7 in SETON'S JUDGMENTS AND ORDERS, interest is charged on the balances in the hands of the defendant under the account of the general personal estate from twelve months after the testator's death, showing that interest after the testator's death should be paid on the money remaining from time to time in the executor's hands. Form No. 8 directs an inquiry whether any and what balances have, since the date of the order, been improperly retained by the plaintiffs, and interest is to be computed on such balances.

What are the circumstances here? The money was not in the pocket of the administrator; it was not employed in his business; it had not been advanced to anyone, or lent; he had simply paid it away in the manner which he ought not to have done, no doubt, as against the estate, but the payment was not improper in itself. It would be wrong now to say that interest on these balances, on which the administrator has made nothing, should be paid by the defendant. It seems to me that as regards that point the plaintiff fails.

A further question arose upon the distribution of the fund in court, namely, whether the defendant could set off the debt due to him for costs in the action by John Jones and Mrs. Williams, against their respective shares as next-of-kin in the estate of Eleanor Jones.

KEKEWICH, J.—If the decision of SIR GEORGE JESSEL, M.R., in *Taylor* v. *Taylor* (1) is sound, it seems to me that it completely covers the dispute, and I am bound by it. It is a decision by a judge of co-ordinate jurisdiction, but it is more than twenty years old, and counsel on neither side have been able to find a case in which this decision has been criticised. That goes a long way towards saying that I am bound to follow it. The argument to the contrary under these circumstances must rest entirely on this—that SIR GEORGE JESSEL, M.R., was deciding a case adversely to a series of previous decisions which bound him, and that he inadvertently or otherwise departed from them, and that I am not to follow him. The argument is not tenable. Without laying any stress on the experience and judicial power of SIR GEORGE JESSEL, M.R., I observe that there is not the slightest indication in his judgment of an intention to depart from the other cases. He had *Whitaker* v. *Rush* (3) cited to him, and also his own decision in *Middleton* v. *Pollock* (4), and I observe that nearly all the cases cited by counsel for the plaintiff in the present case were referred to in that case on this subject and recognised. Therefore, I must take him to have come to the conclusion that what he said in *Taylor* v. *Taylor* (2) was consistent with those earlier cases. If he did so hold, it is not for me to say that he did not rightly so hold.

As regards *Whitaker* v. *Rush* (3), it is to be observed as an example of many cases which have been referred to as illustrating the principle that one debt cannot be set off against another if they are debts in different rights. That is the marginal note in *Whitaker* v. *Rush* (3) to which the judge referred in giving judgment. SIR GEORGE JESSEL, M.R., cannot have meant to go against these decisions. What he did mean was, that this was not a case of two debts arising in different rights. There is this slight distinction between *Taylor* v. *Taylor* (2) and this case, namely, that there the defendant had lent sums of money to the plaintiff, and counsel

for the plaintiff says that shows that he recognised his position. I do not see that there is the slightest difference between an advance out of funds in pocket and liability arising from a judgment of the Court of Probate. Therefore, the question resolves itself into this: whether the two claims arose in different rights or not. *Cooper* v. *Cooper* (5) is useful as showing what position the next-of-kin are in as regards the estate. They have a substantial interest in the property: they cannot get it until the account is made out and the debts paid. Starting from the very first moment of the death of the intestate, they have a substantial interest in the property. The administrator is not a trustee for the next-of-kin in the strict sense of the word. But he has a duty to them, subject to all the debts and claims on the estate, namely, to hand over to each of them his aliquot share of the estate. He is in the position of bailiff for them of their share in the estate. When once it is ascertained, their claim against him is a legal claim. Therefore, if they owe him money, he has a right to set off against that the money to which they have a claim. That is what I understand SIR GEORGE JESSEL, M.R., said in *Taylor* v. *Taylor* (2) (L.R. 20 Eq. at p. 160): "I ask to set off a personal legal debt due from you to me."

As regards the present case, counsel for the plaintiff has not argued one point anticipated by counsel for the defendant, namely, that the money has been paid into court. It could not be argued. The money is paid into court for safe custody, in order that the representative may be himself discharged from liability when the money is claimed. I think it quite right to say that that would no more oust the right of set-off than the right of retainer. The other point is different. Counsel for the plaintiff also represents two of the next-of-kin, who both claim derivatively, being assignees, and the title of one of them passed after the debt became due; as to the other the title was before the judgment, the judgment was of later date. As regards the one, he must claim subject to any right of set-off, if it exists. As to the other, the judgment of later date could not affect the right of the assignee to be paid the share, but he took subject to the rights of the assignor and the administrator.

Under these circumstances I follow the decision in *Taylor* v. *Taylor* (2), and there will be an order distributing the estate according to the minutes, except that two sixteenths payable to the plaintiff and two sixteenths payable to William Parker are to be retained by the defendant.

Order accordingly.

Solicitors: *J. B. Umpleby; Field, Roscoe & Co.*, for *Evan Morris & Co.*, Wrexham.

[*Reported by* FRANCIS E. ADY, ESQ., *Barrister-at-Law.*]

A

MORRIS *v.* EDMONDS

[QUEEN'S BENCH DIVISION (Henn Collins and Ridley, JJ.), August 2, 1897]

[Reported 77 L.T. 56; 41 Sol. Jo. 698; 18 Cox, C.C. 627]

B *Criminal Law—Vagrancy—Failure to maintain wife—Bona fide belief in her adultery—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3.

A husband, who was separated from his wife by agreement, refused to maintain her, although able to do so, as he bona fide believed that she had committed adultery. He was, however, willing to contribute towards the maintenance of his children provided they were cared for in the workhouse. The C husband was summoned under s. 3 of the Vagrancy Act, 1824, for wilfully refusing or neglecting to maintain his wife and children, but the justices dismissed the summons.

Held: the decision of the justices was correct.

Notes. That part of s. 3 of the Vagrancy Act, 1824, relating to persons wilfully D refusing to maintain themselves and their families was repealed by the National Assistance Act, 1948, and liability to maintain is now governed by s. 42 of that Act.

Distinguished: *Biggs* v. *Burridge* (1924), 89 J.P. 75. Applied: *Chilton* v. *Chilton*, [1952] 1 All E.R. 1322. Referred to: *Morton* v. *Morton*, [1942] 1 All E.R. 273.

E As to vagrancy in general, see 10 HALSBURY'S LAWS (3rd Edn.) 697 et seq.; and for cases see 15 DIGEST (Repl.) 921 et seq. For the National Assistance Act, 1948, s. 42, see 16 HALSBURY'S STATUTES (2nd Edn.) 968, and for the Vagrancy Act, 1824, see 18 HALSBURY'S STATUTES (2nd Edn.) 202.

Cases referred to in argument:

F *R.* v. *Flintan* (1830), 1 B. & Ad. 227; 9 L.J.O.S.M.C. 33; 109 E.R. 771; 37 Digest 358, *1608*.

R. v. *Tolson* (1889), 23 Q.B.D. 168; 58 L.J.M.C. 97; 60 L.T. 899; 54 J.P. 4, 20; 37 W.R. 716; 5 T.L.R. 465; 16 Cox, C.C. 629, C.C.R.; 15 Digest (Repl.) 890, *8578*.

Smith v. *Barnham* (1876), 1 Ex.D. 419; 34 L.T. 774; 40 J.P. 710; 44 Digest G 43, *306*.

R. v. *Badger* (1856), 6 E. & B. 137; 25 L.J.M.C. 81; 26 L.T.O.S. 324; 20 J.P. 164; 2 Jur. N.S. 419; 119 E.R. 816; 16 Digest (Repl.) 495, *3182*.

Re Mills' Trusts (1888), 40 Ch.D. 14; 60 L.T. 442; 37 W.R. 81, C.A.; 43 Digest 746, *1842*.

Hosegood v. *Camps* (1889), 53 J.P. 612; 5 T.L.R. 222, D.C.; 37 Digest 360, *1621*.

H

Case Stated by the justices for the county of Monmouth.

On Mar. 24, 1897, the appellant, Bathias Clement Morris, a relieving officer of the parish of Abergavenny, preferred a summons against the respondent, Thomas Edmonds, a labourer, charging that he was an idle and disorderly person within s. 3 of the Vagrancy Act, 1824.

I Elizabeth Edmonds, the wife of the respondent, and the respondent entered into a deed of separation, dated April 27, 1893, whereby the respondent covenanted to pay her the sum of 5s. per week during their joint lives towards the maintenance of herself and her children, of whom she was to have the sole custody, and whom she was to maintain, and she covenanted not at any time thereafter to require the respondent to live with her. The respondent and his wife lived apart in accordance with the deed, and the respondent for some time made the payments due under the deed, but subsequently ceased to make the same. The respondent ceased to make such payments in consequence of a bona fide belief that his

wife had committed adultery subsequent to the date of the deed. Elizabeth Edmonds and her children named in the summons became chargeable to the Abergavenny Union, and the respondent subsequently attended before the guardians of the union, and refused to maintain them, or to contribute towards their maintenance. The respondent denied that he had wilfully refused or neglected to maintain his family within the meaning of the Vagrancy Act, 1824, and he explained that he had ceased to make the payments to her because he alleged that she had committed adultery, and stated that he was willing to pay towards the maintenance of the children provided they were relieved in the workhouse, saying that his wife was not a proper person to have charge of young children, and that he was unable to take charge of them himself, being an indoor servant, but he refused to maintain his wife. The justices decided that this was a case of bona fide mutual separation by deed, that the respondent had at the time of separation made provision for his wife and her children, and had ceased to pay her in consequence of a bona fide belief that she had committed adultery, that the respondent had not within the true meaning and intent of the Vagrancy Act wilfully refused or neglected to maintain his wife and children, and that, therefore, he was not guilty of the offence charged against him by the summons, which they, therefore, dismissed. The question of law arising on the foregoing statement for the opinion of the High Court was, whether the respondent was guilty of wilfully refusing or neglecting to maintain his wife and her children within the true intent and meaning of the Vagrancy Act, 1824, s. 3.

Freeman Jenkins for the appellant.
S. T. Evans for the respondent.

HENN COLLINS, J.—I am of opinion that we ought not to interfere with the discretion of the magistrates. They heard and saw the parties, and came to a conclusion that this was bona fide. I was impressed at one time with the distinction of the fact of adultery, and bona fide belief of adultery, but this is a proceeding not to enforce maintenance, but a penal proceeding for an offence, and so we must look and see if the respondent has "wilfully" refused to maintain. The authorities quoted establish that under the circumstances of this case, the man cannot be described as an idle and disorderly person. I think the decision of the magistrates perfectly right, and this appeal must be dismissed.

RIDLEY, J., concurred.

Appeal dismissed.

Solicitors: *Fallows & Rider*, for *Baker*, Abergavenny; *T. H. Philpots*, for *T. G. Powell*, Brynmawr.

[*Reported by* W. de B. Herbert, Esq., *Barrister-at-Law.*]

A

JONES *v.* SPENCER

[House of Lords (Lord Halsbury, L.C., Lord Herschell, Lord Macnaghten, Lord B Morris and Lord Shand), November 12, 15, 1897]

[Reported 77 L.T. 536; 14 T.L.R. 41]

Court of Appeal—New trial—Verdict of jury against weight of evidence—Doubt whether verdict on determination of question for decision.

C The verdict of a jury will not be disturbed by the Court of Appeal where the jury have reasonably answered a question of fact properly left to them, but the verdict may be set aside and a new trial ordered where the verdict is one which could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, or where the court is not satisfied that the question which had to be determined was so left to them that D their verdict was given on the determination of that question.

Metropolitan Rail. Co. v. *Wright* (1) (1886), 11 App. Cas. 152, explained.

Notes. The power of the Court of Appeal to order a new trial is now governed by R.S.C. Ord. 58, r. 10.

Referred to: *Sutherland* v. *Stopes*, [1924] All E.R. Rep. 19.

As to new trial by reason of the verdict of jury, see 30 Halsbury's Laws (3rd E Edn.) 474; and for cases see Digest (Practice) 593 et seq.

Cases referred to:

(1) *Metropolitan Rail. Co.* v. *Wright* (1886), 11 App. Cas. 152; 55 L.J.Q.B. 401; 54 L.T. 658; 34 W.R. 746; 2 T.L.R. 553, H.L.; Digest (Practice) 599, *2391.*

(2) *Rafael* v. *Verelst* (1776), 2 Wm. Bl. 983.

F (3) *Brisbane Municipal Council* v. *Martin*, [1894] A.C. 249, P.C.; Digest (Practice) 599, *2401.*

Appeal from an order of the Court of Appeal (Lord Esher, M.R., and Chitty, L.J., Lopes, L.J., dissenting) refusing a new trial in an action tried before Lawrance, J., and a jury.

G The action was brought by the respondent, a horse dealer in London, against the appellant, a farmer at Bromsgrove, in Worcestershire, to recover £70 for breach of a warranty of a carthorse which the respondent had purchased from the appellant on a warranty that the horse was at the time of the purchase "a good worker." The respondent claimed that on the arrival of the horse by train in London it was immediately found to be a "shiverer," and as such unable to back, and conse- H quently not a good worker. In support of this the respondent called several veterinary surgeons who had examined the animal shortly after its arrival in London and pronounced it to be a very bad shiverer and suffering from a disease which must have been in existence at the time of its purchase by the respondent. The appellant called a number of witnesses who had used the animal continually, and swore that up to the time of the sale the animal was perfectly sound and had I shown no symptom of shivering. The jury found for the respondent for the amount claimed. The appellant thereupon applied to the Court of Appeal for a new trial, on the ground that the verdict was against the weight of evidence. In the course of his judgment Lord Esher, M.R., remarked that, short of perverseness on the part of a jury, it was nearly, if not quite, impossible that a new trial could be obtained, on the ground that a verdict was against the weight of evidence when there was conflicting evidence in the case. Lopes, L.J., thought that the Court of Appeal had gone rather too far in refusing new trials in such cases, and that it was clear from the judgment delivered in the House of Lords in *Metropolitan Rail.*

Co. v. *Wright* (1) that a new trial ought to be granted if it were necessary to prevent a miscarriage of justice.

Amphlett, Q.C., and *E. A. Owen* for the appellant.
J. G. Witt, Q.C., and *S. W. Clarke* for the respondent.

LORD HALSBURY, L.C.—I believe that your Lordships are all agreed that the result of this trial was unsatisfactory. I do not propose to enter into the question of the evidence, because, according to a rule which has been established now for a great numbers of years, when a verdict is being set aside, it is not desirable that the judges who take part in the discussion of the question whether or not there shall be a new trial, should make any observations about what the effect of the evidence was, or what might or might not have been the proper course to pursue; because such observations are likely to prejudice the trial which may come on afterwards; therefore, that matter ought to be left untouched by the tribunal which orders the new trial. For these reasons I do not propose to enter into the question of the exact position which might or might not be assumed by either of the parties when the new trial actually takes place; it is enough for me to say that I think that, taking either of the two views which have been suggested more than once in the course of the argument, either that the jury were wrong in what they did, or that it was not sufficiently apparent what was the question which they had to determine; at all events, the result is unsatisfactory, and the cause must be remitted for another trial.

I have the less hesitation in coming to that conclusion, and so overruling the Court of Appeal, because that court does not appear to me (with great respect to the majority) to have applied its mind to the question which really arose, but they proceeded, apparently, upon some construction which had been placed upon a former decision of your Lordships, introducing, as was said, a new rule in a case of this sort. I am not aware that the Court of Appeal or this House have a right to introduce any new rule on the subject of a new trial; the question has been many times discussed, and certainly, so far as I am concerned, in using the language which I am reported to have used in delivering judgment in the case of *Metropolitan Rail. Co.* v. *Wright* (1), I was not under the impression that I was suggesting any new rule. I merely gave expression to what I have always believed to be the rule ever since I entered the profession. It is a rule which I see no reason to alter, even if I had jurisdiction to do so, which I have not. I am confident in the belief that I gave utterance to no new rule, or suggested that anything had happened in later times to alter the established rule.

I have been looking into the authorities to see what can have given rise to the impression that it was a new rule, and I find that, in *Rafael* v. *Verelst* (2), now more than a century ago, DE GREY, C.J., said in substance very much what I said in *Metropolitan Rail. Co.* v. *Wright* (1). He says (2 Wm. Bl. at p. 988):

> "This verdict is not against the evidence. The court will not set it aside merely because they might have given it the other way."

If there is a question of fact left to the jury, and they have reasonably answered it, their verdict cannot be disturbed. I am not aware of any observation of my own in *Metropolitan Rail. Co.* v. *Wright* (1) which would suggest any other rule than that which has certainly been held as established with the authority of that learned judge more than a century ago. I have thought it right to say this because some misapprehension appears to have existed in the mind of LORD ESHER, M.R., that your Lordships in this House had laid down a new rule. He appears to have said that now it is almost impossible to get a new trial; I am not aware of the impossibility, and I am not aware of any authority in this House to lay down any such new rule on the subject.

For these reasons I move your Lordships that this judgment be reversed, and that the respondent pay to the appellant the costs both of the appeal to the Court of

Appeal and in this House, and that the costs of the former trial and the costs of the new trial should depend upon the result of that trial.

LORD HERSCHELL.—I am of the same opinion. I think that the hesitation of a court to set aside the verdict of a jury is very natural, and that it is expedient that verdicts of juries, when that is the tribunal to determine the question between the parties, should not be set aside, except where one is satisfied that there has been a miscarriage, because a verdict has been found that could not reasonably have been found if the attention of the jury had been directed to the whole of the facts of the case, and to the question in issue which they had to determine. But it seems to me to be a condition of any such rule that the question which had to be determined should have been so left to them that one is satisfied that it was before their minds, that their minds were applied to it, and that they did really on the determination of that question give their verdict. If we think the verdict wrong in this sense, that one would not have given the verdict one's self, still if one sees that the question was properly submitted to the jury, that is not enough ground for granting a new trial. But if one comes to the conclusion that the verdict is not one which one would have given, and is wrong in that sense, I think that one is perfectly justified in saying that there shall be a new trial if one sees that the real question that had to be determined was not so put before the jury as to reasonably satisfy the tribunal that has to determine the question whether there shall be a new trial or not that the mind of the jury was so applied to the question to be determined that they did determine the case upon the answer to that question. [HIS LORDSHIP reviewed the evidence and the judge's summing up and continued:] I cannot myself say in the present case that the jury have found their verdict upon the evidence, and having in view the real question which they had to decide between the parties.

LORD MACNAGHTEN.—I am of the same opinion.

LORD MORRIS.—I concur in the result at which your Lordships have arrived, and I should have been entirely satisfied with merely saying so, but that it appears to me to be really necessary to say a word or two upon the decision of the Court of Appeal in this case. That court seems to have been under the impression that there had been a new rule of law established by the decision of this House in *Metropolitan Rail. Co.* v. *Wright* (1) as applicable to the granting of new trials. That mistake may possibly have arisen, in my opinion, from the use by LORD SELBORNE, L.C., in giving judgment in the Court of Appeal in that case, of the expressed that "the verdict was not perverse or unreasonable." He brackets the two terms together as if they were somewhat synonymous. As I observed in the course of the argument, a verdict known as "perverse" is one in which the jury have disobeyed the directions of the judge. In that case it would be called a "perverse verdict," and it would be set aside upon grounds wholly different and dissimilar from those which would lead a court of review to set aside a verdict as being against evidence, or against the weight of evidence. LORD ESHER, M.R., in giving his judgment in the present case, laid down this rather strong doctrine:

> "If you can show that the jury have acted perversely, and have not attended to, or taken any notice of, the evidence, that they have wilfully disregarded what they were about, and would not consider the evidence, then, although there was some evidence, I should say that the verdict was perverse, and I should overrule it. But, short of that, short of showing some disregard of misconduct of the jury, I think that it is nearly impossible, if not quite impossible, for this court now to set aside a verdict."

That appears to me to stretch too far the doctrine applicable to setting aside verdicts as against evidence, or as against the weight of evidence. The use of the word

"weight" implies that there is evidence on both sides, but that it preponderates to such an extreme degree on the one side that it would be unreasonable for the jury not to act upon it, although there may be some slight weight in the other scale. A

That doctrine of setting aside a verdict as being against evidence, or against the weight of evidence, has lasted in the courts for an immense time. It would be entirely frittered away, in my opinion, if the analogy with a "perverse" verdict, to which I have already called attention, or "wilful misconduct" on the part of the jury, were to be taken as the criterion to apply to it. The criterion to apply to it was stated by the noble and learned Lords who gave judgment in this House, in *Metropolitan Rail. Co.* v. *Wright* (1), and in my opinion it was also stated by Lord Ashbourne in giving judgment in the Privy Council, in *Brisbane Municipal Council* v. *Martin* (3), and that is where the tribunal which has to decide the question comes to the conclusion that the jury have, in the verdict at which they have arrived, acted unreasonably upon a contrast of the whole of the evidence on both sides. That has been the definition, and it appears to me that it would be entirely abolished and got rid of if we were to accede to the doctrine that it was necessary to prove that the verdict was either "perverse," or had arisen from any "wilful misconduct" on the part of the jury, or "from their having shown some disregard of what they were about." The most honest jury, possibly from dullness, or from a variety of other reasons, may have arrived at a verdict which the tribunal which has to review it might hold to be unreasonable, and that appears to me to come within the rule. I think it would be a very lamentable thing if the doctrine were stretched to the extent laid down by Lord Esher, M.R., in the present case in giving judgment in the Court of Appeal. B C D E

LORD SHAND.—I am of the same opinion. I am satisfied that there was a miscarriage in the verdict in this case, and that upon a reasonable view of the evidence that verdict ought not to stand. In reference to the general rule, I would only say this, that in my opinion *Metropolitan Rail. Co.* v. *Wright* (1) laid down no new rule. Certainly the verdict of a jury ought not to be disturbed upon any light grounds. The court must be satisfied that there has been a miscarriage, and they must be satisfied that the verdict is such that it could not be reasonably sustained on the evidence; but I think that it has been put too strongly by Lord Esher, M.R., when he represents the state of the law to be this, that "it is nearly impossible to obtain a new trial when a jury have returned their verdict." F

Appeal allowed and new trial ordered.

Solicitors: *T. White & Sons*, for *G. & F. Holyoake*, Bromsgrove; *F. Jones.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

REMMINGTON AND OTHERS *v.* SCOLES

[CHANCERY DIVISION (Romer, J.), April 2, 1897]
[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), May 7, 1897]

B [Reported [1897] 2 Ch. 1; 66 L.J.Ch. 526; 76 L.T. 667; 45 W.R. 580; 41 Sol. Jo. 489]

Practice—Striking out pleading—Defence—Frivolous and vexatious—Abuse of process of court.

The defendant delivered a defence in which he merely denied or refused to C admit the several allegations in the statement of claim and did not set up any substantial defence of his own. On a motion to strike out the defence as frivolous and vexatious, the plaintiff adduced affidavit evidence which showed that in previous proceedings the defendant had admitted on affidavit many of the facts alleged in the statement of claim which he now denied, and that he had not disputed any of the others.

D **Held:** although, generally on an application to strike out a defence, the plaintiff was not entitled to show by affidavit evidence that the statements in the defence were untrue and the court would not strike out a defence because it was false or improbable, the court might receive such evidence strictly to show that the defence was frivolous and vexatious and one which the court under its inherent jurisdiction would strike out as an abuse of process of the E court; accordingly, this defence, being an abuse of process of the court, it would be ordered to be struck out.

Notes. This motion to strike out the defence was not brought under R.S.C., Ord. 25, r. 4 (Current ANNUAL PRACTICE (1963) 573) but invoked the inherent jurisdiction of the court.

As to inherent jurisdiction to strike out pleadings, see 30 HALSBURY'S LAWS (3rd F Edn.) 407; and for cases see DIGEST (Pleading) 82 et seq.

Cases referred to:

(1) *Willis* v. *Earl Beauchamp* (1886), 11 P.D. 59; 55 L.J.P. 17; 54 L.T. 185; 34 W.R. 357; 2 T.L.R. 270, C.A.; Digest (Pleading) 83, *695.*

(2) *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; 59 L.J.Q.B. 159; 54 J.P. 196, G H.L.; Digest (Pleading) 84, *701.*

(3) *Boswell* v. *Coaks* (1894), 86 L.T. 365, n.; 6 R. 167, H.L.; Digest (Pleading) 90, *763.*

(4) *Hildige* v. *O'Farrell* (1881), 8 L.R. Ir. 158.

(5) *O'Donnell* v. *Reilly* (1860), 1 I.C.L.R. 329.

H Also referred to in argument:

Marquis of Drogheda v. *Hanlon* (1867), I.R. 1 C.L. 319.

Lawrance v. *Lord Norreys* (1890), 15 App. Cas. 210; 59 L.J.Ch. 681; 62 L.T. 706; 54 J.P. 708; 38 W.R. 753; 6 T.L.R. 285, H.L.; Digest (Pleading) 85, *710.*

Appeal by the defendant from a decision of ROMER, J., ordering the defendant's defence to be struck out.

I On Feb. 10, 1897, the writ in this action was issued by the plaintiffs, J. E. Remmington, W. E. Crisp and J. McRae, against the defendants, J. Scoles and J. Coppen. The statement of claim delivered on Mar. 3, 1897, alleged (i) that in December, 1895, the plaintiffs in conjunction with the defendant Scoles, a solicitor, and M. Ahern, were contemplating the purchase of certain land at Haddenham, in the county of Cambridge, for the purpose of developing it as brick and tile works; (ii) that by an agreement in writing made on Dec. 16, 1895, it was agreed that the plaintiffs should pay as required to the defendant Scoles £2,250, to be applied by him as thereinafter mentioned; that he should out of such sum pay £1,250, the

agreed price of the land at Haddenham, and complete the purchase in accordance with the agreement for sale then held by him, and on the completion of the purchase should hold the land upon trust for and on behalf of all parties thereto, and should execute such deed of trust as might be required; and the agreement contained further provisions regulating the terms on which the land should be held or disposed of by the defendant Scoles; (iii) that in pursuance of that agreement the plaintiffs paid the defendant Scoles £1,750, out of which he paid for the land at Haddenham, which was conveyed to him by an indenture dated Sept. 3, 1896, in fee simple, but no deed of trust had been executed by him as provided by the agreement; (iv) that in consequence of the parties to that agreement being unable to agree as to the manner in which it should be carried into effect, an action of *Remmington* v. *Scoles* was commenced in January, 1897, in the Chancery Division, in which these plaintiffs were plaintiffs and Scoles and M. Ahern were defendants, to have the trusts of the agreement carried into execution by the court; (v) that the defendant Scoles having admitted to the plaintiffs that he had deposited the title deeds relating to the land with J. Coppen as security for advances made to him on his private account, the plaintiffs on Feb. 10, 1897, issued the writ in this action against the defendant and Coppen; (vi) that on the hearing of a motion for an injunction it was proved by Coppen that Scoles had executed a legal mortgage, dated Sept. 24, 1896, of the land to him to secure the sum of £500 and interest, and that on Dec. 9, 1896, Coppen advanced Scoles a further £200 on the security of said land, and that a memorandum of such last-mentioned advance was endorsed on the mortgage of Sept. 29, 1896; and further that Coppen had at the time of making such advances respectively no notice that Scoles was a trustee of the land for the plaintiffs and M. Ahern; that this action was accordingly dismissed against Coppen with costs to be paid in the first instance by the plaintiffs without prejudice to the question how such costs should be ultimately borne; that the plaintiffs were at the date of the issue of the writ in this action wholly unaware that any legal mortgage of the land had been executed; (vii) that by reason of the fraudulent conduct of Scoles the land had become subject to a mortgage debt of £700 and interest, and that Scoles ought to make good to the plaintiffs and M. Ahern the amount of such mortgage debt and interest, and any costs incurred in relation to the same. The plaintiffs claimed (i) a declaration that the defendant was a trustee of the lands at Haddenham for the plaintiffs and M. Ahern; (ii) an injunction to restrain the defendant from dealing with the land except in accordance with the agreement; (iii) that the defendant might be ordered to make good to the plaintiffs and M. Ahern the amount of the mortgage debt of £700 and interest thereon and any costs incurred in relation thereto; (iv) payment by the defendant to the plaintiffs of the costs of Coppen paid by the plaintiffs under the order in this action of Feb. 19, 1897; and (v) damages and costs.

A B C D E F G

On Mar. 19, 1897, the defendant Scoles delivered his defence, in the first four paragraphs of which: (i) The defendant did not admit that he executed or was a party to any such agreement as set out in para. 2 of the statement of claim or any similar agreement; (ii) The defendant did not admit that the plaintiffs, or any of them, paid the defendant £1,750 or any other sum, or that he out of such moneys or otherwise paid any purchase money or completed any purchase of any land at Haddenham or elsewhere, or that by an indenture of Sept. 3, 1896, or any other indenture, any land at Haddenham or elsewhere was in consideration of £1,250 or any other sum conveyed to the defendant in fee simple, or for any other estate or interest as alleged in para. (iii) of the statement of claim, or in fact; (iii) The defendant did not admit any of the allegations contained in para. (iv) of the statement of claim; (iv) The defendant denied that on Feb. 8, 1897, or on any other date, he admitted to the plaintiffs or any of them, or to any other persons or person (nor did he admit it to be a fact), that he deposited any title deeds relating to any land at Haddenham or elsewhere with J. Coppen, or any other person, as security for advances made to the defendant on his private account or for any other purpose.

H I

The remaining three paragraphs were of a similar nature merely denying the other allegations contained in the statement of claim. On Mar. 23 the plaintiffs gave the defendant notice of motion to strike out the defence as being frivolous and vexatious and embarrassing, and an abuse of the process of the court. In support of this motion the plaintiff Crisp, in an affidavit, stated that, in the action of *Remmington* v. *Scoles* the defendant had, in an affidavit sworn by him on Mar. 10, 1897, admitted the agreement referred to in para. (ii) of the statement of claim, and the payment to him by the plaintiffs of £1,750 as alleged in para. (iii) of the statement of claim; and also that he was in possession of the land in question in this action under the terms of the above-mentioned agreement.

The plaintiff, Crisp, further stated that a copy of the conveyance to the defendant, referred to in para. (iii) of the statement of claim, was exhibited on the motion for an interlocutory injunction in this action; that, on that motion, a letter written by the defendant expressly admitting that he had completed the purchase for £1,250, was exhibited to the affidavit of J. Coppen.

The facts alleged in paras. (v), (vi) and (vii) of this statement of claim had been proved in the affidavit in support of the plaintiffs and had in no way been denied by the defendant.

The plaintiff, Crisp, in his affidavit, also stated that, under the circumstances stated, he believed that the defence had been put in solely for the purpose of delaying the plaintiffs in obtaining the relief claimed in this action, and that every allegation in the statement of claim was absolutely true; that the defence was without foundation, and could not be supported, and that he was advised that it was frivolous and vexatious, and an abuse of the process of the court.

The plaintiffs moved to have the statement of defence struck out.

ROMER, J.—The court has an inherent power to prevent the abuse of its legal machinery, as was well observed by BOWEN, L.J., in *Willis* v. *Earl Beauchamp* (1), where, pointing out that in that case an application to strike out the statement of claim was not made under R.S.C. Ord. 25, r. 4, he says this (11 P.D. at p. 63):

> "It does not fall under the rule, but the rules, as we have pointed out more than once, do not, and that a particular rule does not, deprive the court in any way of the inherent power which every court has to prevent the abuse of legal machinery."

Undoubtedly in a proper case the court has power to strike out a statement of claim which the court considers is an abuse of the legal machinery of the court. Is that power of the court confined to a statement of claim? It applies to every pleading, and that it applies to a statement of defence is shown by *Reichel* v. *Magrath* (2) to which my attention has been called; and it appears to me that in a proper case the court may receive evidence on a motion of this kind for the purpose of showing, but only for the purpose of showing, that any pleading complained of and sought to be struck out is an abuse of the process of the court. If authority were wanted for that proposition it is given by *Boswell* v. *Coaks* (3), and I think that the present case is one where the plaintiff was entitled by his evidence to state the circumstances which show that the defence is merely an abuse of the process of the court. I quite agree that a plaintiff is not entitled to try and show by his evidence in general cases what statements in a statement of defence are untrue, so as to raise, as it were, a preliminary trial of the action out of due course. But, as I have said, I think the applicant is entitled, upon a motion of this kind, to bring evidence, confining it strictly to showing that the pleading complained of is an abuse of the process of the court.

In the present case what do I find? The defendant is a solicitor. All the facts in the statement of claim have substantially been already admitted by the defendant in prior proceedings. In my opinion, he clearly has no defence whatever to this action—no substantial defence against it—and none is attempted to be shown by

his statement of defence. To my mind it obviously is a case where the defendant wants to delay and hinder the plaintiffs, and for that reason, and for no other, puts in a statement of defence denying or refusing to admit every statement in the statement of claim. The defence here is confined to that. It has no substantial statement of its own; it merely contents itself in substance with denying or refusing to admit every statement in the statement of claim, and that only. It refuses to admit, for example, an agreement in writing stated in para. (ii) of the statement of claim, which I may add has already been admitted under oath in prior proceedings. It refuses to admit even the statement in para. (iv) that an action was brought. In other words, matters stated which obviously give rise to no controversy are here merely denied or refused to be admitted, and, as I have stated, clearly for no other purpose than to hinder and delay the plaintiffs. I think under the circumstances that this defence is not a real defence at all, but, as I have said, is merely an abuse of the process of the court, and I order it to be struck out.

I may say that this decision will in no way, as suggested on behalf of the defendant, render it possible in ordinary cases for a plaintiff to set aside a defence by trying by evidence on motion to show the untruth of the statements in the statement of defence. This is not really a case of the plaintiff trying to show by affidavit that any substantial statements in the statement of defence are untrue, and therefore that the statement of defence ought to be set aside. It is not really a case like that of *Hildige* v. *O'Farrell* (4) which has been cited to me and the cases which were cited in that case. As I have pointed out, it is a case where the defendant throughout his statement of defence simply refuses to admit all the statements in the statement of claim as it were en bloc—obviously a statement of defence put in for no honest purpose unless the honest purpose be to defeat and hinder the plaintiffs; but for no real purpose of defence except merely of delaying and hindering the plaintiffs, and because the defendant has no real defence. This case before me I agree is a very exceptional one, and will not be hereafter and cannot be hereafter cited as a precedent for such mischief as was guarded against in *Hildige* v. *O'Farrell* (4) and the cases there cited.

I order, under the circumstances in this case, the statement of defence to be struck out, and the defendant to pay the costs of the motion. I will give, as I have already offered to give, the defendant an opportunity of putting in what I have called a real defence, and if he chooses to avail himself of that he will have fourteen days within which to do it. That is on the hypothesis that he may by ingenuity possibly find out some defence which is not at present apparent, and which I am bound to say I do not believe in fact exists.

From this decision the defendant appealed.

F. Russell for the defendant.
G. Lawrence for the plaintiffs.

LINDLEY, L.J.—There is no doubt that what ROMER, J., has done is a very unusual thing to do. It is a very strong thing to say, and it cannot be said as a general proposition, that the defendant is not at liberty to put in a defence denying the statements in the statement of claim. Of course he is entitled to do so, as a general rule; that is obvious. The learned judge is quite right; he recognises the rule which is referred to and illustrated by *Hildige* v. *O'Farrell* (4). In a case of that kind the court will not try whether the statement of defence states what is true or false; it will not do anything of the sort. The ground on which the learned judge has proceeded is this, that this is a mere sham. The character of the defence can be seen through, and is stamped by the first three paragraphs, which are mere shams. That gives a character to the whole thing, and bearing in mind what has been done in this very case, I think the learned judge was not wrong when he said as he did, that it is a defence which never ought to have been put in, and that the whole proceeding is with a view to gain time; it is a mere sham defence, it is not an honest defence

A at all. If the defendant has an honest defence, which probably he has not, he is at liberty to put it in. The learned judge has guarded himself. He says it will not do, after what has passed, simply to deny everything. You must deny it if you choose to deny it and give some evidence to show that you are acting honestly. It is a mere trick to gain time. I think the learned judge was right, and that the B appeal must be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The learned judge observes in this case that it is an exceptional case, and I think it is an exceptional case. It is a case that can only be dealt with in the way he has dealt with it, and we propose to deal with it, where the circumstances are exceptional. We are entitled to deal C with it, and to strike out this defence on account of the inherent jurisdiction in every court of justice to prevent an abuse of its procedure; and I think that this defence, if it was permitted to remain on the file, would be an abuse of the procedure. But I desire to say this, that it is not enough to invoke this kind of jurisdiction of the court if the court thinks the facts alleged in the statement of defence or the statement of claim, as the case may be, improbable or false. But D what the learned judge thought here—and I think he was right in so thinking—is that, having regard to the character of this defence, bearing in mind what is known about the case beforehand, what is known about the previous proceedings in the case, he has come to the conclusion—and again I say I think rightly—that it is a sham defence, and that it has been set up, not honestly and bona fide as a substantial defence, but for the purpose of delay. I think, therefore, we ought to E support his decision.

RIGBY, L.J.—I do not wish in any way to infringe upon the salutary rule that a defendant has a right to put in issue any fact that he pleases and to have that tried in the regular manner. Therefore this court will not, as *O'Donnell* v. *Reilly* (5) and other cases cited have shown, although it may be reasonably satisfied or F quite satisfied as far as the affidavit goes that the defence is untrue, strike it out for that reason. But if the court can, on the facts that are not in dispute, ascertain that the actual defence put in is really a defence which has no relation to the merits of the case at all—in other words, that it is a sham defence—then of course the court has jurisdiction, and in this very exceptional case ought to act upon the jurisdiction, and to have that sham defence taken off the file. I think this is a G case clearly of that kind, and on that ground the decision of ROMER, J., ought to be upheld.

Appeal dismissed.

Solicitors: *Darley & Cumberland; G. Clark.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

Re POMEROY AND TANNER

[Chancery Division (Stirling, J.), January 13, 19, 1897]

[Reported [1897] 1 Ch. 284; 66 L.J.Ch. 158; 75 L.T. 625; 45 W.R. 245; 41 Sol. Jo. 212] B

Solicitor—Costs—Bill—Country solicitor and London agent—Charges of London agent—Inclusion of details in bill—Solicitors Act, 1843 (6 & 7 *Vict.*, *c.* 73), *s.* 37.

A country solicitor employing a London agent ought to incorporate details of the charges of the London agent in his bill of costs since, there being no solicitor and client relationship between the lay client and the London agent, the latter's charges cannot be treated as a disbursement. When a bill of costs is delivered which includes the London agent's charges as a disbursement, there is no complete bill capable of taxation which would justify the solicitor relying on its delivery for twelve months as a ground for non-taxation. C

Notes. The Solicitors Act, 1843, s. 37, has been repealed. See now the Solicitors Act, 1957, s. 69. D

As to delivery of a bill of costs, see 36 Halsbury's Laws (3rd Edn.) 130 et seq.; and for cases see 42 Digest 176 et seq. For the Solicitors Act, 1957, s. 69, see 37 Halsbury's Laws (2nd Edn.) 1111.

Cases referred to in argument: E

Re Nelson, Son and Hastings (1885), 30 Ch.D. 1; 54 L.J.Ch. 998; 53 L.T.O.S. 415; 33 W.R. 645; 1 T.L.R. 507, C.A.; 42 Digest 146, *1449*.

Re Norman (1886), 16 Q.B.D. 673; 54 L.T. 143; 34 W.R. 313; 2 T.L.R. 272; sub nom. *Re Norman, Ex parte Bradwell*, 55 L.J.Q.B. 202, C.A.; 42 Digest 187, *2015*.

Ex parte Edwards (1881), 7 Q.B.D. 155; 45 L.T. 211; sub nom. *Re Johnson, Ex parte Edwards*, 50 L.J.Q.B. 541; on appeal, 8 Q.B.D. 262; 51 L.J.Q.B. 108; 45 L.T. 578, C.A.; 42 Digest 388, *4356*. F

Re Hall and Barker (1878), 9 Ch. D. 538; 47 L.J.Ch. 621; 26 W.R. 501; 42 Digest 177, *1863*.

Summons by the sole surviving executor of the will of the late Mr. Sampson, of Bristol, who died in 1887, for the taxation of two bills of costs delivered by the respondents for professional charges in respect of work done in the course of winding-up the estate of the testator on behalf of the applicant. G

Graham Hastings, Q.C., and *E. Ford*, for the applicant.
Buckley, Q.C., and *Henry Terrell* for the respondents.

Cur. adv. vult. H

Jan. 19, 1897. **STIRLING, J.**—This is an application to tax two bills of costs, amounting to £283 11s. 8d., delivered by Messrs. Pomeroy and Tanner, solicitors. The applicant is the sole surviving executor of the will of Mr. Sampson, who died so far back as 1887. He employed Mr. Pomeroy, who was one of the two solicitors whose name appears in the title to these proceedings, to act as his solicitor with reference to the winding-up of the testator's estate. Mr. Pomeroy's engagement in that capacity continued until November, 1891, when he went into partnership with Mr. Tanner. From that time the applicant must be taken to have retained and employed Messrs. Pomeroy and Tanner as his solicitors. In May, 1894, the executorship affairs were wound-up, whereupon the applicant asked for delivery of the bill of costs. On Jan. 25, 1895, Messrs. Pomeroy and Tanner delivered a bill of costs for £283 11s. 8d., commencing on May 3, 1892. The bill for work done previously to that date, which appeared to have been done by Pomeroy I

alone, was not included. No step with reference to that bill was taken until Feb. 6, 1896, when Messrs. Pomeroy and Tanner began to threaten that they would sue for the balance which appeared due on that bill and on the cash account, which had been delivered at the same time. Thereupon the applicant consulted his solicitor, and that resulted in application being made for delivery of the bill of Mr. Pomeroy alone, and for a cash account from the beginning of the transactions. Accordingly, on April 1, 1896, Mr. Pomeroy delivered certain other bills, which included, amongst others, a bill of the charges of his London agent, with reference to the period covered by the bill which had been delivered on Jan. 25, 1865. Application was made in the common form for taxation of the bill which had been delivered on April 1, 1896, with the exception of that which included the agency charges of the London agent of the country solicitor; but a special application was made with reference to the bill delivered on Jan. 25, 1895, and the London agent's bill. That is the application with which I have now to deal.

The case was opened to some extent and dealt with and argued on the footing that the bill had been delivered more than twelve months, and that, consequently, it was necessary to make out special circumstances to justify the taxation of the bill; but, in the course of the argument, the question was raised whether the bill which was delivered on Jan. 25, 1895, was a complete bill, so as to justify the solicitors relying on it, inasmuch as the delivery of it took place more than a year ago, as a ground for non-taxation. That depends on the view which is to be taken of the last item in the bill, which is this :

> "Paid agents' charges including disbursements, counsel's fees, court charges. etc., in the dispute and subsequent action against Mrs. Mann and Miss F. A. Sampson and the compromise thereof £54 8s. 9d."

That, of course, is what I may call a lump item, and is a substantial item amounting to between one-fifth and one-sixth of the whole bill. It is contended that these London agents' charges are merely disbursements, and that it was wrong to include them in the bill of costs at all, and that there was no necessity for delivering a detailed statement of them. On the other hand it was contended that the London agents' charges ought to be included in the bill. The question I have to decide is, which of these contentions is right.

Let us look at it for a moment as a matter of principle. It is well settled that, as between the client and the London agent of the country solicitor, there is no privity. The relationship of solicitor and client does not exist between the lay client and the London agent. What is done by the London agent is part of the work done by the country solicitor for the client, but, as between the country solicitor and the client, the work is done by the country solicitor. What is done by the London agent is part of the work done by the country solicitor for the client. The country solicitor does, or may do, part of the work personally, or by clerks employed by him in the country, or, if necessary (and the necessity occurred in this case) through his London agents, but, as between the client and the country solicitor, the whole work is done by the country solicitor. It follows, therefore, that such items are not mere disbursements, but are items taxable in the strictest sense between the client and the country solicitor, just as much as if the work had been done by the country solicitor personally, or by the clerks whom he employs in the country. That is the view I take of it according to strict law. It was suggested in the argument that the practice was the other way, and that these items were usually treated as disbursements in bills of costs, and I thought it right to make inquiries of the taxing masters as to what the practice really was. At a meeting of the taxing masters (at which all were present except one), which happened to be held at the close of last week, the matter was considered, and they have informed me that as a matter of practice this item of £54 8s. 8d. was improperly charged as a disbursement, and that the items should appear in detail, and that it was proper

and regular to include them in the bill of costs, and that the country solicitor should incorporate them in and on the same bill.

It appears to me, therefore, that, both in strict law and having regard to the practice, the item cannot be treated as a disbursement, but that the details of such item ought to be included in the bill of costs delivered. Therefore this being a substantial item, the complete bill, on which the country solicitors rely, was not delivered until April, 1896, and, accordingly, I think, an order for taxation must go. As regards the costs, it seems to me the proper course would be that the costs of this adjournment into court must be the applicant's in any event, and that the other costs must abide the result of the taxation.

Solicitors: *J. J. Harlow*, for *J. H. King*, Bristol; *Carthew & Wheeler.*

[*Reported by* W. L. Richards, Esq., *Barrister-at-Law.*]

R. *v.* PELLY AND ANOTHER

[Queen's Bench Division (Hawkins and Lawrance, JJ.), March 31, 1897]

[Reported [1897] 2 Q.B. 33; 66 L.J.Q.B. 519; 41 Sol. Jo. 455; 18 Cox, C.C. 556]

Licensing—Offence—Found drunk on licensed premises—Customer so found during closing hours—Liability to conviction—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 12.

By s. 12 of the Licensing Act, 1872: "Every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty. . ."

Licensed premises **held** not to cease to be licensed premises for the purposes of s. 12 of the Licensing Act, 1872, during closing hours, so that when they were closed to the public, a customer who, being neither a lodger nor inmate, was found drunk on licensed premises might be convicted under s. 12 of being found drunk on licensed premises.

Lester v. *Torrens* (1) (1877), 2 Q.B.D. 403, distinguished.

Notes. Considered: *Lawson* v. *Edminson*, [1908] 2 K.B. 952; *Thompson* v. *McKenzie*, [1908-10] All E.R. Rep. 720. Explained: *Young* v. *Gentle*, [1914-15] All E.R. Rep. 1200. Referred to: *Lewis* v. *Dodd*, [1918-19] All E.R. Rep. 764; *Evans* v. *Fletcher*, [1926] All E.R. Rep. 173; *Trebanog Working Men's Club and Institute, Ltd.* v. *Macdonald*, *Monkwearmouth Conservative Club, Ltd.* v. *Smith*, [1940] 1 All E.R. 454.

As to drunkenness in public places, see 22 Halsbury's Laws (3rd Edn.) 691; and for cases see 30 Digest (Repl.) 111, 712. For the Licensing Act, 1872, s. 12, see 13 Halsbury's Statutes (2nd Edn.) 158.

Case referred to:

(1) *Lester* v. *Torrens* (1877), 2 Q.B.D. 403; 46 L.J.M.C. 280; 41 J.P. 821; 25 W.R. 691, D.C.; 30 Digest (Repl.) 111, *808.*

Also referred to in argument:

Redgate v. *Haynes* (1876), 1 Q.B.D. 89; 45 L.J.M.C. 65; 33 L.T. 779; 41 J.P. 86, D.C.; 25 Digest (Repl.) 460, *346.*

Rule Nisi for a certiorari to quash a conviction of the applicant under s. 12 of the Licensing Act, 1872.

The applicant for the rule, Albert Lacey, was summoned at a court of summary jurisdiction, held on Jan. 9, 1897, at Ongar, Essex, on a charge of being found drunk on licensed premises, namely, the Bell Inn, Chipping Ongar, contrary to s. 12 of the Licensing Act, 1872, and he was convicted and fined 5s. and costs. The applicant had gone into the Bell Inn on the evening of Sunday, Dec. 20, 1896. He did not leave at closing time, which was ten o'clock, when the other customers left. A police constable, who was on duty near the Bell Inn, suspecting that all the customers had not left the house, gained admittance to the premises at about 10.15 p.m., and in the private bar he found the applicant drunk and leaning across the counter talking to the landlord. On the constable asking why the applicant was there at that time, both the landlord and the applicant stated that the applicant had engaged and paid for a bed at the inn for that night, and that, therefore, he was a lodger. The justices disbelieved the evidence that the applicant had engaged a bed at the inn for that night. They found as facts that the applicant was not a lodger or inmate at or in the Bell Inn, and was not intending to sleep there that night; that when the constable gained admittance during the closing hours the applicant was there and was drunk on the licensed premises. They convicted the applicant of being found drunk on licensed premises, contrary to s. 12 of the Licensing Act, 1872. A rule nisi for a certiorari to quash the conviction was obtained by the applicant on the ground that "licensed premises" in s. 12 of the Licensing Act, 1872, meant premises which were open to the public and before closing time, and that, as the applicant was found on the premises during closing hours, he was not on "licensed premises" within the meaning of s. 12.

J. C. Earle, for the justices, showed cause.

John Ogle in support of the rule.

HAWKINS, J.—I am of opinion that this rule ought to be discharged. The conviction which is sought to be quashed is a conviction under s. 12 of the Licensing Act, 1872, which says that a person who is "found drunk . . . on any licensed premises, shall be liable to a penalty not exceeding ten shillings." [HIS LORDSHIP continued:] The applicant was found drunk on these licensed premises, and there is no reason to suppose that he did not go there for the purpose of drinking or using these premises as licensed premises; and, unless there was some lawful excuse for his being there, the landlord of the premises would be answerable for his being there in such a condition, and, indeed, for his being there at all; consequently the landlord gave an excuse which was found by the justices to be absolutely untrue. Ten o'clock was the closing hour for this house, and it is said that, if a man is found drunk on the premises ten minutes before ten o'clock, he would have been liable to the penalty under s. 12; but that, if he remained after ten o'clock for the purpose of getting sober or getting more liquor, as the case may be, then, after closing hour, he could not be fined.

In order to support that contention, *Lester* v. *Torrens* (1) was quoted. I may say, with regard to the decision in that case, that I absolutely agree with it, as that was a charge brought against the occupier of the licensed premises himself, and the charge had reference to his being found drunk in his own house when the house was absolutely clear to customers, the day's work over, and the house actually closed to the public; the landlord lived on the premises, and it was his private dwelling-house. The court said that the meaning of s. 12 of the Act of 1872 could not be that a man, under such circumstances, would be liable to a penalty under the section, and, in my judgment, it would be very unreasonable to construe the section in any other way. He was a private individual in his own house, doing that which every man may do in his own house. Here, it is perfectly true that the applicant went into this licensed house for the purpose of getting drink, and was found drunk there after closing hours, being neither the landlord, nor a lodger,

nor an inmate of the house. He was, to my mind, found drunk on licensed premises, within the meaning of s. 12; and, in my opinion, this construction of the section is fortified by s. 25 [repealed], which imposes a penalty not exceeding 40s. on any person found without lawful excuse on premises during any period during which the premises are required to be closed. According to that section, if, during any period during which the premises are required to be closed, any person is found on them without reasonable excuse, such person is to be liable to a penalty of 40s. If he had been found sober on the premises during closing hours he would, under s. 25, be liable to a penalty of 40s., but if found drunk on the premises during closing hours he would, if the applicant's contention be correct, be liable to no penalty at all. I think that, if a man goes in and uses a licensed house and gets drunk in it, and remains in the house when he has no right to be there—a house, in fact, which he has no excuse at all for entering, except to use it as a licensed house—he is liable to be convicted under s. 12. I think, therefore, that the justices were right, and that this rule ought to be discharged.

LAWRANCE, J.—I am entirely of the same opinion. *Lester* v. *Torrens* (1) does not apply to such a case as this; and, in fact, if it were not for the judgment of MELLOR, J., in that case, there would be no ground at all in support of the applicant's contention here. But even in the judgment of MELLOR, J., there is an expression which is rather in support of this conviction than otherwise, because he says that the house was closed and "everybody excluded but the inmates." The facts here are entirely different, and thinking, as I do, that *Lester* v. *Torrens* (1) is rather an authority in support of this conviction, I think that this rule must be discharged.

Rule discharged.

Solicitors: *Haynes & Clifton*, Romford and London; *Beaumont, Son & Rigden*, for *Charles Smith*, Ongar.

[*Reported by* W. W. ORR, ESQ., *Barrister-at-Law.*]

Re CHAPMAN. COCKS *v.* CHAPMAN

[COURT OF APPEAL (Lindley, Lopes and Rigby, L.JJ.), July 6, 20, 21, August 7, 1896]

[Reported [1896] 2 Ch. 763; 65 L.J.Ch. 892; 75 L.T. 196; 45 W.R. 67; 12 T.L.R. 625; 40 Sol. Jo. 715]

Trust—Investment—Retention of authorised investments—Liability of trustee—Depreciation in value—Error of judgment—Mortgage—Duty to realise within twelve months of testator's death—Realisation not required for testamentary purposes or on ground of prudence.

There is no rule of law that a trustee is liable to make good loss sustained by retaining an authorised security in a falling market, if he retained the security honestly and prudently in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly with ordinary prudence, and within the limits of their trust, are not liable for mere errors of judgment. Wilful default, which includes want of ordinary prudence, must be proved in order to make them liable.

Where a will authorises investment on mortgage of real property, there is no duty on executors and trustees to realise mortgages, forming part of the testator's estate at his death, within 12 months of the death, where realisation is not required for any testamentary purpose and where the securities are not so insecure that trustees acting with ordinary prudence ought to realise them.

Notes. Considered: *Jackson* v. *Dickinson*, [1903] 1 Ch. 947; *Rawthorne* v. *Rowley* (1907), 78 L.J.Ch. 235, n. Referred to: *Re Roberts*, *Knight* v. *Roberts* (1897), 76 L.T. 479; *Shaw* v. *Cates*, [1909] 1 Ch. 389.

As to retainer of investments by trustees, see 38 HALSBURY'S LAWS (3rd Edn.) 1009; and for cases see 43 DIGEST 947-948. As to errors of judgment by trustees, see 16 HALSBURY'S LAWS (3rd Edn.) 297-298 and 38 HALSBURY'S LAWS (3rd Edn.) 1041; and for cases see 23 DIGEST (Repl.) 327 and 43 DIGEST 997.

Cases referred to:

(1) *Re Whiteley*, *Whiteley* v. *Learoyd* (1886), 33 Ch.D. 347; 55 L.J.Ch. 864; 55 L.T. 564; 51 J.P. 100; 2 T.L.R. 864, C.A.; affirmed sub nom. *Learoyd* v. *Whiteley* (1887), 12 App. Cas. 727; 57 L.J.Ch. 390; 58 L.T. 93; 36 W.R. 721; 3 T.L.R. 813, H.L.; 43 Digest 856, *3038*.

(2) *Orr* v. *Newton* (1791), 2 Cox, Eq. Cas. 274; 30 E.R. 127, P.C.; 23 Digest (Repl.) 44, *311*.

(3) *Re Medland*, *Eland* v. *Medland* (1889), 41 Ch.D. 476; 60 L.T. 781; 5 T.L.R. 354; on appeal, 41 Ch.D. 483, C.A.; 43 Digest 932, *3695*.

(4) *Buxton* v. *Buxton* (1835), 1 My. & Cr. 80; 40 E.R. 307; 23 Digest (Repl.) 324, *3923*.

(5) *Marsden* v. *Kent* (1877), 5 Ch.D. 598; 46 L.J.Ch. 497; 37 L.T. 49; 25 W.R. 522, C.A.; 23 Digest (Repl.) 325, *3929*.

(6) *Re Speight*, *Speight* v. *Gaunt* (1883), 22 Ch.D. 727; 52 L.J.Ch. 503; 48 L.T. 279; 31 W.R. 401, C.A.; affirmed sub nom. *Speight* v. *Gaunt* (1883), 9 App. Cas. 1; 53 L.J.Ch. 419; 50 L.T. 330; 48 J.P. 84; 32 W.R. 435, H.L.; 43 Digest 887, *3300*.

(7) *Ames* v. *Parkinson* (1844), 7 Beav. 379; 3 L.T.O.S. 199; 49 E.R. 1111; 43 Digest 950, *3896*.

Also referred to in argument:

Re Brogden, *Billing* v. *Brogden* (1883), 38 Ch.D. 546; 59 L.T. 650; 37 W.R. 84; 4 T.L.R. 521, C.A.; 43 Digest 969, *4089*.

Appeal from a decision of KEKEWICH, J., reported [1896] 1 Ch. 323.

By his will, dated July 15, 1871, James Chapman, of Mundford, Norfolk, appointed his daughter, Martha Ann Chapman ("Martha"), Henry Chapman, and James Rollinson his executors and trustees, and gave them his real and personal estate on trust for Martha during her life, with remainder to her children on attaining twenty-one years, the children of any child dying under twenty-one being entitled at the age of twenty-one to the share of the child so dying; in default of such issue the testator, after bequeathing certain legacies, gave the residue of his personal estate equally between his nephews and nieces, the sons and daughters of his two deceased sisters, Mary Green Cocks and Sarah Tyrrell, share and share alike, when and as they should attain twenty-one years, the children of any child dying under twenty-one being entitled at the age of twenty-one to the share of the child so dying. The testator directed his executors to invest such of the trust moneys under his will as were not thereinbefore directed to be invested, on "good real or government security" at interest, with full power at any time to alter and vary any of the investments directed by his will to be made, and to re-invest the trust moneys on like securities without being answerable or accountable for any loss occasioned thereby. He declared that each of his executors should be answerable and accountable only for so much of the trust moneys under his will as he or she should actually receive, and each of them for her and his own separate acts, deeds, and deficiencies

and defaults only, and not the one for the other or others of them; and he gave his executors all hereditaments vested in him on any trust or by way of mortgage, to the intent that they might be better enabled to get in, receive, and discharge all the trust estates and moneys secured by way of mortgage. The testator died on July 28, 1880.

At the time of his death the greater part of the testator's residuary personal estate consisted of large sums of money invested in several mortgages of agricultural properties in Norfolk and Suffolk, all the investments having been made by the testator in his lifetime, and at a time when the mortgaged lands were a sufficient security for the sums advanced. The first mortgage was by one Heading for £10,000, and was on a farm in Norfolk of 242 acres, which was bought for £15,504; it was therefore for less than two-thirds. The property was let in 1877 for £550, and was so let when the testator died. Afterwards, in consequence of the fall in the value of property of that character, it was let by the trustees in 1885 for £350, again in 1889 for £267, and later for £151. The lease on which it was let originally expired in 1885, and the mortgagor then was apparently in trouble. His brother, who had a bill of sale over the property, waived it. Nothing substantial could have been obtained at that time, and the trustees retained the security. Foreclosure was suggested rather than taking possession, and an action for arrears of interest was suggested, but no one thought that it would be fruitful. There was a suggestion about selling timber but it was advised against. Some other creditors, Gurney's Bank, realised a security which they had and partly thus and partly by proving against the estate they obtained 10s. in the pound, thus losing half their money. Another mortgagee of some of the property tried to sell his security, but failed. No professional valuer was consulted about what was best to be done with the mortgage.

The next mortgage was considerable. The property mortgaged was bought for £8,500 and mortgaged for £5,500 to the testator by one Boldero. The mortgagor was in possession, and in 1885 he died insolvent; notice was given calling in the money, but it was withdrawn because the money could not be obtained. There was considerable correspondence between the solicitors on both sides and it was obvious that the mortgagor could not pay. A new tenant was found at £160 tithe free. The trustees considered selling the property but decided against it; the evidence showed that it would have been impossible. Again, no professional valuer was consulted.

The next mortgage was for £6,000 and there was no reason to suppose that any loss would be sustained in respect of it; it was on a property of 210 acres which was bought for £8,200, the enfranchisement costing £400, thus raising the purchase money to £8,600. This mortgage was for rather less than two-thirds; the interest was always paid. Then there was a group of four mortgages, Aves's mortgages. Aves had executed a creditor's deed in 1888 when there was £100 due for arrears of interest, and one Robins who was consulted advised that the security was good at the time; the property was valued for proof at £1,390 but a claim was made for depreciation of £294. There was a dispute, and the security was ultimately retained, and there was proof for £100 deficiency. It was not considered worthwhile, by those advising the then trustees, to force a bankruptcy as it would not be fruitful. Again, there was no professional valuer, but Robins, a businessman, thought that the security was good. There were some other mortgages which were unimportant.

The testator regarded Henry Chapman as a man of considerable judgment. An affidavit stated that he had great experience; that he always expected that land would not go on sinking in value, and he was always against an immediate sale. One Banham, an auctioneer and estate agent, stated that both Chapmans, the testator and his brother, were injudicious, and were in the habit of advancing more money than Banham thought advisable. Banham said that the mortgages ought to have been realised many years ago. James Rollinson died on April 5, 1889, and Henry Chapman on June 11, 1891, leaving Martha the sole surviving executor and trustee of the will. John Cocks, the only child of the testator's deceased sister,

Mary Green Cocks, who was entitled, subject to Martha's life interest, to a reversionary interest in one moiety of the estate, mortgaged it to Sydney Cozens-Hardy, who ultimately in November, 1892, purchased from him one-third part of the moiety.

On Dec. 21, 1892, Martha and the executors of the will of Henry Chapman received from Sydney Cozens-Hardy a notice stating that the trustees of the will of James Chapman were guilty of a breach of trust in not forthwith after his death investing the trust funds in securities authorised by the will or by the general law and requiring them to invest the funds accordingly. On Mar. 20, 1893, the executors of the will of Henry Chapman took out an originating summons against Martha and Sydney Cozens-Hardy, to ascertain whether the estates of Henry Chapman or Martha, or either of them, ought to make good any deficiencies arising on any of the mortgages and if necessary for administration of the personal estates of James and Henry Chapman. On the hearing of the summons on Aug. 7, 1893, an order was made directing various inquiries as to the mortgage securities. The plaintiffs admitted assets of their testator Henry Chapman. Martha was in possession by her tenants of all the lands comprised in the mortgage securities, except the lands comprised in two mortgages which remained in the occupation of the mortgagors. The chief clerk, by his certificate dated July 3, 1895, certified that the whole of the outstanding mortgage securities had been improperly allowed to remain outstanding, and ought to have been called in within twelve months from the death of James Chapman, but he reserved for the court the question raised by the plaintiffs and Martha whether the trustees, having regard to s. 4 of the Trustee Act, 1893, Amendment Act, 1894, were liable for any breach of trust by reason of their having continued to hold the outstanding mortgage securities as investments authorised by the will.

On Dec. 17, 1895, KEKEWICH, J., decided that s. 4 of the Act of 1894 had no retrospective operation so as to exempt the trustees from liability for a breach of trust committed before the passing of the Act in retaining an investment and that consequently the plaintiffs, as the executors of Henry Chapman, and the defendant Martha, were liable jointly and severally to make good to the trust estate the deficiency on the mortgage securities.

The defendant Martha and the plaintiffs appealed and subsequently, by leave of the Court of Appeal, the defendant issued a summons to vary the chief clerk's certificate, and a similar summons was issued by the plaintiffs. At the hearing in the Court of Appeal witnesses were cross-examined.

Swinfen Eady, Q.C., and *E. C. Macnaghten* for Martha Ann Chapman.
Warrington, Q.C., and *Gatey* for the executors of Henry Chapman.
Warmington, Q.C., and *Micklem* for Sydney Cozens-Hardy.

Cur. adv. vult.

Aug. 7, 1896. **LINDLEY, L.J.**, stated the facts substantially as set out above, and continued: We have the whole matter before us, and the question is what ought the decision of the court to be respecting these mortgage securities. It is necessary to observe that the mortgage securities were proper securities under the will of the testator. That is, of course, all important. The mortgage securities were very considerable, and every one of them was created by the testator himself. [HIS LORDSHIP stated the facts concerning the mortgages, and continued:] The evidence before us satisfies me that more trouble was taken to consider and determine what ought to be done than might be inferred from the affidavits alone. It is true that the trustees did not consult professional surveyors or valuers, but there was nothing special in the nature of the property as there was in *Learoyd* v. *Whiteley* (1) to render the assistance of an expert really necessary for the guidance of a prudent man. A man need not be a professional surveyor or valuer to form a trustworthy opinion of the value of ordinary agricultural land; and the law is not so stringent as to compel us to say that the trustees were guilty of a dereliction of duty in not seeking advice from such persons. Henry Chapman, the acting trustee, was himself well acquainted

with land and its value, and the testator thought well of him and trusted his judgment. He had no personal interest to serve in not doing the best for the trust estate. When he felt that he wanted further advice he consulted the two Carters, Robins, and one Francis, all men of good judgment and experience. Mr. Francis was a solicitor in Norwich, and he told us what I entirely believe—that for some years after the testator's death Henry Chapman's opinion and the general opinion in Norfolk was, that the fall in value of land would be temporary only; that its value would improve; and that it was unwise for mortgagees to attempt to realise their securities.

These, however, are merely general observations, and it is necessary to examine more closely what the duties of the trustees were at various periods, and to ascertain whether and in what respects there was any failure to discharge those duties. The same persons being executors and trustees, it will be convenient to consider their duties, first, as executors, and, secondly, as trustees, as if the same persons did not fill both characters. Under such a will as this the duty of the executors was simply to call in the testator's unsecured debts and to convert into money so much of his personal estate as was necessary to enable them to pay his funeral and testamentary expenses and his debts and pecuniary legacies, and to hand over to the trustees whatever personal estate was not wanted for those purposes. No doubt, speaking generally, it is the duty of executors to get in debts due to their testator. But it was no part of the duty of the executors as such to realise mortgage securities of their testator not wanted for the above-mentioned purposes (see *Orr* v. *Newton* (2), which contains some useful observations upon that point), and the executors were not, as executors, guilty of any devastavit in not realising such securities. The duties of the trustees have to be considered first with reference to their acceptance of these mortgages from the executors in the first instance; secondly, with reference to their retention of the mortgages up to the present time.

As regards the acceptance of the mortgages from the executors in the first instance, or, in this case, the retention of the mortgages as part of the trust estate at the end, say, of a year from the death of the testator, it must be borne in mind that investments on mortgage were authorised by the will. The trustees had to consider not whether they should invest money on a particular security, but whether they ought to get rid of a security of a kind upon which they were authorised to invest money. These two considerations are by no means practically the same. Confining myself at present to the end of a year after the testator's death, what the trustees had then to consider was whether they ought to refuse to keep these mortgages as part of the trust estate. Most of the mortgages were for two-thirds of the prices paid for the lands, some were for less. But, as pointed out in *Re Medland* (3) (41 Ch.D. at p. 481), the retention of such a mortgage is not necessarily a breach of trust.

Having regard to the evidence in this case, I am not prepared to hold that there was any breach of trust in not realising the securities by calling in the mortgage debts, or by proceeding to sell or foreclose in 1881 or 1882. In July, 1881, no one foresaw that the value of land would deteriorate more and more, as we now know that it has, and to have called in Heading's, Boldero's, Francis's, or even Aves's mortgages at that time would have been to do what no competent person would seriously have advised the trustees to do. No witness says that in July, 1881, or shortly afterwards, the testator's mortgage securities were so insecure as that the trustees acting with reasonable prudence ought to have called them in. Banham (who was an auctioneer and valuer, and gave evidence on behalf of Cozens-Hardy) no doubt says that if called in shortly after the testator's death there would have been no loss; but that is quite another matter. The chief clerk has found that these mortgages ought to have been got in or realised in July, 1881. I cannot adopt that view. The evidence is entirely the other way as to all the important mortgages. There may be some doubt about some of the smaller ones. But, as regards those which are of any importance, it would, in my opinion, be wrong to hold that the trustees com-

A mitted a breach of trust in retaining the testator's mortgages in the first instance as part of his trust estate.

But the mortgages are still unrealised, and it is now unfortunately true that, with one or two exceptions they cannot be realised except at a great loss, and the real question is whether the trustees are liable for this loss. A mortgage security is unlike an ordinary investment, inasmuch as it consists of a debt which can be B enforced by action, and also of a security which can be realised by sale or foreclosure. A trustee of a mortgage security is, therefore, liable for loss sustained by his wilful default in not obtaining payment in either of these ways. But a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong. We have to deal here with authorised trust investments, and this must never be lost sight of. C Everything turns upon it. Bearing this point in mind, and bearing also in mind that we have to deal with honest trustees placed in great difficulties by the constant fall in the value of land, what is it that they have done wrong?

First, it is said that they ought long ago to have called upon the mortgagors for payment. But so long as the land was a satisfactory security the trustees committed no breach of duty in not calling in the money; and when the land ceased to D be a satisfactory security the mortgagors were themselves in such difficulties that nothing could be got from them. Moreover, the mortgagors for the large sums were farmers and could not have paid off or materially reduced the mortgage debts and have kept on their farms. To have pressed them would have been to throw the farms on the hands of the trustees, and this certainly would not have been for the benefit of the trust estate. What could the trustees have done? They might have given E up their securities and have proved for their debts; or they might have sold or valued their securities and proved for the difference; or they might have held aloof and retained their securities. The trustees adopted the last course, not hastily nor without consideration and advice, but after advice. Mr. Francis now says it was, in his opinion, the best course they could have taken. No one says the contrary, for Banham refers to a time when the mortgagors were still solvent. I cannot say F that the trustees were guilty of such imprudence as to render them liable for the consequences of adopting the course they did.

Then it is said that the trustees ought to have realised the securities; but how? Foreclosure would have cost money and would have benefited no one. The trustees have the mortgaged lands now and nothing has been lost by not foreclosing. On the other hand, the expenses of foreclosing have been saved to the trust estate. The G only other mode of realising would have been by sale. But not a single person is called to say that it would have been a prudent or judicious step to try and sell. On the other hand, there is evidence that it would not, and it is clear that, unless the mortgaged property had been sold whilst the securities were good, sales, even if effected at all, would have resulted in serious loss. There is no rule of law which H compels the court to hold that an honest trustee is liable to make good loss sustained by retaining an authorised security in a falling market, if he did so honestly and prudently in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly with ordinary prudence and within the limits of their trust are not liable for mere errors of judgment. Any loss sustained by the trust estate under such circumstances falls upon and must be borne by the owners of the I property—i.e., the cestuis que trust—and cannot be thrown by them on their trustees, who have done no wrong, though the result may prove that they possibly might have done better. *Learoyd* v. *Whiteley* (1) is a clear authority to this effect; so are *Buxton* v. *Buxton* (4) and *Marsden* v. *Kent* (5). The case is an important one not only to the trustees of this particular will, but to trustees of mortgages generally. Owing to the great fall in the value of agricultural land, trustees of mortgage securities have been placed in a position of great difficulty. To throw on the trustees the loss sustained by the fall in value of securities authorised by the trust, wilful default, which includes want of ordinary prudence on the part of the

trustees, must be proved; but it is not proved in this case. In my opinion wilful default is disproved in all the important instances, and is not proved in the doubtful ones. The appeal must be allowed.

[His Lordship ordered that there should be one order on both summonses and both appeals, striking out from the certificate the finding that the mortgage securities were improperly retained; and varying the order of the court below by striking out the declaration of liability and the consequential directions and substituting a declaration that the trustees of James Chapman's will were not liable. No order as to the costs of the summonses and appeals.]

LOPES, L.J.—In this case it is sought to throw upon trustees under the will of James Chapman, trustees who are also his executors, a loss in the value of certain mortgage securities occasioned by the depreciation in the value of land. The case is a most important one, and, having regard to the gradual and persistent depression of the agricultural industry in this country, most intimately concerns the position of a large body of persons who have incurred the responsibility of trustees. The testator, James Chapman, died in July, 1880. The securities in question were authorised by the trust, and were all created during the life of the testator (a man who had largely invested in real securities, and had acquired much experience as to their desirability) and were at the time of their creation respectively of sufficient value to justify the mortgage debts secured by them. The facts of the case, so far as necessary, have been fully stated. I propose to deal with the case only so far as concerns the liability of the trustees.

In 1879 the depression in the value of land, caused by the importation into this country of foreign produce, began first to be sensibly felt; a series of bad seasons followed, the season of 1879 being probably the worst of all. This depression, though it has fluctuated at times, has gradually continued. Expectation, however, of improved times has never, in the minds of those most competent to judge, become extinct. I unhesitatingly say that it would have been considered unwise until quite recently, when each succeeding year had rendered the future less hopeful, to have realised real securities, such as mortgages, when that realisation would of necessity have been attended with a heavy loss. It is very easy to be wise after the event; but, in order to exercise a fair judgment with regard to the conduct of trustees at a particular time, one must place oneself in the position they occupied at that time, and determine for oneself what, having regard to the opinion prevalent at that time, would have been considered the prudent course for them to have adopted. As I have said, the trustees and executors were the same persons, and it was faintly urged that they, as executors, ought to have realised these real securities at the end of a year after the testator's death. That is easily disposed of. It cannot be seriously contended that it was the duty of the executors to realise mortgages created by the testator himself when their realisation was not required for any testamentary purpose, and when the securities themselves were not in any peril.

I will now state what I believe to be the law applicable to trustees circumstanced like the trustees in the present case. A trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorised, but depreciated in value, should be retained or realised, provided he acts with reasonable care, prudence, and circumspection. The liability of trustees should not, in my judgment, be extended. What was said by Sir George Jessel, M.R., in *Re Speight, Speight v. Gaunt* (6) is very applicable to this case. He says (22 Ch.D. at p. 746):

> "I think it is the duty of the court in these cases, where there is a question of nicety as to construction or otherwise, to lean to the side of the honest trustee and not to be anxious to find fine and extraordinary reasons to fix him with any liability upon the contract. You are to endeavour, as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people

A from whom he receives no benefit. I think that is the view which has been taken by modern judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation. It appears to me that the Vice-Chancellor has adopted an entirely different view. I think he has inferred that which is not fairly to be inferred in this case; and even if he were right it could only be inferred by taking one of two views, and we ought not to take the B adverse view if the other view being equally as good can be adopted."

Re Medland (3) and *Learoyd* v. *Whiteley* (1) are also important cases on this subject. Adopting my formula, have the trustees in this case sinned against it?

In 1881 they take the mortgages from the executors, and most certainly would not have been justified in realising them—mortgages created by the testator, authorised by the trust, and at that time in no possible jeopardy. But they retained them. C What was the state of things in 1881? No one could anticipate what was about to happen; it was not a question of value, it was a question of the prospects of the landed interest. Those prospects depended on an infinite variety of circumstances, the happening and effect of which no one but a prophet could foresee. The trustees admittedly were honest; admittedly they were competent. It is said they ought to have consulted valuers. I do not believe any valuer could have given any advice D which would have assisted them. Valuers could have ascertained the then value of the land, but with regard to the prospects of land, or of its ultimate recovery, absolute or partial, they were powerless to express an opinion. I doubt much whether the opinion of a practical farmer, cultivating his own land, was not preferable to that of any ordinary expert. Henry Chapman was a practical farmer and well acquainted with land, and able, therefore, to form an opinion as to future E prospects. Mr. Francis said, in answer to me in the witness-box, that the preponderance of opinion in the county was in favour of retaining mortgage securities rather than of realising them; and no evidence was adduced to rebut that statement.

But it is said the largest mortgagors were unable to pay the interest due on the mortgages, and that then the trustees ought to have adopted means to realise F the debts. This, no doubt, is the strongest point made against the trustees, and involves considerations which require careful examination. The trustees might have brought an action on the covenants; they might have exercised the powers of sale contained in the mortgage deeds; or they might have foreclosed. And if any of these remedies could be shown to have been imprudently neglected by the trustees, and thereby loss to the trust estate caused, they would be liable for G wilful default. But the answer is, that it would not have been wise as things then stood to have pressed any of these remedies. So long as the land afforded a sufficient security it would clearly have been unwise to precipitate events which there was reasonable ground for believing never would have happened. And even in the case of the smaller mortgages it would be difficult to say that, having regard to the general opinion then prevalent, it was unwise to wait for better times, when H it was clear that taking proceedings would in all probability have placed the land in the hands of the trustees for them to cultivate without any available capital, and would have eventuated in a sale at a ruinously low price.

When it was apprehended that the securities were insufficient, the trustees were placed in a most difficult position. I do not believe anything substantial would have been obtained from the mortgagors if actions had been brought on the I covenants; and if those mortgagors who were farming the lands, the subject-matter of the mortgages, had been pressed, the probability is that they would have been compelled to give up their farms, or at any rate, for want of capital, to cultivate them in such a way as to make them unremunerative; and in this case the farms would have been thrown on the hands of the trustees, who would have had to find new tenants or to have cultivated the lands themselves, and have found capital for so doing. The same answer may be made to the suggestion that the trustees ought to have foreclosed. Clearly this would not have been desirable, nor do I think giving up their securities and proving for their debts, or selling or

valuing their securities and proving for the difference, would have benefited the trust estate. The only other course was to retain the mortgages as they have done. I am unable to say this was unwise or amounts to a breach of trust, having regard to the very peculiar circumstances in which the trustees were placed, bearing in mind that the securities were authorised securities, and that nobody could with any degree of certainty anticipate the contingencies to which land was subject or form any reliable opinion as to its future. There is evidence, and I believe it, to show that the better-received opinion was that it was advisable to retain mortgage securities like these in hopes of better times. I cannot find that the trustees committed in these circumstances any breach of trust or made wilful default. I think the appeal should be allowed.

RIGBY, L.J.—I agree that this appeal ought to be allowed, and I agree in the form of order that has been proposed by LINDLEY, L.J. [HIS LORDSHIP expressed regret that the question had been dealt with on an originating summons by proceedings in chambers, and continued:] I am bound to say that at the very first sight of the chief clerk's certificate I had a very strong impression that it must be wrong; because we find all the numerous mortgages dealt with in one paragraph, which treats it apparently as a matter of law that the securities ought to have been called in within twelve months after the testator's death, and fixing the responsibility of the trustees as from that date. Certainly there is no such rule of law; and when we look at the schedule to the certificate we find that these mortgages differ in their circumstances pretty nearly as much as mortgages could differ one from the other. It seemed to me next to an impossibility that that finding in the chief clerk's certificate could in point of law be correct. However, we could not proceed without having some evidence before us. The court, therefore, decided, in the very special circumstances of the case, that, notwithstanding the irregularity, or by reason of the irregularity, of the earlier proceedings—for which, as I have said, Cozens-Hardy was not responsible—and notwithstanding the time that had expired, justice required that liberty should be given to issue a summons to vary the certificate, the effect being of course to let in the evidence which had been read before the chief clerk. And at Mr. Warmington's very reasonable suggestion he was allowed to cross-examine in court Miss Chapman herself, and Mr. Francis, the solicitor who had had a good deal to do with these matters.

I think that the misconception in this case has arisen altogether from confounding two totally different questions: the one, what is the duty of trustees who have money in their possession for investment; the other, what is the duty of trustees with respect to investments for which they are not primarily liable, and which in the exercise of their discretion they have chosen not to call in? The two things, I repeat, are totally different. In the one case you have the money safe and capable of being invested in securities which would incur no risk at all; I mean no risk that the court can anticipate, and no liability on the part of the trustees. And it is not important to add that, for any investigation into the value of the property, for any fees payable to experts, trustees can (and do as a matter of fact) throw those expenses upon the intended mortgagor. Therefore, a proper investigation can be made without throwing any expense upon the estate. If in these circumstances trustees choose to disregard the well-known general rules of the court—including the rule which is the most material for the present purpose, that they are not to invest in agricultural land to an amount exceeding two-thirds of its value—they are incurring a risk with their eyes open, and which is altogether the consequence of their own acts. The case is entirely different when you have to deal with existing securities. So far as I know, the court has never laid down that, even with regard to risky securities, such as Turkish bonds for instance or shares in an unlimited company, there is an absolute unvarying obligation on executors or trustees to get them in within the twelve months regardless of the opinion the trustees may have as to the prudence or the advisability of doing so. Of the cases

cited by LINDLEY, L.J., I may mention *Buxton* v. *Buxton* (4), and *Marsden* v. *Kent* (5), which show that there is no such rule, and that the court has never been so unreasonable as to say to a trustee: "There is a fixed and binding rule; you have not acted upon it as you thought for the benefit of the estate; things have turned out unfortunately and you must pay the loss."

There being no such rule, what is the duty of trustees who get possession of an estate where there are mortgage securities? Of course, if on the face of things they appear to be good mortgage securities, certainly there is no obligation on them to call in those securities. It would be very idle to do so for the purpose of investing in other securities perhaps not more advantageous to the estate. At any rate the rule, as I have already remarked, does not exist. What have they to do? They are to act honestly. Here there is no kind of doubt but that the trustees acted honestly. One of them, Miss Chapman, was tenant for life of the testator's property. Her interest as well as that of the other persons who were residuary legatees was to have the property safe. Trustees must act prudently as a prudent man acting prudently would do with regard to his own affairs.

Let us consider the state of things as to these mortgages. The principal mortgages are Heading's mortgage for altogether £10,000 and Boldero's for £5,500; and for other reasons I shall have to consider Aves's mortgages—four of them altogether. I do not remember that any case was made out as to any other of the mortgages. They were thrown in as a make-weight, but certainly no such case has been made out by the evidence brought to our attention as would induce us with respect to those to make an adverse order on the trustees. Take the Heading mortgage, the £10,000 mortgage. It is shown that when the testator advanced the money upon that mortgage he did it within the two-thirds limit. There may be some question, I dare say, whether that two-thirds limit was not slightly exceeded at the end of twelve months after his death. But under what circumstances had that deficiency, if there were one, arisen? In this country as in others, real property had been going up in value by leaps and bounds. In England, indeed, it had been increasing in value for some uncertain period; Mr. Francis fixes the high-water mark at between 1871 and 1874. The value had gone up for so long a period, as we all know, that it had come to be considered as part of the law of nature that real property must in our state of society and of civilisation continue to advance.

Then came what upon the evidence seems to have been taken as a period of temporary depression. The year 1879, a twelvemonth before the testator's death, was one of the worst seasons that had been known, which, of course, would have a temporary effect upon the value of property. No one, as I judge from the evidence —and I have no doubt that that evidence is in accordance with what we all know to be the fact, but I go on the evidence alone—supposed that there was to be a further deterioration in the value of property. Everyone in this country apparently thought that by waiting a little the old order of things would return and that property would come back to its former value, or rather that it might be reasonably expected to go far beyond, according to experience at that time. As regards these mortgages, at any rate, nothing was done.

Taking the £10,000 mortgage, the property was then let to a tenant at £550 a year; a rent in itself which was a good deal more than sufficient to pay the interest on the mortgage. Did the trustees act otherwise than as a man acting prudently in his own affairs would have acted in taking no steps respecting that mortgage? I cannot say that they did not. I think that they did act as almost every prudent man would have acted at that time. It is suggested, and, of course, has to be considered, that they ought then to have got a valuer to put a value on the property, and to have called on Heading to reduce the capital amount due on the mortgage to such a point that it would not then exceed two-thirds of the real value. I think that that is a rule far too strict to impose for the first time on trustees, and I find no authority for saying that that is their duty. To value land is an expensive matter. It is a certain loss, to provide against a quite un-

certain danger, which prudent men at the time thought would take care of itself by reason of the anticipated recovery in the value of land. A

So matters went on until 1885, and before 1885 Heading, the mortgagor, appears to have fallen somewhat in arrear with his interest notwithstanding that he was receiving the rent of £550 a year. He was pressed, as we know now, with his own affairs, and he fell in some arrear as to the interest. Who was Heading? He was a farmer, not occupying this farm, but occupying another important farm, as I gather, in the same part of the county. The trustees had no reason to suppose that he was anything but an honest man, and if he could not keep down the interest, what was the chance of their succeeding in getting him to pay off any part of the capital? What would have been the probable result of pressing him? I think that the probable, if not the certain, result would have been that his difficulties would have increased; he would have been obliged to become bankrupt, and the trustees would have had the danger of having to value their security under circumstances of very great difficulty. Of course, if they had valued it too high, it would have been left on their hands. If they had valued it too low, it would not have repaid them the amount of their investment, and they would have lost their security. I think that there is a reasonable ground for supposing that any personal proceedings against Heading would have resulted in a loss, or, at any rate, would have appeared at the time (and that is the real point) as most likely to result in a loss, rather than a benefit to the estate. B C D

As I understand the authorities, they have never gone so far as to lay down that you must prove absolutely that proceedings taken under such circumstances would not have resulted in bringing back the money belonging to the estate, but that you must show that there was such reasonable ground for thinking that they would not; and that a prudent man acting prudently would not have taken the course which was taken by these trustees. As regards that mortgage, I really do not think that there is any ground whatsoever for saying that there was a breach of trust down to the time of Heading's difficulties in 1885. From that time we know unfortunately that the position of things had changed so much to the disadvantage of the estate that the securities were altogether insufficient to pay off the debts. Mr. Francis says, speaking generally about these matters, that real property was selling so badly that everyone would have thought it absurd to offer it for sale. I do not see why we should not take that evidence as good evidence. He is not an expert in the value of land, but he is a man thoroughly conversant with landed property in that part of the country from his position as a solicitor; and that evidence is evidence of great value in favour of the trustees. E F G

I will not go through the other cases with the same amount of detail. As regards Boldero's mortgage there no doubt was a 5 per cent. security instead of a 4 per cent. That points a little to the security not being of the full value, but rather more to the fact that the mortgagor was not in a position to go into the market and give the best security possible. He was in occupation of the mortgaged farm, and the trustees had to consider whether they would take the strong step of proceeding against him personally with the result that he probably—I do not say certainly, and it is not necessary to prove certainty—would have had to give up the occupation of the farm. We have to consider whether a prudent man acting prudently would have done that in his own case. I do not think that he would. I think that he would have said: "I had better let Boldero have the advantage of the good time which is likely to come; I had better allow him to remain there, and not turn him out of the estate with the strong probability that I shall get no other tenant, and that I shall be obliged either to sell the property on disastrous terms without a tenant, or to undertake the cultivation myself." I do not, I repeat, think that a prudent man would have done that. H I

With regard to Aves's mortgage, I think that the evidence shows that the subject was very carefully considered by Henry Chapman. Miss Chapman no doubt trusted a great deal to Henry Chapman, and she might unfortunately have been made

liable if he had done anything that was altogether wrong. But he seems then to have gone into the matter very carefully indeed, and to have come to the conclusion, on what I must say were, to my mind, reasonable grounds, that it was far better not to run the risk of having the property taken away at such valuation as was the only reasonable one to make then, but to hold on to it. I cannot see that in any other case there was anything done that was not according to the lights and according to the knowledge of the time, or done in a way that was imprudent, unduly speculative, or in any other way reprehensible on the part of the trustees.

I do not mention all the authorities that have been already cited, because there is not any advantage in repeating. But, with regard to one case which has not been mentioned by my learned brethren, namely *Ames* v. *Parkinson* (7), decided by a great authority, LORD LANGDALE, counsel for Sydney Cozens-Hardy asked us to come to the conclusion that there was a duty to call in mortgage debts corresponding, and in fact co-extensive with, the duty which trustees are under when they invest money on mortgage. I do not read that case so at all. The question there was between a specific legatee of a legacy of £1,500 and the residuary legatees, one of whom was the very trustee who was sought to be made liable. The question only referred to a small sum of £200. It is not the less an authority for that reason, but what was the state of things? The evidence was that it was not a sufficient security; and that therefore, as between the specific legatee and the residuary legatees, it was not a proper sum to retain. The trust there was to invest on mortgage securities or government securities—one somewhat risky you may say, and the other perfectly safe. The trustees were carrying out their trust to invest in that case by appropriation, and under the circumstances there, what LORD LANGDALE said was, that they were bound to get in those securities in order to invest. Still there was positively a trust to invest on mortgage securities, which they were supposed to be carrying out. I do not think that that is a case at all like the present, where the investment has taken place without any responsibility on the part of the trustees, and where the only question is what under difficult circumstances the trustees ought to have done. I repeat, that I quite agree in the order which LINDLEY, L.J., has proposed.

Appeal allowed.

Solicitors: *Collyer-Bristow, Russell, Hill & Co.*, for *J. O. Taylor*, Norwich; *Waterhouse, Winterbotham & Harrison*, for *Cozens-Hardy & Jewson*, Norwich; *H. A. Maude*, for *Francis & Back*, Norwich.

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

EXCHANGE TELEGRAPH CO., LTD. *v.* GREGORY & CO.

[COURT OF APPEAL (Lord Esher, M.R., Kay and Rigby, L.JJ.), November 2, 1895]

[Reported [1896] 1 Q.B. 147; 65 L.J.Q.B. 262; 74 L.T. 83; 60 J.P. 52; 12 T.L.R. 18]

B

Copyright—Infringement—Stock Exchange prices—Publication to subscribers—Prices obtained and published by non-subscriber.

Tort—Contract—Inducement to break—Communication of copyright matter.

By a contract made by the plaintiffs with the committee of the London Stock Exchange information as to prices on the Stock Exchange was collected from hour to hour by a member and transmitted by telegraph to the plaintiffs who C communicated it to their subscribers by tape machines, the subscribers being under contract not to supply the information to non-subscribers. The information was also typed by the plaintiffs on a sheet which was registered as a newspaper and sold to the public. The defendant, who was not a subscriber, induced a subscriber, in breach of his contract, to supply him with the prices telegraphed by the plaintiffs, and wrote the prices so obtained on a blackboard D in his office for the use of his customers.

Held: (i) since the plaintiffs' newspaper was published before the defendant published the prices on his blackboard he had infringed their copyright in the newspaper; (ii) even if the publication of the newspaper were subsequent to the publication by the defendant of the prices on his blackboard, he had invaded the plaintiffs' common law right of property in the unpublished figures; and E (ii) damage must necessarily have resulted to the plaintiffs from the act of the defendant in inducing the subscriber to break his contract and special damage need not be proved; and the plaintiffs were entitled to injunctions accordingly.

Notes. Statutory copyright in unpublished literary works was first given by s. 1 F of the Copyright Act, 1911, s. 31 of which abrogated the common law rights: see 4 HALSBURY'S STATUTES (2nd Edn.) 778-779, 806. See now the Copyright Act, 1956, ss. 2, 46 (5) (36 HALSBURY'S STATUTES (2nd Edn.) 72, 141).

Distinguished: *Exchange Telegraph Co.* v. *Central News*, [1897] 2 Ch. 48. Considered: *Summers* v. *Boyce and Kinmond* (1907), 97 L.T. 505. Explained and Distinguished: *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph* G *Co.*, [1904-7] All E.R. Rep. 116. Considered: *Fenning Film Service* v. *Wolverhampton, Walsall and District Cinemas*, [1914] 3 K.B. 1171; *Goldsoll* v. *Goldman*, [1914] 2 Ch. 603. Applied: *British Motor Trade Association* v. *Salvatori*, [1949] 1 All E.R. 208. Referred to: *Sports and General Press Agency* v. *"Our Dogs" Publishing Co.*, [1916] 2 K.B. 880; *Pratt* v. *British Medical Association*, [1919] 1 K.B. 244; *Said* v. *Butt*, [1920] All E.R. Rep. 232; *Odham's Press, Ltd.* v. *London* H *and Provincial Sporting News Agency (1929), Ltd.*, [1935] Ch. 672; *British Industrial Plastics, Ltd.* v. *Ferguson*, [1938] 4 All E.R. 504; *Meikle* v. *Maufe*, [1941] 3 All E.R. 144; *Morris, Ltd.* v. *Gilman, Ltd.* (1943), 60 R.P.C. 20; *Bents Brewery Co.* v. *Hogan*, [1945] 2 All E.R. 570; *Robertson* v. *Aberdeen Journals, Ltd.*, [1954] 2 All E.R. 767; *Evans Medical Supplies, Ltd.* v. *Moriarty (H.M. Inspector of Taxes)* (1958), 37 Tax Cas. 540. I

As to restraint by injunction of breach of confidential relations and damages, see 8 HALSBURY'S LAWS (3rd Edn.) 437-438 and 444-447, and 21 HALSBURY'S LAWS (3rd Edn.) 395-396; and for cases see 13 DIGEST (Repl.) 53, and 17 DIGEST (Repl.) 77.

Cases referred to in argument:

Chilton v. *Progress Printing and Publishing Co.*, [1895] 2 Ch. 29; 64 L.J.Ch. 510; 72 L.T. 442; 43 W.R. 456; 11 T.L.R. 329; 39 Sol. Jo. 380; 12 R. 381, C.A.; 13 Digest (Repl.) 54, *46*.

Caird v. *Sime* (1887), 12 App. 326; 57 L.J.P.C. 2; 57 L.T. 634; 36 W.R. 199; 3 T.L.R. 681, H.L.; 13 Digest (Repl.) 63, *109.*

Bowen v. *Hall* (1881), 6 Q.B.D. 333; 50 L.J.Q.B. 305; 44 L.T. 75; 45 J.P. 373; 29 W.R. 367, C.A.; 42 Digest 988, *174.*

Temperton v. *Russell*, [1893] 1 Q.B. 715; 62 L.J.Q.B. 412; 69 L.T. 78; 57 J.P. 676; 41 W.R. 565; 9 T.L.R. 393; 37 Sol. Jo. 423; 4 R. 376, C.A.; 42 Digest 987, *170.*

Flood v. *Jackson*, [1895] 2 Q.B. 21; 64 L.J.Q.B. 305; 73 L.T. 161; 59 J.P. 388; 43 W.R. 453; 11 T.L.R. 335, C.A.; reversed sub nom. *Allen* v. *Flood*, ante p. 52; [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 42 Digest 972, *35.*

White v. *Mellin*, [1895] A.C. 154, 64 L.J.Ch. 308; 72 L.T. 334; 59 J.P. 628; 43 W.R. 353; 11 T.L.R. 236; 11 R. 141, H.L.; 28 Digest (Repl.) 766, *204.*

Appeal from a decision of MATHEW, J., in favour of the plaintiffs at the trial of the action without a jury, reported in 73 L.T. 120.

The plaintiffs, the Exchange Telegraph Co., were a company, part of whose business was to collect information as to prices and quotations on the London Stock Exchange, and to telegraph that information to their subscribers, members of the Stock Exchange and others who were not members, on the terms that the subscribers would not supply the information to non-subscribers, and would only use it for their own purposes. They entered into a contract with the committee of the Stock Exchange, by which, in consideration of a royalty, they obtained permission to appoint a member of the Stock Exchange to obtain for them, from time to time during each day, information as to the prices and fluctuations in stocks and shares. The prices so obtained were telegraphed from the Stock Exchange to the plaintiffs about six times each day, the prices being marked upon a slip or tape that came out of the receiving instrument. One of the plaintiffs' clerks at once telegraphed the information so received to their subscribers by means of a tape machine, and another clerk at the same time recorded by a type-writing machine the same information upon sheets which were made up into a newspaper entitled "The Exchange Telegraph Company's Stock Exchange News" and registered at Stationers' Hall, copies of which were sold to anyone who wished to buy them.

The defendant, who carried on business as an outside broker under the name of Gregory & Co., was at one time one of the plaintiffs' subscribers, but subsequently the Stock Exchange Committee objected to the information being given to certain outside brokers, the defendant among them, and in March, 1894, the plaintiffs refused to supply the information to him when he ceased to be a subscriber. The defendant thereupon went to one of the plaintiffs' subscribers, and obtained from him the information that he had received from the plaintiffs, and used that information for the purposes of his, the defendant's, business by transcribing the prices so obtained on to a blackboard in his office.

The plaintiffs brought an action claiming injunctions restraining the defendant from infringing their copyright in the information published in the newspaper, from obtaining information from their tapes and thereby invading their proprietary rights in unpublished matters and from inducing their subscribers to give the information to him in breach of their contracts with the plaintiffs. MATHEW, J., granted the injunctions and the defendant appealed.

Crackanthorpe, Q.C., and *Macaskie* (*Cock*, Q.C., with them) for the defendant.

Bigham, Q.C., and *Montague Shearman* (*Scrutton* with them) for the plaintiffs.

LORD ESHER, M.R.—In this case a mean and contemptible act has been committed by the defendant, and in any doubtful act of his I shall draw the inference of fact against him, knowing from experience that a man who has done one mean act for the purpose of gain would do another mean act if it were wanted for the same purpose. What then has occurred in this case? Transactions take

place upon the Stock Exchange which are altering every minute in the day. It is a valuable thing for people to know what transactions are taking place on the Stock Exchange, and at what prices, and the instantaneous communication of those facts is of great value. The Stock Exchange belongs to certain persons, and it is managed by a committee, who have a right to deal with it as they think fit. The persons whom they choose to admit there are bound to submit to the terms imposed as a condition of their admittance. It is, as I have said, a valuable thing for members of the Stock Exchange to know the course of dealing in the various stocks throughout the day, and the committee may take measures to collect that information and supply it to the members. They may also give the information to others besides members. They gave that information to the plaintiffs, who paid for it.

But the committee say that they will not give that information to outside brokers, who transact outside the Stock Exchange and outside the control and rules of the Stock Exchange, business of a similar character to that which is transacted on the Stock Exchange. This they have a perfect right to do. They give this information to the members of the Stock Exchange on condition that they make use of it for the purpose of their own transactions, and will not communicate it to anyone else to use it for profit. The committee allow the plaintiffs to have this information for the purpose of distributing it among their subscribers, and the defendant knows that the plaintiffs, under the conditions upon which they receive it, will not take him as a subscriber. He knows the terms that the plaintiffs have made with their subscribers, namely, that the subscribers shall not impart the information to non-subscribers. The defendant wants the information in order to induce people to deal with him in stocks and shares. Knowing all that, for the purpose of obtaining that information he goes surreptitiously to some person who is a subscriber, and persuades that person to give him the information from time to time during the day. In fact he pays somebody to break his contract and to commit a gross breach of faith. I have no hesitation in calling that a mean act. That information was the property of the Stock Exchange, and they sold it to the plaintiffs, and the defendant has wilfully invaded that right of property which the plaintiffs so purchased.

It has been argued that damage must be shown to support the cause of action for inducing the subscriber to give the information to the defendant in breach of his contract with the plaintiffs, and that no damage has been proved here. In my opinion what the defendant has done must cause some damage to the plaintiffs. I can imagine many ways in which it would injure them. The plaintiffs sell this information from hour to hour, and if a person cannot get it in the surreptitious mode in which the defendant got it, he must buy the plaintiffs' newspaper which contains it. To my mind that is sufficient. It is not necessary to measure the damages exactly. The tribunal which has to assess the damages may say that the defendant has caused the plaintiffs damage by a mean and contemptible act, in order to benefit himself—that, in fact, damage must ensue from his act—and the damages are at large. It is not necessary to prove any specific damage. In the same way, in cases of trespass to land, the damages are at large, and the jury has to assess them. Next, as to the infringement of the statutory copyright: a great deal of the argument which has been addressed to us is not supported by the facts. To my mind the proper inference of fact is, that the defendant put upon his blackboard the information which was already published in the plaintiffs' newspaper. The defendant, therefore, infringed the plaintiffs' copyright. He has done so in the past, and has threatened to do so in the future, and accordingly MATHEW, J., was right in granting the injunction, and every part of that injunction is right. The appeal must, therefore, be dismissed.

KAY, L.J.—I am of the same opinion. The injunction has been granted in three particulars. The first restrains the defendant from multiplying copies of and thereby

infringing the plaintiffs' copyright in their newspaper. It then goes on to restrain the defendant from obtaining information from the plaintiffs' tapes. Thirdly, it restrains the defendant from inducing the plaintiffs' subscribers to give the information which the plaintiffs had obtained by special arrangement with the Stock Exchange. In my opinion all these heads of injunction are justified by the facts of the case. The facts have been fully stated by the Master of the Rolls. The Stock Exchange supplied to the plaintiffs, by leave of the committee, certain valuable information, for which the plaintiffs paid, on condition that the information should not be communicated to the present defendant among others. The plaintiffs were at liberty to communicate the information to their own subscribers. They also published it in their newspaper, and communicated it to the evening newspapers. They communicated it to their subscribers on the condition that it was to be used for their special information only, and was not to be communicated to non-subscribers for reward or otherwise.

It is material to observe that the defendant was himself at one time a subscriber and bound by this condition. Therefore he knew of this condition. The Stock Exchange refused to allow the information to be communicated to him, and thereupon he committed this fraud: he went to a subscriber and induced that subscriber to break his contract and to communicate the information to him. He then wrote the information so obtained on a blackboard in his office for the purpose of his business. This information is absolutely essential to his business. He must have it from hour to hour, and the only mode in which he could obtain it was by fraudulently inducing a subscriber to give it to him, or by buying the plaintiffs' newspaper. MATHEW, J., has first of all restrained the defendant from taking the information from the plaintiffs' newspaper. The evidence shows that, simultaneously with the communication of the information to the subscribers, the plaintiffs print six times each day this newspaper, which is registered under the Act, and in which they have a statutory copyright. It, therefore, seems to me to be a necessary inference that there must be many occasions on which the defendant put this information on his blackboard after the newspaper was printed. That would be a distinct infringement of the statutory copyright. But MATHEW, J., thought that there might be instances of the publication of the information on the blackboard before the paper was printed, and to restrain this invasion of the plaintiffs' proprietary rights he has granted the injunction in both forms.

There remains the third head upon which the injunction was granted. It is said that, as there is no contractual relation between the plaintiffs and the defendant, damage must be shown. I agree that the gist of this cause of action is damage. But, if the facts are such that damage must in the ordinary course result, that is sufficient. It is not necessary to prove special damage. If the defendant did not get this information fraudulently, he must have bought the newspaper. There was thus a loss of one customer at any rate. The act of the defendant in obtaining this information in a surreptitious manner is a direct interference with the plaintiffs' business. It is obvious that, if this can be done by one, it can be done by a dozen, and the result would be that one subscriber would be sufficient, and everyone else could take the information from him. It seems to me clear that damage must ensue, and therefore the third head of the injunction is perfectly warranted by the facts.

RIGBY, L.J.—I am of the same opinion. The action is founded on three main causes of action. The first is founded upon an attack made upon the proprietary right of persons in unpublished matter. The second is founded upon an attack made upon the proprietary right of persons in published matter. The third is not founded upon any proprietary right, but consists of an attack on the interest which the plaintiffs have in a contract. As regards the first, it is not necessary to prove registration or damage actually sustained. As regards the second, it is necessary to prove registration, but not damage. As regards the third, unless damage has

been actually sustained, there is no right of action at all. That is the only thing which brings the plaintiffs into any relation with the defendant. There is no contract between them. My view of the contract with the subscribers is, that it was a term of the contract that the subscribers should use their instruments solely for the purpose of personal information. The defendant, well knowing that term, for the purpose of injuring the plaintiffs and benefiting himself, induced a subscriber to supply the information in question to him. In the statement of claim there is no allegation of damage, but that becomes immaterial because the defendant set up in his defence that there was no damage, and upon that the plaintiffs joined issue, so that the question of damage has been put in issue.

First of all, was there here a proprietary right in this unpublished matter? The facts are, that the matter is produced in the first instance by means of a telegraphic instrument on a tape, which is the property of the persons who have collected the information. Simultaneously with the creation of this sheet of letterpress a copy is made by a typewriter for the purpose of the newspaper, which is entitled to protection by copyright. This printed matter is literature within the meaning of the authorities, and before publication it is the property of the plaintiffs, and after publication it gives them a right to a monopoly of the multiplication of copies of it. We find that, simultaneously with the placing of the information on the defendant's blackboard, or so nearly simultaneously that it would be difficult to say whether it was before or after—I should come to the conclusion that sometimes the copy was sent off before and sometimes after—the publication of it in the plaintiffs' newspaper took place. That would justify the injunction in the form granted by the learned judge, including both the common law right of property and the statutory copyright. I cannot see how we can say that, because this was intended to be communicated to a large section of the public, that would deprive the plaintiffs of their common law right of property. They can limit the publication of the information as they think fit, and they have contracted with their subscribers that the latter shall not communicate the information to others.

With regard to the question of damages arising under the third cause of action, it is not the procuring of a breach of every contract that will give a right of action, even if done maliciously. We must in each case consider the nature of the contract. I have come to the conclusion that damage has been sufficiently proved. I cannot doubt, considering the importance of outside brokers getting this information, that they must get it from the plaintiffs if they cannot get it in the way this defendant has got it, and that the plaintiffs have suffered damage in their business by the act of the defendant. I do not stop to inquire the amount of the damage. Any damage will be sufficient to give a right of action. As the defendant threatens to continue doing as he has done, the injunction must go.

Appeal dismissed.

Solicitors: *Nicholson & Crouch; Bennett & Leaver.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

A

ELLESMERE BREWERY CO. *v.* COOPER AND OTHERS

[Queen's Bench Division (Lord Russell of Killowen, C.J., and Cave, J.), October 30, December 5, 1895]

B [Reported [1896] 1 Q.B. 75; 65 L.J.Q.B. 173; 73 L.T. 567; 44 W.R. 254; 12 T.L.R. 86; 40 Sol. Jo. 147; 1 Com. Cas. 210]

Guarantee—Co-sureties—Contribution—Sureties bound for different amounts—Claim for less than full amount for which sureties liable—Contribution by each surety in proportion to his liability.

Guarantee—Discharge—Material alteration of bond—Reduction of liability of one C *co-surety after execution.*

A principal and four others as sureties for him entered into a bond whereby they were jointly and severally bound to the plaintiffs in the sum of £150 in case the principal, who was an employee of the plaintiffs, should fail to account for all moneys received by him for the plaintiffs. By the terms of the bond, the liability of N., one of the sureties, and that of another surety, was D limited to £50 each, while the liability of the other two sureties was limited to £25 each. N., who was the last to sign the bond, added after his signature the words "£25 only." The principal having failed to account to the plaintiffs for the sum of £48 received for them, the plaintiffs sued him and the four sureties on the bond to recover this sum.

Held: (i) the principle of contribution inter se between sureties who were E jointly and severally bound in unequal amounts was that where the claim was for less than the full amount for which the sureties were liable, each must contribute to the loss in proportion to the amount of his liability on the bond; (ii) the addition of the words by N. reducing the amount of his liability was a material alteration which rendered the bond void against all the defendants (except the principal) including N. himself.

F Per Curiam: The principle upon which liability of sureties inter se rests is that sureties for the same principal, and for the same engagement, even though bound by different instruments and for different amounts, have a common interest and a common burden, so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligations he has discharged, and it is clear that one surety cannot G keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement.

Notes. Considered: *Re Denton's Estate, Licenses Insurance Corpn. and Guarantee Fund* v. *Denton*, [1903] 2 Ch. 670; *National Provincial Bank of England* v. *Brackenbury* (1906), 22 T.L.R. 797. Referred to: *Stirling* v. *Burdett*, [1911] H 2 Ch. 418.

As to conditions precedent to liability on a guarantee, see 18 Halsbury's Laws (3rd Edn.) 450; as to contribution among sureties, see ibid. 484 et seq.; and as to material alteration of a guarantee, see ibid. 500-501. For cases see 26 Digest (Repl.) 149.

Cases referred to:

I (1) *Dering* v. *Earl of Winchelsea* (1787), 1 Cox, Eq. Cas. 318; 29 E.R. 1184; sub nom. *Deering* v. *Earl of Winchelsea*, 2 Bos. & P. 270; 26 Digest (Repl.) 145, *1065*.

(2) *Pendlebury* v. *Walker* (1841), 4 Y. & C. Ex. 424; 10 L.J.Ex. 27; 5 Jur. 334; 160 E.R. 1072; 26 Digest (Repl.) 146, *1067*.

(3) *Steel* v. *Dixon* (1881), 17 Ch.D. 825; 50 L.J.Ch. 591; 45 L.T. 142; 29 W.R. 735; 26 Digest (Repl.) 154, *1144*.

(4) *Re Arcedeckne, Atkins* v. *Arcedeckne* (1883), 24 Ch.D. 709; 53 L.J.Ch. 102; 48 L.T. 725; 26 Digest (Repl.) 147, *1083*.

(5) *Ellis* v. *Emmanuel* (1876), 1 Ex.D. 157; 46 L.J.Q.B. 25; 34 L.T. 553; 24 W.R. 832, C.A.; 26 Digest (Repl.) 92, *634.*

(6) *Evans* v. *Bremridge* (1855), 2 K. & J. 174; 25 L.J.Ch. 102; 26 L.T.O.S. 164; 2 Jur. N.S. 134; 4 W.R. 161; 69 E.R. 741; on appeal (1856), 8 De G.M. & G. 100; 25 L.J.Ch. 334; 27 L.T.O.S. 8; 2 Jur. N.S. 311; 4 W.R. 350; 44 E.R. 327, L.JJ.; 26 Digest (Repl.) 73, *520.*

Also referred to in argument:

Ward v. *National Bank of New Zealand* (1883), 8 App. Cas. 755; 52 L.J.P.C. 65; 49 L.T. 315, P.C.; 26 Digest (Repl.) 211, *1614.*

Craythorne v. *Swinburne* (1807), 14 Ves. 160; 33 E.R. 482, L.C.; 26 Digest (Repl.) 145, *1063.*

Thompson v. *Butcher* (1625), 3 Bulst. 300.

Gardner v. *Walsh* (1855), 5 E. & B. 83; 3 C.L.R. 1235; 24 L.J.Q.B. 285; 25 L.T.O.S. 155; 1 Jur. N.S. 828; 3 W.R. 460; 119 E.R. 412; 26 Digest (Repl.) 228, *1772.*

Re Macdonaghs (1876), 10 I.R. Eq. 269; 26 Digest (Repl.) 149, **429.*

Suffell v. *Bank of England* (1882), 9 Q.B.D. 555; 51 L.J.Q.B. 401; 47 L.T. 146; 46 J.P. 500; 30 W.R. 932, C.A.; 6 Digest (Repl.) 353, *2568.*

Appeal by the plaintiffs from the county court judge sitting at Oswestry by which he gave judgment for the plaintiffs as against the defendant Cooper, the principal, but in favour of the other four defendants, the sureties.

The facts, as stated by Lord Russell of Killowen, C.J., were as follows: This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned county court judge, judgment was given for the plaintiffs as against Cooper, and judgment given for the four remaining defendants—the sureties.

The facts were, that Cooper, having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants. The bond was dated April 30, 1894. By its terms the five defendants were jointly and severally bound to the plaintiffs in the sum of £150. It then recited that Cooper had been appointed agent for the company, and stated the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs and otherwise performed the dates of his agency, the bond should be void. It then provided that the liability of Nunnerly and Emberton (two of the defendants) should be limited to £50, and that of Pay and Bromfield (two other of the defendants) to £25 each.

The effect, therefore, of the bond as drawn was, that the principal and the sureties were jointly and severally bound in the sum of £150, but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerly was the last to sign, and his signature thus appears on the bond—"Walter Nunnerly. Twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appeared, took the bond without making any objection to the manner of Nunnerly's execution; nor was it suggested that Nunnerly had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point it could not be assumed that Nunnerly in bad faith sought, by the form of his execution of the bond, to limit any liability he had previously agreed to undertake. The probability was that, in giving particulars of his sureties, Cooper had erroneously stated that Nunnerly had agreed to undertake liability to the extent of £50, whereas he had done so only to the extent of £25. Subsequently Cooper, the principal, received moneys for the plaintiffs to the amount of £48 for which he had failed to account, and judgment was given against him at the trial for that amount.

The contested question was the liability of the other defendants—the sureties.

A The learned county court judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal was against that judgment.

A. T. Lawrence for the plaintiffs.
E. W. Hansell for the defendants.

Cur. adv. vult.

B

Dec. 5, 1895. **LORD RUSSELL OF KILLOWEN, C.J.**, read the following judgment of the court in which after stating the facts as set out above, he continued:—It was argued for the plaintiffs—(i) that the form of Nunnerly's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties; (ii) that, if an alteration, it was not a C material alteration, and therefore did not discharge such sureties; and lastly (iii) that in any case Nunnerly was liable to the extent of £50, or if not of £50 at least to the extent of £25. In my judgment no one of these contentions is well founded. I think the effect of Nunnerly's mode of execution on the facts of this case is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out £50 and inserting D instead £25. It was, therefore, an alteration; its effect I shall presently discuss.

The argument of the learned counsel for the plaintiffs was, that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay and without any right to contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amount. Here it was E said the one-fourth of the loss was £12, and as Nunnerly had clearly intended to make himself liable, as also had Pay and Bromfield, for £25 each, it was immaterial whether Nunnerly signed for £25 or for £50. Each, it was contended, was bound to pay £12, and Emberton was bound to bear no more of the loss than the others. In my judgment this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties inter se F rests. That principle is, that sureties for the same principal, and for the same engagement, even though bound by different instruments, and for different amounts, have a common interest and a common burden, so that, if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligations to the creditor he has discharged.

How is the amount of the claim to be determined? According to the argument G of the learned counsel for the plaintiffs it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. This is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and H severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths of the sum paid.

How, when, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that, where the full amount of the bond is due and payable to the creditor, that liability can only be enforced I against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each had paid to the limit of his liability. But, suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties who has fixed the limit of his liability at one-half the amount of the bond, could it be said that he had no right to any contribution from his co-sureties? Surely not. The burden is a common burden of all, but unequally distributed. By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties upon the fixed limit. It would be against all equitable

principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only.

Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was £1,000, had realised £1,000 from such a security, being bound with three other sureties with a limit of liability of £2,000 each, making in all £7,000; it is clear that that £1,000 must be taken into account for the benefit of all the sureties inter se. But upon what principle? Surely, upon the only principle which will secure its equitable division—namely proportional distribution. Thus the surety for £1,000 would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burden has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but when the claim is less than such full amount, and it is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in *Dering* v. *Earl of Winchelsea* (1); but in *Pendlebury* v. *Walker* (2), ALDERSON, B., expressly states the rule thus (4 Y. & C. at p. 441):

> "Where the same default of the principal renders all the co-sureties responsible, all are to contribute, and then the law superadds that which is not only the principle but the equitable mode of applying the principle that they should all contribute equally if each is a surety to an equal amount, and if not equally, then proportionately to the amount for which each is a surety."

In *Steel* v. *Dixon* (3), FRY, J., cited with approval the language I have quoted; and, later PEARSON, J., in *Re Arcedeckne*, adopts the language of FRY, J.: see also *Ellis* v. *Emmanuel* (5) and *Evans* v. *Bremridge* (6).

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualification or alteration. The total loss being £48, Emberton having subscribed for £50 out of the total of £150, would be liable for one-third; and if he paid no more would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion Emberton's liability would be arrived at thus: As 150 is to 50, so is 48 to the result. So worked out Emberton would be liable for £16 only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for £8 each, and Nunnerly for £16.

To appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerly. He explicitly says, "I execute the bond only on the terms of my liability being limited to £25." He could not, therefore, in any case be made liable for more (whether he can be made liable even for the £25, I shall presently consider). What, then, is the effect of the altered limitation to £25 by Nunnerly upon the position of the other three sureties? Take Emberton's position. For simplicity assume that the total liability to the plaintiff company for £48 had been paid by Emberton. According to the tenor of the bond without the alteration Emberton would have to bear two-sixths, equal to one-third of the loss; Nunnerly, two-sixths, equal to one-third; and Pay and Bromfield, one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerly; and if Nunnerly is not bound at all would have no right of contribution against him. The alteration then was clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield.

The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerly being a party to it with a liability of £50.

That is not the contract as it now appears from the bond, and I am therefore not bound by it." Their position would be still stronger if Nunnerly is not bound by the bond at all.

The remaining question then is, is Nunnerly bound at all? I have already intimated that as he has expressly said, "I shall be liable only for £25." He cannot be made liable for £50; but, is he liable even for the £25? I think he is not. He, in good faith, as must be assumed, expressly limits his liability to £25, but he undertakes that liability, not as a separate or independent liability, but as part of a contract, in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burden is to be borne, although unequally distributed. But if, in fact, such other sureties are not bound by the contract—and I have adjudged that they are not—Nunnerly is entitled to say, "That is not the contract into which I have entered, and I am not bound by it." The judgment of the learned county court judge must stand, and the appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Solicitors: *Moore & Davies*, for *Salter & Giles*, Ellesmere; *Kennedy, Hughes & Kennedy*, for *Lloyd*, Ellesmere.

[*Reported by* G. H. Grant, Esq., *Barrister-at-Law.*]

DUNN *v.* MACDONALD

[Court of Appeal (Lord Esher, M.R., Lopes and Chitty, L.JJ.), March 16, 1897]

[Reported [1897] 1 Q.B. 555; 66 L.J.Q.B. 420; 76 L.T. 444; 13 T.L.R. 292; 45 W.R. 355]

Crown—Crown servant—Liability on contract made in official capacity.

A public servant of the Crown is not personally liable in respect of a contract which he makes in that capacity, and is not liable for breach of warranty of authority to make such a contract.

Notes. Considered and Distinguished: *Graham* v. *Public Works Comrs.*, [1901] 2 K.B. 781. Referred to: *Lucas* v. *Lucas and High Comr. for India*, [1943] 2 All E.R. 110.

As to liability of public officers in contract, see 30 Halsbury's Laws (3rd Edn.) 701 et seq.; and for cases see 38 Digest (Repl.) 53 et seq.

Cases referred to in argument:

Macbeath v. *Haldimand* (1786), 1 Term Rep. 172; 99 E.R. 1036; 1 Digest (Repl.) 754, *2923*.

Gidley v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275; 1 State Tr.N.S. 1263; 7 Moore, C.P. 91; 129 E.R. 1290; 1 Digest (Repl.) 754, *2933*.

Appeal by the plaintiff from a decision of Charles, J., at the trial of the action without a jury, reported [1897] 1 Q.B. 401.

The plaintiff brought this action to recover damages from the defendant for wrongful dismissal or, alternatively, for damages for breach of warranty of authority. He alleged that in 1892 the defendant, Her Majesty's Commissioner and Consul-General for the Oil Rivers Protectorate (now known as the Niger Protectorate) in

Africa, had engaged him to serve in the Protectorate for a term of three years certain, and had wrongfully dismissed him before the end of the three years. The plaintiff had sought compensation from the Crown by a petition of right, which was dismissed upon the ground that servants of the Crown hold their offices only during the pleasure of the Crown: *Dunn* v. *R.*, ante p. 907. The action came on before CHARLES, J., the plaintiff alleging (i) an absolute contract of service between him and the defendant whereby he was to be retained in service until Jan. 29, 1895, at the earliest, and (ii) breach of a warranty of authority by the defendant that he was duly authorised by the Crown to engage the plaintiff, the plaintiff being thereby induced to accept his engagement. CHARLES, J., found against the plaintiff on the first point, holding himself bound by the decision in *Dunn* v. *R.* (ante p. 907) in which the plaintiff had taken up the position that he was the servant, not of the defendant, but of the Crown. On the second point the learned judge held that the doctrine of an implied warranty of authority was inapplicable to a public servant and therefore the defendant had no personal liability or responsibility towards the plaintiff. The plaintiff appealed.

W. H. Stevenson for the plaintiff.

The Solicitor-General (*Sir Robert Finlay*, *Q.C.*) and *H. Sutton*, for the defendant, were not called upon to argue.

LORD ESHER, M.R.—I quite agree with CHARLES, J., upon the ground upon which he himself has put his judgment; but it seems to me that he need not have put it on that ground, and that it is as clear a case as possible otherwise. It is suggested that the defendant, Sir Claude Macdonald, employed the plaintiff for three years, and that he had no authority to do so, and that he warranted that he had authority. The truth is that he had authority to appoint him for three years, and he did it. If he appointed him at all, he had authority, but of course subject to this, that, although in the name of the Crown he appoints him for three years, the Crown can dismiss him at any moment. Therefore, the alleged warranty comes to this, not that he had no authority to employ the plaintiff, but that it must be inferred that he promised him that he should be kept in the employ for three years certain, whereas he had no authority to make such a promise as that. But CHARLES, J., says: I will assume for the purposes of my judgment that the defendant did employ him for three years certain; but the only way in which he employed him was in the capacity of Governor of that district—Governor appointed by the Crown—and he appointed this plaintiff to serve under the Crown because he, the defendant, was the Governor appointed by the Crown, and, in his capacity of Governor appointed by the Crown, he made this contract with the plaintiff. Assuming all that, the plaintiff says that he will bring an action in respect of that contract, so made with him, against the defendant and alleges an implied stipulation that he had authority to employ him. CHARLES, J., held that, supposing the plaintiff could say that truly, nevertheless he cannot make the defendant personally liable because the defendant made this contract by virtue of himself being a public servant of the Crown, and no action lies against a public servant of the Crown, upon any contract which he makes in that capacity, unless he has made an expressly personal contract. It cannot be pretended here that he made any express contract that he had authority to do anything. It is said to be the implied authority, and in respect of that there are decisions of the highest courts a hundred years old that he cannot be made liable for any such contract, and therefore the learned judge so holds. Therefore there is no bottom whatever in the grounds on which this appeal is brought, and it must be dismissed.

LOPES, L.J.—If there was not another and insuperable objection to this case, I am at a loss to see myself that any breach is made out, because it appears that the defendant had authority to make the appointment which he did make. I think the case would fail on that ground; but there is a much more cogent ground than

A that. The liabilities of public agents on contract stand on a very different footing from contracts made by ordinary agents. In the ordinary course of things, unless there is something very special which would be evidence that the person intended to be personally liable, an agent contracting on behalf of the government or a republic is not personally bound by such contract, even though he would, by the B terms of the contract, be bound if it was an agency of a private nature. That is the law which is established by a number of cases for any number of years past. In the present case the defendant was beyond all question a public servant, and it was in his capacity of a public servant that he appointed the plaintiff to his place. I think there is that very short answer to the case, and that, I understand, is the answer given by CHARLES, J., at greater length. I entirely agree with him.

C **CHITTY, L.J.**—An agent for the Crown is not personally liable on any contract entered into by him on behalf of the Crown. That immunity is well established. But, if we were to accept the proposition of the plaintiff, the immunity would be practically abolished, because the plaintiff contends that the Crown agent is personally liable upon a contract warranting his agency. It cannot be doubted that a D Crown agent may enter into an express contract of that kind, and on that contract, if it was so expressed, he would be personally liable. But the argument of the plaintiff here is that there is an implied contract. It is plain that the defendant was acting in this transaction simply in one character and one character only, namely as agent for the Crown with the power of appointment that has already been mentioned. To draw an inference in this case, whereby a contract will appear as by implication E from that circumstance and from that circumstance alone, that he was intending personally to bind himself with reference to the warranty of the agency, seems to me to be utterly inconsistent with the facts and the main proposition. There is no ground, therefore, for inferring that he was voluntarily entering into an implied contract warranting some authority in his private capacity.

Appeal dismissed.

F Solicitors: *Dunn & Hilliard; The Solicitor to the Treasury.*

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

G

SEAWARD AND OTHERS *v.* PATERSON

[COURT OF APPEAL (Lindley, A. L. Smith and Rigby, L.JJ.), February 15, 16, 1897]

H [Reported [1897] 1 Ch. 545; 66 L.J.Ch. 267; 76 L.T. 215; 45 W.R. 610; 13 T.L.R. 211]

Contempt of Court—Breach of injunction—Aiding and abetting—Injunction not granted against person in breach.

The court has jurisdiction to commit for contempt a person, though not a defendant to an action for an injunction and against whom the injunction has I not been granted, who, knowing of the injunction, aids and abets in committing a breach of it the person against whom the injunction has been granted.

Notes. Considered: *Scott* v. *Scott*, [1911-13] All E.R. Rep. 1. Followed: *Hubbard* v. *Woodfield* (1913), 57 Sol. Jo. 729. Referred to: *Brydges* v. *Brydges and Wood*, [1909] P. 187; *Marengo* v. *Daily Sketch and Sunday Graphic, Ltd.*, [1948] 1 All E.R. 406; *Multiform Displays, Ltd.* v. *Whitmanley Displays, Ltd.* (*formerly Reay and Davis, Ltd.*), [1957] R.P.C. 137.

As to contempts in procedure see 8 HALSBURY'S LAWS (3rd Edn.) 20-30; and for cases see 16 DIGEST (Repl.) 48 et seq.

Cases referred to :

(1) *Lewes* v. *Morgan* (1818), 5 Price, 518; 146 E.R. 681; 16 Digest (Repl.) 45, *402.*

(2) *Lord Wellesley* v. *Earl of Mornington* (1848), 11 Beav. 181; 11 L.T.O.S. 286; 50 E.R. 786; 16 Digest (Repl.) 45, *403.*

(3) *Avery* v. *Andrews* (1882), 51 L.J.Ch. 414; sub nom. *Avory* v. *Andrews*, 46 L.T. 279; 30 W.R. 564; 16 Digest (Repl.) 45, *405.*

(4) *Day* v. *Longhurst* (1893), 62 L.J.Ch. 334; 68 L.T. 17; 41 W.R. 283; 37 Sol. Jo. 175; 3 R. 234; 42 Digest 325, *3649.*

(5) *Iveson* v. *Harris* (1802), 7 Ves. 251; 32 E.R. 102, L.C.; 16 Digest (Repl.) 438, *2448.*

(6) *R.* v. *Coney* (1882), 8 Q.B.D. 534; 51 L.J.M.C. 66; 46 L.T. 307; 46 J.P. 404; 30 W.R. 678; 15 Cox, C.C. 46, C.C.R.; 14 Digest (Repl.) 91, *540.*

(7) *Re Bahama Islands, Special Reference from*, [1893] A.C. 138; sub nom. *Re Mozeley*, 62 L.J.P.C. 79; 68 L.T. 105; 57 J.P. 277, P.C.; 16 Digest (Repl.) 9, *19.*

Also referred to in argument :

Barlee v. *Barlee* (1822), 1 Add. 301; 162 E.R. 105; 16 Digest (Repl.) 97, *1080.*

St. John's College, Oxford v. *Carter* (1839), 4 My. & Cr. 497; 8 L.J.Ch. 218; 41 E.R. 191, L.C.; 16 Digest (Repl.) 45, *404.*

Hodson v. *Coppard* (1860), 29 Beav. 4; 7 Jur.N.S. 11; 9 W.R. 9; 54 E.R. 525; sub nom. *Hodgson* v. *Coppard*, 30 L.J.Ch. 20; 28 Digest (Repl.) 892, *1214.*

Evans v. *Bear* (1874), 10 Ch. App. 76; 31 L.T. 625; 23 W.R. 67, L.JJ.; 5 Digest (Repl.) 1097, *8848.*

Harvey v. *Hall* (1873), L.R. 16 Eq. 324; 43 L.J.Ch. 95; 28 L.T. 734; 42 Digest 361, *4117.*

Mander v. *Falcke*, [1891] 2 Ch. 554; 65 L.T. 203, C.A.; 31 Digest (Repl.) 190, *3218.*

Appeal against a decision of NORTH, J., on a motion by the plaintiffs in the action, William Seaward and others, to commit one Edwin Murray for contempt of court.

The plaintiffs were William Seaward, the lessee for a term of ninety years of premises known as No. 53, Fetter Lane, in the city of London, an under-lessee of part of the premises, and a mortgagee of such underlease. The defendant William Paterson was the under-lessee of the first, second, and third floors of the premises from Seaward for a term of twenty-one years from Christmas, 1895, under a lease dated Dec. 13, 1895, which contained a covenant in the words of the injunction hereafter mentioned. The object of the action was to restrain the defendant from holding upon the premises boxing contests which had been advertised under the name of meetings of the Queensbury Sports Club, Ltd., a company registered for the purpose. The action was heard on July 15, 1896, and a perpetual injunction was granted in the following terms :

"That the defendant George Paterson, his under-tenants, agents, and servants, be perpetually restrained from doing or suffering to be done anything which may interfere with the full and quiet enjoyment by the plaintiff William Seaward or his under-tenants of the premises adjoining or neighbouring to the first, second, and third floors of the messuage or tenement No. 53, Fetter Lane, in the city of London, demised by the plaintiff William Seaward to the defendant by indenture of lease dated Dec. 13, 1895, or which shall be or tend to grow to be an annoyance, nuisance, damage, inconvenience, disturbance, or injury to the plaintiff William Seaward or his superior landlord, or his or their tenants or any of them, and from using the said premises so demised to the defendant as aforesaid, or suffering the same to be used otherwise than for the purpose of a private club, without the written licence of the plaintiff William Seaward."

On Oct. 9 and 21 boxing entertainments were again given on the defendant's premises, which the court held to be a clear breach of the injunction. On Nov. 11,

1896, the plaintiffs moved to commit Paterson and Sheppard, a prize-fighter, who, it was alleged, had acted as his servant and agent in the matter. Paterson swore an affidavit that he had never, since the date of the order, had any control over the premises; that Edwin Murray took possession of the premises in December, 1895, and had put into possession the Queensberry Sports Club, Ltd.; that he had taken the house at Murray's request, under a promise that Murray would indemnify him; that all profits of the club were to belong to Murray; and that the action had been defended in Paterson's name by Murray's solicitors, on his instructions, and with funds found by him. The plaintiffs then amended the notice of motion by asking to commit Murray as well as the others. The motion stood over for cross-examination of witnesses, and now came on for hearing. NORTH, J., found the following facts were proved. Murray, who had been present in court at the hearing, but left before judgment, was fully informed of the injunction as soon as it was granted, though he was not actually served with the order until after Oct. 21. Paterson was a man of no means, and all the money required for costs of the lease, rent, and for fitting up the premises for the purposes of the Queensberry Sports Club was found by Murray, and the money paid by members of the club was paid to Murray's partner. Murray was present at the boxing contests on Oct. 9 and 21, not merely as a spectator but as a person interested in the premises, and in the proceeds of the performance. In giving judgment the learned judge said: In my opinion, any person who deliberately assists another person in committing a breach of an injunction can be punished for contempt of court in taking part in the commission of such acts. As regards servants and agents, I think that there is an explanation of those words often being used in such a case. I think they are inserted as a warning to other persons. The words servants and agents are, I think, used, not as describing a particular class of persons, but as describing any persons who act as servants or agents, or assistants of the person who is restrained in committing the act the commission of which is restrained, and I do not think there is any magic in those words If the act restrained was one which could only be committed through a solicitor, for instance, I think it would be quite right expressly to restrain a man, his solicitors and agents, from committing it. . . . It seems to me, therefore, that in this case Murray, whether Paterson has servants or agents or not, is in the same position as they are if he has assisted Paterson in committing a breach of the injunction. In my opinion, that clearly is the case here. I have referred to the early history of Murray's connection with the matter not for the purpose of making his contempt worse by reason of this connection, but as throwing light upon the circumstances under which he was present on the occasions in question. Under these circumstances I think that all the three persons named in the motion have rendered themselves liable to committal. As regards Sheppard, I think that he is a servant, and that I may deal more lightly with his case than the others. But I think that, as to all three persons, it is a case in which I can usefully say for what period they shall be imprisoned. They must be committed for contempt of court, and a direction will be given by the order that Sheppard shall be discharged after being in prison a fortnight, and the other two after being in prison a month.

Murray appealed.

Seward Brice, Q.C., and *Stephen Lynch* (with them *Kays*) for Murray.
Swinfen Eady, Q.C., and *Methold* for the plaintiffs.

LINDLEY, L.J.—This case is really one of importance. The courts ought to be very chary about committing people for contempt, or still more for fanciful contempt, with which the court must necessarily, unless it is to become useless, deal in the interests of the public. The greater the power the more caution it is necessary to use in exercising it.

The case which we have got before us is one which I do not think is anywhere near the line. It seems a plain straightforward case. On July 15, 1896, NORTH, J., granted an injunction in an action against a man named Paterson, to restrain him

from infringing a covenant in a lease which had been granted to him by the plaintiff. The controversy at that time turned upon the fact that Paterson had got a boxing club, or something of the kind, on the first, second, and third floors of a house in Fetter Lane, the premises which had been demised to him, and that was complained of by other people, and was an infringement of the covenant contained in the lease. NORTH, J., having come to that conclusion, granted an injunction restraining Paterson, his under-tenants, agents, and servants, from doing or suffering to be done anything which might interfere with the full and quiet enjoyment by the plaintiff or his under-tenants of the premises adjoining or neighbouring to the first, second, and third floors of the messuage or tenement demised by the plaintiff to the defendant, or which should be or tend to grow to be an annoyance, nuisance, damage, inconvenience, disturbance, or injury to the plaintiff or his superior landlord, or his or their tenants, or from using the premises, or suffering the same to be used otherwise than for the purpose of a private club, without the written licence of the plaintiff. The injunction, as is usual in such cases, follows the language of the covenant in the lease granted to the defendant, but the real nuisance complained of was the noise and disturbance created by the boxing performances which were taking place. A man named Edwin Murray was present in court, and heard a good deal of the proceedings which led to that injunction being granted. He says that he left the court shortly before the actual injunction was pronounced, or before judgment was given, he admits that he knew the result. Notwithstanding that, what was done—I do not say by whom at present—was this. There were arrangements made for having boxing performances in September and October, and on Oct. 9 and 21 some more boxing contests took place. Upon that an application was made to NORTH, J., to commit Paterson for infringement of the injunction. Before that came on for hearing, it appears, Paterson said that Murray was the person who was really responsible for the nuisance. Thereupon, proceedings were taken to commit Murray. He was not a party to the action, either first or last.

Let us pause and consider upon what jurisdiction the court can proceed against Murray. There is no injunction against him—he is no more bound by that injunction than any other member of the public. He is, however, bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice, and the case made against him, if it be anything, must be, not that he has technically infringed the injunction, which has not been granted against him, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt, as distinguished from a breach of the injunction, which has a technical meaning. Counsel for Murray has endeavoured to persuade us that there is no such jurisdiction. It startled me, I confess, as an old equity practitioner, to hear the jurisdiction contested if the facts brought the case up to what I have supposed. It has always been familiar to my brother RIGBY and myself that the orders of the court could not be set at naught, and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who were bound by the orders of the court which ought to be obeyed. All that is familiar law, and if authority is required for it it is to be found in *Lewes* v. *Morgan* (1); in *Lord Wellesley* v. *Earl of Mornington* (2); and in *Avery* v. *Andrews* (3), where KAY, L.J., upheld that jurisdiction. It is, I think, also to be found in *Day* v. *Longhurst* (4).

Counsel for Murray has argued very strenuously that there is no such jurisdiction, founding his argument on a passage in LORD ELDON'S judgment in *Iveson* v. *Harris* (5). *Iveson* v. *Harris* (5) was a case of prohibition, and LORD ELDON, differing from a view taken by the Court of Exchequer with respect to proceedings on a bail bond not being a proceeding against a prohibition restraining the original action so as to incur a contempt, as to which I say nothing, says this (7 Ves. at pp. 256, 257):

> "I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause for the purpose of the cause.

A The old practice was that he must be brought into court, so as according to the ancient laws and usages of the country to be made a subject of the writ. The jurisdiction in lunacy is quite distinct."

That strikes me as perfectly right. LORD ELDON is addressing himself there to persons bound by the injunction; he is not considering those persons who assist B others in setting the court at defiance; he does not deal with that class of persons at all. The law is there defined in a way which is familiar to anybody accustomed to the procedure in Chancery. A notice of motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, and a notice of motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the cause or anything of that kind, but because C he is conducting himself so as to obstruct the course of justice, are totally different things. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against; the proceedings against him are for the purpose of enforcing the order of the court for the benefit of the person who got the order. In the other case the court will not allow its process to be set at nought, and treated with contempt. The consequence is that in the one case the person who is D interested in enforcing the order is enforcing it for his own benefit, while, in the other case, if the order of the court has been contumaciously set at naught, he cannot settle it with the person so acting and save that person from the consequences of his act. The difference between the two kinds of contempt is perfectly well known, although in some cases there may be a little difficulty in saying on which side of the line they fall.

E As to the jurisdiction, if the facts indicate what I have stated, I have not the slightest doubt; and, notwithstanding the arguments on behalf of Murray, I cannot bring myself to see any difficulty about it. The facts, of course, are all important, and I agree at once that, if I can accept Murray's suggestion that he was present on the two occasions referred to simply as a spectator—if that were really true in substance—I cannot regard him as having done anything which justified the court F in making an order against him. I should think that that was not anything like enough. But let us see. What is Murray? I will not allude now to his past career. It is quite unnecessary to go into that. What is his connection with the club? Murray and a friend of his called Coaney, alias Brown, give Paterson references; Murray introduces Paterson to Mr. Norris, his solicitor; Murray from first to last finances Paterson. Paterson has not got any money; he wants £300 or £400 to G furnish the club and get a billiards-table, and he gets all his money from Murray. Then arises this very important matter. Just before the trial comes on there is a bill of sale, and just after the trial there is an agreement by Paterson to sell the whole of the concern to Murray—whether it is carried through or not I do not know. Murray is said to be an ordinary member of this club, and he evidently takes a very considerable interest in it. He is the man who has found the money, and, so far as H I can draw the inference, he carries on the club. It is evident that Paterson was a mere tool of somebody.

After the injunction there comes the important part of the case. Circulars are sent out to the members of the club informing them of the proposed boxing contests which took place in October. Whoever sent out those circulars, knowing of the injunction, did that which was obviously most improper. I cannot be so blind as to I suppose that Murray knew nothing about those things—I cannot imagine it for a moment. At all events, he goes to the place upon those two occasions which are specified; there were thirty or forty people there, and he was then present. We are asked to say that he was there simply as a spectator. I do not believe a word of it. The view taken by NORTH, J., is this:

"Looking at the history of Murray's connection with the club, I have not the least doubt as to the character in which he was present on the occasions in question. He was not there present as a mere spectator, but he was there as

one of the persons interested. That, I consider, is proved by the statements which are really not in dispute between the parties, looking at the whole of the evidence."

There is a little ambiguity about that expression, "he was there as one of the persons interested"; but I have not the slightest doubt that Murray was at the bottom of the whole thing. I give him credit for taking a view, which, if there was anything in it, might be of use to him. I daresay he thought that, if these boxing matches were not advertised. and the public were not invited to come, and so on, what was done would not matter. That was not, perhaps, within the objection, but he knew perfectly well that what was within the objection was creating a disturbance, under any circumstances, without having boxing matches. He did not do anything intentionally which he thought would get him into gaol—of course, he did not; he was not so foolish as that. I have not the slightest doubt, therefore, that what was done was a gross breach of the injunction, and that the court would be utterly wrong in acceding to this appeal. It must be dismissed.

A. L. SMITH, L.J.—I also come to the conclusion that the appeal must be dismissed, and dismissed with costs. The real question to be decided in this case is whether or not Murray, on Oct. 9 and 21, 1896, or either of those dates, was party or privy to—in other words, aided or abetted—Paterson in committing a breach of the injunction which NORTH, J., had granted on July 15, 1896. As regards the law, I have no doubt that the Court of Chancery has jurisdiction to commit for contempt a person, who, though not a defendant to the action, and against whom the injunction has not been granted, aids and abets a breach of the injunction, of which he knows, by the defendant. The cases that have been cited and referred to by my brother LINDLEY—first of all, in 1818, in *Lewes* v. *Morgan* (1) in the Exchequer, secondly, in 1848, the well-known case of *Lord Wellesley* v. *Earl of Mornington* (2), and *Avery* v. *Andrews* (3), before KAY, J.—undoubtedly show that the jurisdiction of the court could be exercised under the circumstances I have stated. Now comes the question whether or not it is shown by the evidence here, and shown clearly, that Murray was guilty of the offence charged against him. I agree with LINDLEY, L.J., that a man is not to be sent to gaol unless the evidence is clear that he is guilty of the offence charged against him. If I were not clear on the evidence in this case, or thought the case was not conclusively made out, I should not be a party to sending Murray to gaol for a period of one month. But I have not the slightest doubt that the offence is brought home on substantial evidence—evidence that cannot deceive one—against Murray.

I want to point out how the evidence strikes me strongly. Beginning first of all on Dec. 13, 1895, with the lease, it was a lease of three rooms in a house in Fetter Lane. Boxing entertainments were held in this house in breach of a restrictive covenant. The house had been fitted up, with a ring and seats round it for boxing purposes. In February, 1896, the landlords take proceedings by way of action against Paterson to restrain him from so doing; and on Feb. 13, the landlord moves for an interim injunction up to the date of the hearing. What do I find? I find Murray attending at the hearing of the motion. What did he do that for if, as he put forward at the trial, he had nothing whatever to do with this case? Why does Murray trouble himself by attending NORTH, J.'s, court when an interim injunction is being asked for against a man in whom we are invited to say that Murray had no interest? The action is pending, and we find that in the five months between Feb. 13, 1896, and June 12, 1896, Murray was unquestionably financing Paterson. First of all he pays the costs of the lease to Paterson—£10. Next, he pays the rent in advance—£50. Next, he buys a billiards-table for the premises—paying £76. Lastly, he advances from time to time moneys amounting to the sum of £200, making in all £336 for the purposes I have mentioned. What does he do all that for if he had nothing to do with the matter? He says that it was to oblige Paterson,

and that Paterson gave him I O Us. He says that he has not got those I O Us, but that he destroyed them when a bill of sale was given, on June 12, 1896. What was that bill of sale given for? When the circumstances of these loans, as they are now called, from Murray to Paterson come to be investigated, they cannot be made to fit in any way with the bill of sale being given to secure £150 and £50. It seems to me that what was done was for Murray's benefit. Inasmuch as the action against Paterson was coming on to be heard, and it was highly probable that Seaward would succeed, and that the interim injunction would be made perpetual, and that Paterson would be condemned in costs, the best way to prevent Seaward from getting those costs out of Paterson was for Murray to take a bill of sale of all the chattels, so that when the sheriff went in he could say: "You cannot take anything; all these goods are mine."

The action comes on to be heard on July 15, 1896. What do I find then? I find Murray in attendance again upon NORTH, J. What is he there for if he had nothing to do with the proceedings, as he now says? When you are dealing with a conflict of evidence you must take all the circumstances, one fact with the other, and see whether the chain is such as to make a strong chain or a weak chain. The injunction is granted; an order for costs is made; the sheriff goes in; the bill of sale plays its part; and Seaward does not get any of the costs which have been awarded to him. Then I find that, shortly after the injunction is granted, Murray and Paterson are agreeing together that Paterson shall assign to him this lease which was in his name. During this period the club had been going on; and there had undoubtedly been takings at the club. Where did those takings go to? Murray's counsel pointed out to my satisfaction that Paterson was not a man to be entirely believed, because he is contradicted by Mr. Norris, the solicitor whose evidence I have no reason to doubt. On the other hand, I must say that Murray is not to be believed on account of his antecedents; certainly he is not a witness of credit on whom you could place implicit reliance. What does Paterson say? Paterson says they went to one Coaney, alias Brown. Who is Coaney? Coaney is said to be partner to Murray in half shares in the business. If that statement is untrue—and it is a material fact when you are dealing with the question as to what interest Murray had in these premises in Fetter Lane, and in carrying on business there—there are two persons who could have contradicted Paterson. One is the secretary of the club, and the other is Coaney. He is not contradicted upon that. I should say, if the evidence does preponderate one way or the other, that it shows that the takings of this club went into the pocket of Murray's partner Coaney. I am aware that Murray says that, if they did, he knew nothing about it. If these takings did not go to Coaney, to whom did they go? The statement that they went to Coaney is not contradicted, and I certainly arrive at the conclusion that that part of the story is true, and it coincides with the rest of the history of the case which I have traced. As to the outgoings, they, in all probability, came out of the takings.

On Oct. 9 and Oct. 21 breaches of the injunction granted by NORTH, J., unquestionably took place. There could not have been two more flagrant and contumacious breaches than those which are proved by the evidence to have taken place on those dates. Murray was there on both occasions. We have from Murray's cross-examination that, before these two meetings—at which, he says, and his case is, that he was casually present as a spectator and nothing more—circulars were sent out to the members informing them with regard to the proposed boxing contests which were to take place in October. In his affidavit there is a denial of everything that pinches him; but I do not find any manner of denial that he knew these circulars were sent out, but he made a statement which was very significant. In cross-examination he said: "They were not, as far as I know, advertised in the papers." Is this court to believe that Murray was present—I am using his own words—at both meetings as a spectator only? The meaning of that is that he had nothing whatever to do with either of those meetings except as a spectator; and, therefore, he was not

an aider and abettor of the flagrant breach of the injunction which took place on those two occasions. A

I agree with what was laid down in *R.* v. *Coney* (6) by the majority of this court, namely, that the mere fact of a man being present as a spectator at a prize fight, or a boxing exhibition, or a like thing, does not make him an aider or abettor of what is going on. If, however, there is evidence which shows that Murray was not there as a mere spectator only, but had an interest, and was doing what he did as regards the carrying on of this so-called club in Fetter Lane from as early as February, 1896, down to Oct. 21, 1896, I cannot hold otherwise than that it has been clearly proved that he was there aiding and abetting in a breach of the injunction which he knew had been granted, and which he flagrantly disobeyed. For these reasons, I think that my brother NORTH'S judgment in this case must be upheld. B C

RIGBY, L.J.—After the analysis of the evidence that has been given by my brothers, in which I entirely concur, I do not think it is necessary for me to say anything upon that part of the case. I will only say a few words on the argument of counsel for Murray with reference to the jurisdiction of the court in matters of contempt of court with relation to injunctions. Unless I entirely misapprehend that argument, it went so far as that the court has no jurisdiction to commit for contempt by way of punishment, but that the jurisdiction is an ancillary jurisdiction in order to secure that the plaintiff in a suit shall have his rights. I do not think that that can be for a moment supported. I do not remember a case in which it has ever been suggested before in that way, for I am satisfied that the dictum of LORD ELDON in *Iveson* v. *Harris* (5) had absolutely nothing to do with this question. The learned judge was quite right, no doubt, in saying that you must look very carefully when a prohibition or an injunction is granted; you must see how far it extends; and you must take care that you do not overstep the meaning of the court with reference to the injunction and bring in people as though they were prohibited or enjoined, when the court never thought of prohibiting or enjoining them. That is true. It has, however, nothing to do with the question of contempt at all. I do not think that that passage is relevant to cases of the present kind at all. D E F

That there is a jurisdiction to punish for contempt of court is undoubted. It has been exercised for a very long time—for longer than any of us can remember. That punitive jurisdiction is founded upon this, that it is not for the good of the plaintiff or a party, but it is for the good of the public, that orders of the courts should not be disregarded, and that people should not place themselves in the position of assisting in the breach of those orders in what is properly called contempt of court. It is astonishing to me that at this date that jurisdiction should be questioned. I will not again refer to the authorities that have been mentioned by LINDLEY, L.J., and, to some extent, by A. L. SMITH, L.J. I will only say what occurred to me at the commencement of this case. The matter was greatly discussed in *Yelverton's Case* (*Re Bahama Islands, Special Reference from*) (7) before the Privy Council, where there were judges of very great experience and very great knowledge. There the whole question of contempt was considered in a very much more exhaustive manner than I have known in any other case. As appears from the opinion which is printed in the report of the case, the Privy Council, not as new law, but as it were incidentally, and, therefore, in a more important manner, did support this view of the punitive jurisdiction. They advised Her Majesty that the prerogative of the Crown in cases of punitive contempt, which they took for granted, extended to a remittal of the sentence. In that opinion it was not necessary for them to take the other side of the question, but I apprehend that it is undoubted, irrespective of the decision in the Privy Council, that it is the practice of the representative of the Crown, the Secretary of State for the time being, to interfere in the other branch of cases of committal for contempt, when the contempt consists in the refusal to do that which is right to a party litigant. The two cases are broadly G H I

A distinguishable; but it was astonishing to me, as I said before, to have it argued that there are not two branches at all, but that the last branch—that is, the interest of a party litigant—is the only thing that gives jurisdiction to the court. I entirely deny it, and I do not now that it has ever before been asserted.

With reference to the particular case now before us, it is said that this present proceeding is only for the benefit of the plaintiff. It is quite true that, in cases of B this kind, the court does not act of itself. It is quite true that there is no public informer, or public officer charged with the duty of bringing before the court cases of contempt. In the vast majority of cases, I do not think it is necessary that it should be so. You might conceive of cases in which it would be different, but in the vast majority of cases it is upon the information brought by a party to an action that the court commits for contempt, or entertains the question of com- C mitting for contempt. But I entirely dissent from the suggestion that that party can, when once the court is seised of the matter, exercise any influence at all. Sometimes there is an appeal to the court, just as there may be to a judge who is about to inflict a sentence in any case. The prosecutor may say: "Perhaps you will take into consideration this and that, and the other thing, and not be so severe." He may go to that extent, but the court acts upon its own jurisdiction, D upon its own authority, and without more regard than I have suggested to the wishes and feelings of the person who has brought the matter before the court. It is perfectly clear that the cases in which the plaintiff or a party litigant can waive a right have nothing to do with a case like the present.

I have no doubt whatever of the jurisdiction here; and I have no doubt that the facts call for an exercise of that jurisdiction. Although the warning can never be E too frequently repeated that the court must be very careful how it acts in matters where the discretion is so wide, and the jurisdicton so extensive and important, I do not question for a moment that this is one of those cases in which the jurisdiction ought to be exercised, and the sentence ought to be an exemplary one. I have no doubt whatever that the aiding and abetting a breach of the injunction here on the part of Murray was both wilful, and in a high degree, reprehensible. I F cannot think that the committal, which NORTH, J., has pronounced against him was in any way excessive, and I do not think, therefore, that we ought to attempt to interfere.

Appeal dismissed.

Solicitors: *Norris & Son; Proudfoot & Chaplin.*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law.*]

A

CLYDESDALE BANK, LTD. AND ANOTHER *v.* PATON AND ANOTHER

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris and Lord Davey), April 30, May 1, 11, 12, 1896] B

[Reported [1896] A.C. 381; 65 L.J.P.C. 73; 74 L.T. 738]

Guarantee—Credit—Representation as to credit—Fraudulent representation—Applicability of Mercantile Law Amendment (Scotland) Act, 1856, *s.* 6, *and Statute of Frauds Amendment Act*, 1828, *s.* 6.

By s. 6 of the Mercantile Law Amendment (Scotland) Act, 1856, which C
is in substantially the same terms as s. 6 of the English Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act): "All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of the payment of D
debt or of any other obligation . . . shall be in writing . . . otherwise the same shall have no effect."

Held: the section applied, not only to innocent representations, but also to representations which had been, or might have been made, fraudulently.

Notes. Referred to: *Banbury* v. *Bank of Montreal*, [1918-19] All E.R. Rep. 1. As to the Statute of Frauds Amendment Act, 1828, see 18 Halsbury's Laws (3rd E
Edn.) 425, 426, and 4 Halsbury's Statutes (2nd Edn.) 659. For cases see 26 Digest (Repl.) 31-33.

Cases referred to in argument:

Pasley v. *Freeman* (1789), 3 Term Rep. 51; 100 E.R. 450; 26 Digest (Repl.) 31, *187*. F

Haslock v. *Fergusson* (1837), 7 Ad. & El. 86; 2 Nev. & P.K.B. 269; 6 L.J.K.B. 247; 1 Jur. 689; 112 E.R. 403; 26 Digest (Repl.) 32, *192*.

Tatton v. *Wade* (1856), 18 C.B. 371; 4 W.R. 548; 139 E.R. 1413; sub nom. *Wade* v. *Tatton*, 25 L.J.C.P. 240; 2 Jur.N.S. 491, Ex. Ch.; 26 Digest (Repl.) 33, *200*.

Devaux v. *Steinkeller* (1839), 6 Bing.N.C. 84; 8 Dowl. 33; 8 Scott, 202; 9 G
L.J.C.P. 30; 3 Jur. 1053; 133 E.R. 33; 26 Digest (Repl.) 32, *191*.

Swann v. *Phillips* (1838), 8 Ad. & El. 457; 3 Nev. & P.K.B. 447; 1 Will. Woll. & H. 374; 112 E.R. 912; sub nom. *Swann* v. *Phillips*, *Cherrington* v. *Phillips*, 7 L.J.Q.B. 200; sub nom. *Swarne v. Phillips*, 2 Jur. 494; 26 Digest (Repl.) 32, *194*.

Lyde v. *Barnard* (1836), 1 M. & W. 101; 1 Gale, 388; Tyr. & Gr. 250; 5 L.J.Ex. H
117; 150 E.R. 363; 26 Digest (Repl.) 31, *190*.

Appeal by the defendant in the action from a decision of the Second Division of the Court of Session (the Lord Justice-Clerk, Lord Macdonald, Lord Young and Lord Trayner), affirming with a variation a decision of the Lord Ordinary, Lord Low. I

The action was brought by the respondents against the appellant bank to recover damages for misrepresentations made by one Scott, an agent of the bank, whereby the respondents were induced to accept bills for the accommodation of a firm named Douglas, Reid & Co. to the amount of £4,000. The representations made by Scott were to the effect (i) that Douglas, Reid & Co. were in a sound financial position, and only required some temporary help; (ii) that the sum due by them to the bank was not large; (iii) that they had made up certain losses which they had previously sustained; (iv) that no portion of the proceeds

of the respondents' acceptances would be applied towards the extinction of the debt due to the bank. In the course of the argument their Lordships expressed an opinion that the respondents had not sufficiently averred that the fourth representation alleged to have been made by the appellant Scott had not in fact, if made, been given effect to by the bank. The respondents proposed to amend the record by adding the following averments :

> "In fact the object of procuring the pursuers to accept the bills . . . was to pay off with their proceeds existing debts due to the bank by Douglas, Reid & Co. on account-current contrary to the fourth assurance above set forth. Had it not been for the said assurance the pursuers would not have accepted any of the bills."

The acceptances

> "were applied in extinction pro tanto of the bank's debt contrary to the assurances given as aforesaid. If the said acceptances had not been granted and applied as aforesaid, the bank's ultimate loss would have been larger by the amount of the said bills, viz, £4,000, with interest thereon. The result was that the bank obtained and the pursuers lost the said sum of £4,000 and interest."

The appellants pleaded that these representations were not in writing as required by s. 6 of the Mercantile Law Amendment (Scotland) Act, 1856, and were therefore of no effect. The respondents contended that the fact that the representations were made in pursuance of a fraudulent scheme, to enable Douglas, Reid & Co. to raise money with which to pay off their debt to the bank, took them out of the operation of the section, and the courts below gave effect to this contention. It was not alleged that the directors of the bank were parties to the fraud, but it was said that Scott was acting within the scope of his employment in making the representations.

The Solicitor-General for Scotland (*Graham Murray*, *Q.C.*), *Ure*, and *King*, all of the Scottish Bar, for the appellants.

Balfour, *Q.C.*, (of the Scottish Bar), *Sir Robert Reid*, *Q.C.*, and *Robertson*, *Q.C.*, for the respondents.

LORD HALSBURY, L.C.—The averments now seem to me to be clear. To use the language of English pleading, facts are set out from which it would appear that there has been a combination to induce the respondents to advance a sum of money under circumstances in which it was to the advantage of the bank and to the advantage of those who persuaded the respondents to allow the debtors, who were in difficulties which might lead to their sudden bankruptcy, to continue carrying on their business. If the allegations with which I am about to deal had been to the effect that in pursuance of that combination the bank had managed to get their own debt paid, and the person who signed the bills had been induced to sign them by the false representation that it was intended to enable the debtor to carry on his business so as, perhaps, to recover himself, but that in lieu of that the bank had appropriated the whole of the new advances to pay off their own past debt, I am of opinion that there would have been a good cause of action shown upon the face of this record. But after the discussion which has taken place, and after what has been pointed out as to the ambiguous language used in the pleadings, it is manifest to me that no such thing can be averred, and that it is perfectly consistent with every allegation on this record that, on receiving these new advances, the bank applied them to the credit of the debtor. Although in a certain sense it may be that at the end the bank was less a loser than it would otherwise have been by reason of this advance, yet the only thing which makes it properly a cause of action is omitted from this condescendence. Therefore, I am of opinion that the judgment of the Inner House ought to be reversed, the action remitted,

and the defenders assoilzied. The language of an English pleader would be, that whatever was the contract intended to be entered into, and entered into in fact, there was no breach upon the face of this record properly assigned. There is nothing which shows that the thing that was to be done by the bank was not done and done bona fide with the intention of helping the person who was in difficulties. I should have been reluctant to have given judgment against the pursuer in this case on the ground only of the ambiguous language of pleading, but after more than a week's delay, and seeing the amendments which are now proposed, it seems to me that with great astuteness and skill in the use of language the pleader has repeated exactly the same thing in different words, and has expressly avoided doing that which would have set out a complete cause of action. Under these circumstances it appears to me that all your Lordships can do is to allow the appeal and remit the action to the court below to assoilzie the defenders, and find the respondents liable in expenses.

LORD WATSON.—The main question involved in this appeal is new to the law of Scotland, although it arises upon the terms of a statute which was passed in 1856. Section 6 of the Mercantile Law Amendment (Scotland) Act of that year enacts:

> "All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, of postponement of the payment of debt or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person making such representations and assurances, or by some person duly authorised by him, otherwise the same shall have no effect."

This enactment is in substance the same as the provisions of s. 6 of the Statute of Frauds Amendment Act, 1828, commonly known as Lord Tenterden's Act, which applies to England and Ireland. There is this difference of expression between the clauses, that in the earlier statute it is declared, not that the representations and assurances shall be of no effect, but that no action shall be maintainable upon them when they are not contained in a writing duly subscribed.

This is an action of damages brought by the respondents founded upon representations alleged to have been falsely and fraudulently made to them by the appellant Scott, who was agent in Dundee for the appellant bank, for the purpose and with the effect of inducing them to sign bills of exchange to the amount of £4,000 for the accommodation of the firm of Douglas, Reid & Co. It is alleged that the main object which Scott had in view in making these representations was to enable the bank to apply the proceeds of the bills so procured in reduction of a large overdraft which was then due to it by the firm accommodated. It is not asserted that the directors, or any official of the bank other than Scott, were in the knowledge of his fraudulent proceedings, but it is averred that the representations made by him were within the scope of his employment as agent, and there are also averments which are said to mean that the bank did in fact receive the proceeds of the bills and apply the same in extinction of the debt due to it from Douglas, Reid & Co. It is admitted by the respondents that all the representations upon which they rely were made by Scott verbally. These representations were—(i) That Douglas, Reid & Co. were in a sound condition financially, and only required temporary accommodation; (ii) that the sum due by them to the bank was very trifling; (iii) that Douglas, Reid & Co. had made up the losses which they had previously sustained through the failure of the firm of Lipman & Co. by fortunate speculations in jute; and (iv) that no portion of the proceeds of any acceptance by the respondents would be applied towards extinction of the bank's debt, or of any obligation to the bank. In their defences the appellants pleaded that these representations, being neither in writing nor subscribed as the Act of 1856 requires, were of no effect, and could not be admitted to proof. The plea was overruled by the Lord Ordinary,

A LORD LOW, who allowed the parties, before answer, a proof of their respective averments. The Second Division of the court recalled the interlocutor of the Lord Ordinary, and, instead of a proof before answer, appointed issues to be lodged for the trial of the cause.

All the learned judges in the courts below were of opinion that the circumstances of the case, as disclosed in the condescendence, took these representations out of the B statute of 1856. The Lord Justice-Clerk held it to be sufficient for that purpose that the representations were made in pursuance of a fraudulent scheme, by means of which the bills were obtained, on the assurances of its agent, for the purposes of the bank. The same view was more clearly indicated by LORD YOUNG and LORD TRAYNER, who were of opinion with the Lord Ordinary that the representations would have been within the statute if they had been made for the sole purpose C of inducing the respondents to accept the bills, but that they were excluded from its operation because they were made for an ulterior purpose which is not mentioned in the statute, namely, in order that the bank might be enabled to obtain payment of its claims against Douglas, Reid & Co. The fourth representation does not appear to me to involve the construction of the statute. It differs from those which precede it in this respect, that it does not contain any assurance relating D to Douglas, Reid & Co., or to their credit, ability, or trade. In my opinion, it does not possess the character of a representation to which the statute applies. In the view of the law which was adopted by the courts below, the distinction between the fourth and the first three of the representations libelled on was immaterial.

E The provisions of s. 6 are expressed in terms as comprehensive as they are imperative. They enact that no verbal representations, being of the character, and made for the purpose and with the intent specified in the section, shall be of any legal effect as giving a remedy to the person who may be misled by them to his detriment. They in substance provide that no person to whom such verbal representations are made for such a purpose shall have any right to rely upon them, and that if he does choose to act upon them, he must bear the consequences F of his own credulity. It is also, in my opinion, obvious that these provisions were not intended to meet the case of truthful and honest representations, and that they necessarily include all representations of the character, and made with the purpose specified, however false and however fraudulent. In the present case it has hardly been controverted, and it does not appear to me to admit of serious dispute, that G the first three of the representations upon which the action is laid answer precisely both in character and in their immediate object to the description contained in s. 6. But it has been argued (and the argument found favour with the learned judges of the Court of Session) that the first three of these representations are not within the incidence of s. 6, because they are alleged to have been made, not merely with the immediate purpose of inducing the respondents to sign accommodation bills, but H with the further and fraudulent purpose of enabling the bank to appropriate the bills, when granted, to the payment of its debts. I do not think that the argument has any solid foundation in fact.

The main, if not the only, cause of action disclosed by the condescendence is the fraudulent procuring of the respondent's acceptance of the bills in question by means of these representations. But I am of opinion that, even if it be warranted I by the facts, the argument is without foundation in law. It seeks to limit the generality of the enactments of s. 6 by introducing a proviso to the effect that they shall not apply in cases where the person making the representations has in view some ulterior and illegitimate purpose, beyond inducing the person to whom they are made to give credit or money to a third party. There is no warrant for such a limitation to be found in the words of the section, which, in my opinion, declare explicitly that any verbal representation to which they apply shall be absolutely inefficacious, no matter what may be the further and fraudulent design of the person who made it.

It was maintained for the respondents that the competency of proving these representations by parol has been established by s. 100 of the Bills of Exchange Act, 1882, which provides :

> "In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question, may be proved by parol evidence."

It may well be doubted whether the present action does raise any question of liability upon the respondents' accommodation bills, but it is an obvious answer to the argument that in the present and similar cases such verbal representations have since the Act of 1856 ceased to be relevant facts. It is possible that the fourth representation might be founded on, either as being a fraudulent inducement to sign bills for the accommodation of Douglas, Reid & Co. or as constituting a promise or agreement binding the bank to abstain from imputing any part of the proceeds of these bills towards payment of its debt. But in neither of these aspects do I find any relevant allegation in the condescendence. It is not averred that the bank has failed to fulfil the representation said to have been made by its agent. The only averment upon this point, which occurs in the 8th article of the condescendence, is that the respondents' acceptances

> "were all placed to the credit of the said Douglas, Reid & Co.'s overdrawn account-current with the Clydesdale Bank at the several dates when the pursuers' said acceptances were obtained as aforesaid. The defenders, the Clydesdale Bank, were thus lucrati to the extent of the said acceptances."

These allegations are quite consistent with the possibility that the whole of the sums so credited were drawn out by Douglas, Reid & Co., and by them applied to their own purposes, and are, therefore, irrelevant.

Your Lordships delayed the consideration of this appeal in order that the respondents might have an opportunity of submitting any amendment showing that the bank had applied the proceeds of these acceptances in reduction of the balance due to it by Douglas, Reid & Co. The respondents have proposed to add two new averments, the first being that the acceptances were "applied in extinction pro tanto of the bank's debt;" and the second, that,

> "if the said acceptances had not been granted and applied as aforesaid the bank's ultimate loss would have been larger by the amount of the said bills, viz., £4,000 and interest thereon."

I see no reason to doubt that these amendments have been very properly framed with a strict regard to the limits of truth, but in my opinion, they come far short of relevancy. So far from negativing they appear to me rather to suggest that the appellant bank not only allowed to Douglas, Reid & Co. the free use of the proceeds of the respondents' acceptances, but made new advances to that firm out of its own funds. I am of opinion that the interlocutors appealed from must be reversed, with costs; and that the action ought to be remitted to the Second Division of the Court of Session, with directions to assoilzie the appellants from its conclusions, with expenses in both courts below.

LORD HERSCHELL.—The action is founded upon four matters, the statement of which is contained in the fifth condescendence. It cannot be doubted that the first three complaints are founded upon statements made by the appellants' agent with reference to the "character, conduct, credit, ability, trade, or dealings" of Douglas, Reid & Co. Apart from the provisions of the Mercantile Law Amendment (Scotland) Act, 1856, no doubt can be entertained that the condescendence discloses relevant facts establishing a cause of action against the appellants.

The objection taken on their behalf to the relevancy of the condescendence is founded upon the provisions of that enactment. The respondents seek to avoid the

operation of the statute so far as they are concerned in the present case, and have succeeded in obtaining judgment in their favour on the ground that the representations made were part of a scheme fraudulently devised by the appellants and Douglas, Reid & Co. for the purpose of benefiting the bank at the expense of the respondents. In my opinion, the operation of the statute cannot be so avoided. Assuming that the respondents could establish that the representations were made for the purpose of giving effect to such a fraudulent scheme, I am of opinion that the enactment positively forbids any effect being given to those representations. It is impossible to conceive an enactment in more general or unambiguous terms, "all representations and assurances" of the nature described, unless in writing, are to have no effect. The action of the respondents, if it is to be maintained, requires as its foundation that effect should be given to those representations which the statute has said shall have no effect. I do not see how it is open to question that the representations were within the words of the statute, because the statute applies to all such representations made or granted to the effect or "for the purpose of enabling such person to obtain credit, money, goods," etc. The very framework of the respondents' case is that the representations had the effect of rendering them liable upon certain bills of exchange, which resulted in money being paid to the bank for the accommodation of Douglas, Reid & Co. How, then, it can be said that they were not made or granted to the effect of enabling those persons to obtain credit or money it is difficult to see, but if the statute in terms applies, how is it possible to avoid its operation by proving that the design of the bank and of Douglas, Reid & Co. in making the representations, and so procuring the credit was an ulterior benefit to the bank?

The respondents also maintain that s. 100 of the Bills of Exchange Act, 1882, dispenses in such a case as this, inasmuch as obligations on bills of exchange come in question, with the necessity of the writing which is required by the Mercantile Law Amendment (Scotland) Act. I think that it is an argument which it is difficult to treat seriously. It is impossible to conceive that s. 100 of the Act can have repealed pro tanto the Mercantile Law Amendment (Scotland) Act whenever obligations upon bills of exchange have been obtained by representations as to conduct, credit or character.

That disposes of the case so far as regards the first three allegations contained in the condescendence. The fourth allegation is quite independent of the statute; it is

> "that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt."

I think that allegation is only relevant if it can be maintained as a representation made by the bank to the respondents, upon which they acted, being a false and fraudulent representation. If it is a promise only it would not be relevant, because the respondents would have no title to sue in respect of its breach. But no doubt that which is in form a promise may be in another aspect a representation, and I think that the fourth averment of the fifth condescendence may be treated as relating to a representation by the bank which is alleged to be false and fraudulent. Taking it to be so, I do not think that, when you take the whole of the condescendences together, it is shown that the bank did make a false and fraudulent representation of an intention which they never intended to carry out, because that is what it must amount to. So far as appears, the bank, if they indicated an intention that the money should not be used in extinction of the debt, carried out that intention. There is no allegation that they did not give full effect to that which they alleged to be the intention. It was open, perhaps, to some argument, as the case stood, whether the allegations in the subsequent condescendences had not been from want of care so framed as to be consistent with that intention either being carried out or not being carried out. Accordingly, an opportunity was given to the respondents to suggest any amendment which they would desire to make with a view of clearing up the doubt which might be said to exist. Having had ample opportunity of con-

sidering what averments they could add, they have failed to suggest to your Lordships any averments as capable of proof by them which would show that the bank did not intend that the money should not be applied in extinction of their debt, looking at the substance of the matter and not at the form, and that the alleged intention was not given effect to. For these reasons I think that the action altogether fails, and I entirely concur in the order which has been proposed.

LORD DAVEY.—I also concur in the order which your Lordships propose to make in this appeal, and also in the reasons which have been assigned for it. It is worthy of observation that the fifth article of the condescendence which contains the representations alleged to have been made by or on behalf of the bank, commences with the averment that those representations were made on the occasion of Douglas, Reid & Co. requiring temporary accommodation. It then avers that Mr. Paton, one of the pursuers, saw Mr. Scott, the manager of the bank, who made the four representations relied upon.

We have it then that those representations were made upon the occasion of Douglas, Reid & Co. requiring temporary accommodation from the pursuer's firm, and this pursuer, accordingly, seeing the manager of the bank. It cannot be disputed, I think, that the three first of these representations contained in the fifth article of the condescendence are "representations and assurances as to the character, conduct, credit, ability, trade, or dealings," of the firm of Douglas, Reid & Co., and it is scarcely denied that they were made for the purpose of enabling the firm of Douglas, Reid & Co. to obtain credit or money from the pursuers. If so, they would seem prima facie to fall within s. 6 of the Mercantile Law Amendment (Scotland) Act, 1856. But it is said that, although they were made for that purpose, there was an ulterior purpose or motive for obtaining the credit for Douglas, Reid & Co. from the pursuers, which was of a fraudulent character, and takes the case out of the statute. I entirely concur in the observation that has been made, that, if it was intended to except representations made with a fraudulent motive, or representations of a fraudulent character, from that statute, an exception to that effect would have been introduced into the statute. Indeed, it appears to me that if you introduce such an exception into the Scottish statute or into the English statute which is known by the name of Lord Tenterden's Act, you will to a large extent, I should say almost entirely, nullify the beneficial operation of the statute, because what are the cases in which the statute comes into play?

In England, and I believe also in Scotland, you cannot maintain an action upon a representation unless that representation is made fraudulently. An innocent representation, that is to say, a representation made by a man who believes what he is saying, is not actionable in England, and I believe that it is not actionable in Scotland. At any rate, the class of representations in which the question which was intended to be dealt with by those two statutes occurs are usually and for the most part fraudulent representations, or it is sufficient to say that they may be, and if you excluded representations of a fraudulent character, or representations made fraudulently or with a fraudulent purpose from those statutes, you would, in my opinion, do away with at least half their beneficial operation. Therefore I think that it is no answer to the plea of the defenders that the case falls within s. 6 of the Mercantile Law Amendment (Scotland) Act, to reply that these representations were made with a fraudulent motive or were of a fraudulent character; consequently I am of opinion that, having regard to the language of s. 6 of the Act, the present action is not maintainable upon these three first averments of representations by the defenders.

With regard to the fourth representation, I will assume that it may be read as a representation of a fact. I have considerable doubt whether in the form in which it is alleged, being an allegation of an intention and not of a fact, it is not giving too benevolent a construction to the pleadings so to read it, but for the present purpose I will assume that it is an allegation of fact, and that it is a representation of the

purpose for which the acceptances were required from the pursuers. But treating it so, it would not, I agree, be within s. 6 of the Mercantile Law Amendment (Scotland) Act; it would be outside that statute. To make it actionable you would require allegations, not only that that representation was made fraudulently, but also that it was acted upon, and that the defenders suffered damage by such acting. It was agreed on all hands by your Lordships that the allegation in the condescendence as it stands was wholly insufficient to allege any such damage, because it merely alleged that the £4,000 were paid to the overdrawn account of Douglas, Reid & Co. with the Clydesdale Bank, and that "the Clydesdale Bank were thus lucrati to the extent of the proceeds of the said acceptances," leaving it perfectly open and perfectly uncertain whether the Clydesdale Bank, although they immediately got the benefit of the £4,000, did not afterwards allow Douglas, Reid & Co. to draw to that extent for the purposes of their business, so that the £4,000 really and in substance would go in the manner in which it was averred it was intended to go.

Your Lordships have given the respondents an opportunity of amending their condescendence, in case what I conceive to be the obvious meaning of it was only a slip. Possibly if the amendment which they propose had been in the condescendence in the first instance, it might have been considered sufficient; but I am bound to say that after the respondents had heard what had been said by your Lordships, and had known exactly where the shoe pinched, and where the averment was insufficient, if they had been able to aver that Douglas, Reid & Co. were not allowed to draw £4,000 after the bills had been paid into the bank for the purposes of their business, I cannot conceive that they would not have said so. Instead of that, they propose to insert an allegation which is, to my mind, perfectly consistent with the fact that Douglas, Reid & Co. were allowed to draw and did in fact draw out £4,000 after having placed it to their credit with the bank, because what they say is, that "the bank's ultimate loss would have been larger by the amount of the said bills, namely, £4,000 and interest thereon." That is perfectly susceptible of the construction that it means the ultimate loss of the bank having regard to further advances made against the £4,000. That I believe to be the true construction of the amendment, but it is sufficient to say that, in my opinion, it wholly fails to meet the requirements which, it was pointed out to the respondents by your Lordships, should be met in any amendment which they proposed to make of their pleadings. Under these circumstances I think that it would be a wilful and wanton waste of expense to allow the defenders to go to trial upon the fourth representation contained in the fifth article of the condescendence.

LORD HALSBURY, L.C.—I wish to say that **LORD MACNAGHTEN** and **LORD MORRIS** concur in the opinions which your Lordships have delivered. For myself, I wish to add that if I only dealt with the fourth question in the condescendence in the opinion which I have just expressed to your Lordships, it was because I really, with all respect to those learned persons who have looked into the matter, thought that the question with regard to the statute was too plain for argument. But as my silence upon that question might be supposed to indicate some difference of opinion, I wish to say that I entirely concur in the construction of the statute which has been placed upon it by my noble and learned friends.

Appeal allowed.

Solicitors: *Murray, Hutchings, Stirling & Murray*, for *Ronald & Ritchie*, Edinburgh; *W. Robertson & Co.*, for *J. Smith Clark*, Edinburgh.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

Re ARBITRATION BETWEEN LORD GERARD AND LONDON AND NORTH WESTERN RAIL. CO.

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), January 12, 15, 1895] B

[Reported [1895] 1 Q.B. 459; 64 L.J.Q.B. 260; 72 L.T. 142; 43 W.R. 374; 11 T.L.R. 170; 14 R. 201]

Compulsory Purchase—Railway—Compensation—Acquirement of land and minerals excepting coal—Basis of compensation for coal—Time for determination—Right of landowner to go through acquired land to get coal—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict.*, *c.* 20), *ss.* 77-85. C

A railway company gave a landowner notices to treat in respect of certain land together with the stone, sand, and other minerals thereunder excepting all mines and seams of coal. The question of the amount of compensation to be paid to the landowner having been referred to arbitration, the company obtained a rule nisi to set aside the submission on the ground of misreception of D evidence by the arbitrator.

Held: (i) the question of compensation was governed by ss. 77-85 of the Railway Clauses Consolidation Act, 1845, to the exclusion of the common law rules as to the rights of the parties which would have been applicable if the land had been bought by agreement; (ii) compensation with regard to the coal left was to be determined in accordance with ss. 77-85, not at once, but when the E landowner gave the company notice of his intention to work the coal; (iii) if the company did not then acquire the coal, there was a necessary implication that the landowner could go through the surface of the acquired land in order to get at the coal.

Notes. Referred to: *Glamorgan Canal Navigation Co.* v. *Nixon's Navigation Co.* F (1901), 85 L.T. 53; *Manchester Corpn.* v. *New Moss Colliery*, [1906] 1 Ch. 278; *Re Carlisle and Northumberland County Council* (1911), 10 L.G.R. 50; *London and North Western Rail. Co.* v. *Howley Park Coal and Cannel Co.*, [1911] 2 Ch. 97; *Kirkness* v. *John Hudson & Co.*, [1955] 2 All E.R. 345.

As to the "mining code" in the Railways Clauses Consolidation Act, 1845 (19 HALSBURY'S STATUTES (2nd Edn.) 590) see 26 HALSBURY'S LAWS (3rd Edn.) 349 et G seq.; and for cases see 34 DIGEST 714-717.

Cases referred to:

(1) *Holliday* v. *Wakefield Corpn.*, [1891] A.C. 81; 60 L.J.Q.B. 361; 64 L.T. 1; 40 W.R. 129; 7 T.L.R. 153, H.L.; 11 Digest (Repl.) 170, *407*.

(2) *Great Western Rail. Co.* v. *Bennett* (1867), L.R. 2 H.L. 27; 36 L.J.Q.B. 133; H 16 L.T. 186; 15 W.R. 647, H.L.; 11 Digest (Repl.) 164, *375*.

(3) *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* v. *Robinson* (1889), 15 App. Cas. 19; 59 L.J.Ch. 442; 62 L.T. 194; 54 J.P. 580; 38 W.R. 577; 6 T.L.R. 100, H.L.; 11 Digest (Repl.) 162, *353*.

Also referred to in argument: I

Caledonian Rail. Co. v. *Sprot* (1856), 19 Dunl. (Ct. of Sess.) (H.L.) 3; 2 Macq. 449; 28 Sc. Jur. 486; 34 Digest 667, *648*.

Elliot v. *North Eastern Rail. Co.* (1863), 10 H.L.Cas. 333; 2 New Rep. 87; 32 L.J.Ch. 402; 8 L.T. 337; 27 J.P. 564; 9 Jur.N.S. 555; 11 W.R. 604; 11 E.R. 1055, H.L.; 11 Digest (Repl.) 172, *420*.

Ruabon Brick and Terra Cotta Co. v. *Great Western Rail. Co.*, [1893] 1 Ch. 427; 62 L.J.Ch. 483; 68 L.T. 110; 41 W.R. 418; 9 T.L.R. 121; 2 R. 237, C.A.; 34 Digest 702, *914*.

A *Errington* v. *Metropolitan District Rail. Co.* (1882), 19 Ch.D. 559; 51 L.J.Ch. 305; 46 L.T. 443; 30 W.R. 663, C.A.; 34 Digest 605, *25*.
Pountney v. *Clayton* (1883), 11 Q.B.D. 820; 52 L.J.Q.B. 566; 49 L.T. 283; 47 J.P. 788; 31 W.R. 664, C.A.; 34 Digest 610, *86*.

Appeal by Lord Gerard from a decision of the Divisional Court (MATHEW and B KENNEDY, JJ.) making absolute a rule nisi to revoke a submission to arbitration.

In June, 1889, the London and North Western Rail. Co. gave Lord Gerard, in the exercise of their statutory powers, a notice to treat in respect of certain lands, "together with the stone, sand, clay, and gravel within and under the same." With the consent of Lord Gerard, the company shortly afterwards entered upon and took possession of the land. In July, 1891, the company gave to Lord Gerard C a second notice to treat in respect of other land, "together with the mines and minerals thereunder, except all mines, beds, and seams of coal," and subsequently entered upon and took possession of that land. In May, 1894, an agreement was made between Lord Gerard and the company, by which it was agreed to refer to an arbitrator the determination of the amount to be paid to Lord Gerard for the purchase of the lands and minerals taken by the company, and the compensation D payable to him for damage by severance or otherwise injuriously affecting his other lands and minerals in consequence of the exercise of their statutory powers by the company. The coal lying beneath the land taken, and beneath the land adjacent to the land taken, was not being worked at the date of the arbitration, and there was no immediate prospect of its being worked. At the arbitration evidence was tendered on behalf of Lord Gerard in support of a claim for compensation because E he would have to leave unworked large quantities of coal subjacent and adjacent to the land taken by the company, in order to afford the necessary vertical and lateral support to such land; and also because it would be impossible to work the coal without taking away part of the land taken by the company; and also because, having no power or right to remove or pass through the land so taken, he would be prevented from working certain coal belonging to him, either at all, or at the same F cost as that at which he might otherwise have worked it.

By the Railways Clauses Consolidation Act, 1845:

"Section 77. The company shall not be entitled to any mines of coal, iron-stone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the G construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

"Section 78. If the owner, lessee, or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the H prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier, shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company I that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner, lessee, or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

"Section 79. If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines

or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or, if the company shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby by action in any of the superior courts."

The evidence in support of those claims was admitted by the arbitrator, and the railway company obtained a rule nisi to set aside the submission upon the ground of improper reception of evidence by the arbitrator. Upon argument this rule was made absolute by the Divisional Court (MATHEW and KENNEDY, JJ.). Lord Gerard appealed.

Sir Richard Webster, *Q.C.*, and *Fletcher Moulton*, *Q.C.* (*Pollard* with them) for Lord Gerard.

Sir Henry James, *Q.C.*, *H. D. Greene*, *Q.C.*, and *Ernest Page* for the railway company.

LORD ESHER, M.R.—The London and North Western Railway Co. resolved to carry their railway through certain parts of the property of Lord Gerard, and, therefore, gave him notices to take certain portions of his property. The railway company had resolved to purchase not merely the surface of the land, but also to take a considerable part of the land under the surface. The part under the surface included certain minerals. There were under that land several strata of minerals, the one under the other; there were strata of gravel and clay, and under those two minerals there was a long seam of coal. What the railway company proposed to take was land; it was none the less land, because it was partly composed of minerals.

It has been determined by authority that, under the Railways Clauses Consolidation Act, 1845, "land" means not merely the surface or crust of the land. The word "surface" is not used in the Act. "Land" means everything which the railway company proposes to take, including minerals. The Act allows a railway company to take a portion only of that which is land; if a part of the land consists of minerals they may take a portion of the land, leaving the minerals. Here the railway company proposed to take the whole of the land down to the coal. The coal, therefore, was beneath the land which they proposed to take. That is the transaction between the railway company and the landowner, for which compensation has to be made. I am of opinion that the meaning of the Act of Parliament is that, as soon as a railway company has resolved to take a portion only of the land, the case is at once governed by ss. 77-85, and that it is not only within those sections, but those sections are the sole and absolute code for determining the obligations of both parties. From that moment no common law rights exist, but statutory rights only, according to the construction of the Act. I think that *Holliday* v. *Wakefield Corpn.* (1) gives to that interpretation of the statute the authority of the House of Lords. It is so stated by LORD WATSON most clearly, and also by LORD HALSBURY. Therefore, upon the true construction of the statute, and upon the authority of the House of Lords, the proposition is clear that, whenever the position is created by virtue of the exercise of the powers conferred by the Railways Clauses Consolidation Act, 1845, the whole subject of the rights of the parties as to land taken and minerals left is regulated solely by ss. 77 to 85.

In the present case it is clear that the railway company, in the exercise of the powers given by the Railways Clauses Consolidation Act, 1845, resolved to take

A land under which there was this coal mine. Those facts bring the case within s. 77, which provides that

> "the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away, or used in the construc-
B tion of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

The railway company has taken land, including gravel and clay, and under that
C land there is the coal mine. With regard to any compensation for the land taken, that is to be determined under the Act of Parliament. The railway company have left the coal, and any dispute between the parties as to compensation of any kind in consequence of the coal being left, is to be determined under ss. 77-85, and in no other way.

Section 78 says that, if the owner of any mines or minerals lying under the
D railway, or within the prescribed distance, is desirous of working the same, he shall give the company notice in writing of his intention to do so; and that the company, if it appears to them that the working will damage the railway, may compensate the owner, and the owner shall not work such mines or minerals. Therefore, although the coal mine is left to Lord Gerard as his absolute property, yet some right is taken away from him by s. 78, because he cannot work his coal
E without first giving notice to the railway company. He has to give this notice for the purpose of giving the railway company the power of buying the coal, even against his will, when he is about to work it. That is my view of the object of the notice required by s. 78. Then compensation is to be given for the coal mine at that time by buying it, but not until then. It is contended that it is not so in this case, because the railway company have bought, not only the ordinary surface
F soil, but also the two layers of gravel and clay below the surface. Those mines are under the surface and within the terms of ss. 77-85, but it is said that those sections do not apply because those two mines were bought, and those sections apply only when ordinary surface is bought. We do not agree with that contention, and there is nothing in the Act which supports it.

Another point was taken. It was contended that the compensation with regard
G to the coal left should be determined at once, because Lord Gerard can never work that coal and it has become dead to him. Let us look at the Act to see if it says that compensation for coal left must be determined at once if it is shown that it never can be got. I will assume here that it never can be got, though I do not think that is so, for the owner could work the coal. At common law, if by agreement the surface was sold and the minerals below were reserved and nothing more
H was agreed to, it would be a necessary implication in favour of the vendor, if he could not otherwise get at the minerals, that a right was reserved to him to go through the surface in order to get at the minerals. Under the statute the same thing is done without an agreement. The surface is taken, and the minerals are left. Is the owner in that case in a worse position? Clearly not, in my opinion. The railway company has taken the surface and left the mine, and it is a necessary
I implication that the right is left to the owner to go through the surface to get at the minerals if necessary. I would say that it was so even if there were no authority to that effect, otherwise there would be a manifest injustice. Whether the difficulty is vertical or horizontal makes no difference; the owner can go either way through the land bought. I would have so held upon principle. There is, however, clear authority upon the point, that the rule is the same under the statute as at common law. All the propositions put forward by Lord Gerard, therefore, fail. It is not true that the owner cannot get at his coal; and, even if were true, the time for compensation has not yet arrived. When the time comes for working the coal, if

the railway company do not buy it, the owner can work it by going through the land which the railway company have purchased, even if by so doing the railway is let down, and regardless of any consequences to the land bought by the railway company. The claim altogether fails, and the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. The judgment of the court below was right. There was an arbitration under the Railways Clauses Consolidation Act, 1845. Evidence was received by the arbitrator as to the value of certain coal, and the question is whether that evidence was properly admitted. I am of opinion that it was not admissible. The railway company gave Lord Gerard two notices to treat in respect of land owned by him. By those notices they proposed to purchase the land with all the subjacent minerals except the coal. Lord Gerard contends that he is entitled to present compensation in respect of the coal. He says that by reason of some of the minerals being taken he would have to leave large quantities of coal unworked, or would have to work it at a far greater cost, and that he is, therefore, entitled to be paid present compensation in respect of the coal. If he is right, the railway company is in no better position than if they had given notice to buy the coal. Lord Gerard says that this coal cannot be worked without affecting the minerals purchased by the railway company. The question has also been raised as to the severance of two parts of Lord Gerard's property by the barrier of minerals bought by the railway company.

The answer to all these allegations is, that this case is provided for by ss. 77-85 of the Railways Clauses Consolidation Act, 1845. Those sections apply not only when a railway company takes land with the minerals beneath, but also whenever any minerals are not taken with the land. That was the opinion of Lord Halsbury, L.C., and of Lord Watson, in *Holliday* v. *Wakefield Corpn.* (1). Lord Watson there says ([1891] A.C. at p. 97):

> "The mines clauses are, in my opinion, equivalent to an exception (even in cases where minerals are taken) from the provisions of s. 6, with respect to compensation. These clauses are framed in general terms, and appear to me to be applicable to the case of all minerals, save those which are expressly purchased and conveyed to the undertakers."

Lord Halsbury, L.C., says (ibid. at p. 93):

> "No compensation, I think, for injuriously affecting can at any time be demanded under the 6th section, since I think the rights of compensation are exhaustively dealt with under the mining sections."

This case is entirely governed by the code contained in ss. 77-84 of the Act. I do not propose to refer particularly to those sections, except to say that s. 77 provides that the railway company is not entitled to minerals unless they have been expressly purchased, and s. 78 provides that minerals near the railway are not to be worked under or within the prescribed distance of the railway until the owner has given thirty days' notice of his intention so to do, and that, "if it appears to the company that the working of such mines or minerals is likely to damage the works of the railway," the company may compensate, and the owner shall not work those minerals. Those words, "if it appear to the company," etc., are very material. I wish to observe upon that, that if Lord Gerard's contention were right, then the power of determining whether damage was likely to be done to the railway is taken away from the railway company. If compensation can now be claimed for the coal, then the railway company will not have the power to determine in the future whether damage is likely to be done under s. 78. Perhaps this coal may never be desired to be worked, and that is a strong reason in favour of our conclusion.

I think the judgment given in the court below is an excellent judgment. I wish to adopt this passage in that judgment ([1894] 2 Q.B. at pp. 921, 922):

A "We see nothing in these sections to render their provisions inapplicable to a case in which the railway company has, as in the present case, purchased with the 'lands' certain specified subjacent minerals, but has left the others to the owner—nothing which confines their provisions for the adjustment of the relations between the railway company and the owner of subjacent minerals to the case of the purchase of lands only. We fail to find any ground for the B distinction, contended for by Lord Gerard's counsel, between letting down surface soil and letting down minerals bought by the company with the soil, or for the argument that Lord Gerard would be a wrongdoer if, in properly working his works, he interfered by removal or otherwise with the clay or sand which the company has bought under the surface, when he would not be a wrong-doer if he interfered with the soil on the surface. The railway company can legally C acquire either surface or minerals for the purpose of their undertaking, and for that purpose only; and the scheme of these statutory provisions appears to us clearly to be that the owner of any subjacent mineral, not purchased by the company, may lawfully get his minerals by proper working, whatever else the company may have bought, subject only to the due protection of the works of the undertaking; and if, and so far as, such due protection prevents his getting D his minerals or renders it more costly, he is to be compensated when the time for working under or near the railway works arrives, and not before."

I entirely agree with that statement of the law. I am of opinion, therefore, that this claim is premature, and that the appellant is not entitled to have any compensation at present assessed in respect of the coal. The appeal fails, and must be E dismissed.

RIGBY, L.J.—I am of the same opinion. The first question is: What is the law applicable to the case—whether the case is outside the operation of ss. 77-85 of the Railway Clauses Consolidation Act, 1845, and compensation is to be assessed according to the rules of the common law when the surface of land and the subjacent F strata are severed.

In my judgment that question was determined long ago by the House of Lords in *Great Western Rail. Co.* v. *Bennett* (2), where LORD CRANWORTH says (L.R. 2 H.L. at p. 40):

"It was obviously the intention of the legislature, in making these provisions, to create a new code as to the relation between mine owners and railway com- G panies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be H considered, nothing but the surface."

That passage was cited and adopted in *Midland Rail. Co. and Kettering, Thrapston and Huntingdon Rail. Co.* v. *Robinson* (3). It is to be observed that LORD CRANWORTH used the word "surface"; but that word was used as a convenient phrase to describe not only the top crust of the land, but also all that part of the land I which does not consist of minerals or of minerals expressly sold to the railway company. We ought, therefore, to read into that passage, in substitution for the phrase "surface," the phrase "land taken by the railway company." Therefore, we may exclude altogether those common law rules which would be applicable if the land had been bought by agreement. It has been argued that, although the words of ss. 77-85 are plain, yet injustice would be done if their meaning were not cut down so as to introduce exceptions, and the sections so construed as not to apply when some only of the minerals are taken and others left. It is said that the statute was not intended to give rights which would not previously have existed.

I think that it did; for instance, it took away a right which the mineowner had at common law by preventing him from working minerals within forty yards of the railway. He is very seriously affected, for he cannot work such minerals or minerals under the railway without giving notice to the railway company.

Then it is said that the owner cannot derogate from his grant by going through the land, which has been actually sold to the railway company, in order to work his minerals. That seemed to be a plausible argument until the common law rights of the owners of minerals are considered. If the surface and the minerals are severed by agreement, the law implies a right to go through the surface to get at the minerals, if necessary, or to go laterally through something which may not be a mine. There is, therefore, no injustice to the owner in the present case, for he will still have that right. These sections of the Act form a complete code, substituted for the common law rights and liabilities of the parties; and these sections are the only directions which we have to consider. No compensation can be claimed in respect of minerals which are left until the time for working such minerals arrives. Ample provision is made for the compensation of the mine-owner. Then, and not until then, the claim for compensation arises. This appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors: *Meynell & Pemberton; C. H. Mason.*

[*Reported by* J. H. Williams, Esq., *Barrister-at-Law.*]

PAGET *v.* PAGET

[Court of Appeal (Sir Nathaniel Lindley, M.R., Rigby and Vaughan Williams, L.JJ.), February 22, 25, March 1, 24, 1898]

[Reported [1898] 1 Ch. 470; 67 L.J.Ch. 266; 78 L.T. 306; 46 W.R. 472; 14 T.L.R. 315; 42 Sol. Jo. 378]

Husband and Wife—Debts—Husband's debts—Wife's property charged to pay debts—Right to have property exonerated from charge—Consideration of all circumstances—Application of doctrine to charges created by court.

Where a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is prima facie regarded in equity, and as between herself and him, as lending him, and not giving him, the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created. This doctrine is purely equitable and the authorities which establish it plainly show that it is based on an inference to be drawn from all the circumstances of each particular case, the prima facie inference in such a case being that both parties intended that the wife's assistance should be limited to the necessity of the case and should not go beyond it. To say that in all such cases there is a presumption in favour of the wife and that it is for the husband to rebut it is to go too far and to use language calculated to mislead. The circumstances of each case must all be weighed in order to see what inference ought to be drawn, and until an inference in favour of the wife arises there is no presumption for the husband to rebut. Even where the wife charges her property with money to pay her husband's debts incurred without reference to her, there may be circumstances which prevent any inference from arising in her favour. The

doctrine is applicable to charges created, not by a wife, but by an order of the court: see s. 169 of the Law of Property Act, 1925, as amended by the Married Women (Restraint upon Anticipation) Act, 1949 [see note infra], replacing s. 39 of the Conveyancing Act, 1881.

Notes. Section 39 of the Conveyancing Act, 1881, which is set out at p. 1154 post, has been replaced by s. 169 of the Law of Property Act, 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 429), which as amended by the Married Women (Restraint upon Anticipation) Act, 1949 (ibid. vol. 28, p. 733) (see Sched. 2) provides: "Where a married woman, in respect of any property or interest in property belonging to her, is by law unable to dispose of or bind such property or her interest therein [the present is the case of the mortgage of a life interest] . . . the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in such property." Restraints on anticipation or alienation attaching to the enjoyment of property by a woman were abolished by the Act of 1949 mentioned above.

Applied: *Re Shaw*, *Shaw* v. *Jones* (1905), 94 L.T. 93. Considered: *Hall* v. *Hall*, [1911] 1 Ch. 487.

As to a wife's right of indemnity where her property is charged for the husband's benefit, see 19 HALSBURY'S LAWS (3rd Edn.) 843, 844; and for cases see 27 DIGEST (Repl.) 139 et seq.

Cases referred to:

(1) *Earl of Huntington* v. *Countess of Huntington* (1702), 2 Vern. 437; 2 Bro. Parl. Cas. 1; 2 Eq. Cas. Abr. 672; 23 E.R. 881, H.L.; 27 Digest (Repl.) 140, *1006*.

(2) *Hudson* v. *Carmichael* (1854), Kay, 613; 2 Eq. Rep. 1077; 23 L.J.Ch. 893; 23 L.T.O.S. 168; 18 Jur. 851; 2 W.R. 503; 69 E.R. 260; 27 Digest (Repl.) 141, *1016*.

(3) *Lewis* v. *Nangle* (1752), 1 Cox, Eq. Cas. 240; Amb. 150; 2 Ves. Sen. 431; 29 E.R. 1146, L.C.; 27 Digest (Repl.) 140, *1011*.

(4) *Clinton* v. *Hooper* (1791), 3 Bro.C.C. 201; 1 Ves. 173; 1 Hov. Supp. 65; 29 E.R. 490, L.C.; 27 Digest (Repl.) 140, *1012*.

(5) *Earl of Kinnoul* v. *Money* (1767), 3 Swan. 202; cited in 1 Ves. at p. 186; 36 E.R. 830, L.C.; 27 Digest (Repl.) 143, *1034*.

Also referred to in argument:

Aguilar v. *Aguilar*, *Lousada* (1820), 5 Madd. 414; 56 E.R. 953; 27 Digest (Repl.) 140, *1013*.

Bagot v. *Oughton* (1717), 1 P. Wms. 347; 24 E.R. 420, L.C.; 27 Digest (Repl.) 140, *1009*.

Caton v. *Rideout* (1849), 1 Mac. & G. 599; 2 H. & Tw. 33; 15 L.T.O.S. 497; 41 E.R. 1397, L.C.; 27 Digest (Repl.) 160, *1167*.

Ferguson v. *Gibson* (1872), L.R. 14 Eq. 379; 41 L.J.Ch. 640; 26 Digest (Repl.) 124, *869*.

Gray v. *Dowman* (1858), 27 L.J.Ch. 702; 31 L.T.O.S. 279; 6 W.R. 571; 27 Digest (Repl.) 143, *1038*.

Appeal from a decision of KEKEWICH, J., in an action by Mrs. Lucy Annie Emily Paget against her husband, Gerald Cecil Stewart Paget, in which the plaintiff claimed a declaration of the liability of Mr. Paget to indemnify her and her separate estate in respect of mortgages, made by her in 1882 and 1887 under orders of the court binding her life interest in certain funds, and the sums of money paid or applied by her out of her separate estate in satisfaction of the debts and liabilities of the husband, or otherwise on his account, with interest. KEKEWICH, J., dismissed the action on the ground that, where the wife's life interest had been made available for raising money for payment of her husband's debts by means of relief from the restraint on anticipation under the sanction of the court, it was inconceivable

that she intended, or that the court intended, that she should have a remedy against him not reserved (as in the present case) by the order giving such sanction, or that a doctrine flowing from the relations of husband and wife, and called into operation by her action independently of the court, should be thus extended. From that decision the wife appealed.

Renshaw, Q.C., and *A. à Beckett Terrell* for the wife.

Cozens-Hardy, Q.C., and *John Henderson* (*Warrington, Q.C.*, with them) for the husband.

Cur. adv. vult.

Mar. 24, 1898. **SIR NATHANIEL LINDLEY, M.R.,** read the following judgment of the court.—This is an appeal by the plaintiff, Mrs. Paget, against a judgment of KEKEWICH, J., dismissing an action brought by her against the defendant, her husband. The object of the action was to obtain a declaration that the plaintiff's husband was liable to indemnify her against two charges for £23,000 and £22,000 created by her on her separate property for the payment of his debts.

Mr. and Mrs. Paget were married in January, 1877. The husband was entitled to some reversionary property. His interest in this property was settled on the marriage, but the property produced no income to him. The wife was a lady of fortune, and the bulk of her property was settled on her for her life for her separate use without power of anticipation. The sum of £2,000 a year derived from her property was, however, settled on her husband for life, but so that, if he attempted to alienate it, or if he became bankrupt, this annuity became payable to his wife. The husband and wife moved in good society, and, large as their income was, they lived far beyond it. So recklessly extravagant were they that five years after their marriage £23,000 was sorely needed to relieve them from the pressure of debts for which the husband was legally liable, but which had been contracted to defray the expenses of the extravagant mode of living which they both apparently enjoyed.

The affidavits filed in support of the plaintiff's application in June, 1882, for the order to which we will refer presently, leave no doubt, in our minds, that these debts had been contracted, not for purposes of the husband with which the wife had little to do, but in order to enable them both to live in the style they both thought suitable, and perhaps necessary, to enable them to maintain and enjoy that high social position which they both so greatly desired. We attach more importance to what the wife said in these affidavits than we do to what she said some fifteen years later when examined in this action, and when she was endeavouring to support her present claim. In the affidavits sworn by her and her solicitor in 1882 there is nothing to lead to the inference that any of the debts which then had to be met were incurred by her husband for purposes of his own as distinguished from the purposes of himself and his wife. In her affidavit of June, 1882, the plaintiff referred to the debts as contracted by her husband and herself as "our debts." It is true she said that until 1880 her attention was not called to the fact that she and her husband were getting into difficulties; but her affidavit shows that after she knew of those difficulties all that she really cared about was to increase the net income of herself and her husband, and to maintain their position in society. Her solicitor's affidavit leads to the same conclusion.

On June 28, 1882, the plaintiff applied for and obtained an order under s. 39 of the Conveyancing Act, 1881 [repealed], enabling her to mortgage her life interest to secure £23,000 and interest and the premiums of a policy on her life. We do not think it necessary to refer in detail to the arrangements made for raising this sum, nor to its application when raised. It is sufficient to say that the money was raised as authorised by the order, and except as to £3,600 was applied in paying the debts intended to be paid off by its means. The £3,600 not so applied was misappropriated by the solicitor who raised the money. Five years afterwards another sum of £22,000 was wanted for similar purposes. Another application was

made to the court, supported by further affidavits by the plaintiff and her then solicitor, and on Aug. 11, 1887, another order was made enabling the plaintiff to mortgage her life interest for £22,000 and interest and for the premiums on another policy. This sum was accordingly raised and applied as authorised by the order. The plaintiff's affidavit filed on this occasion, July 28, 1887, referred to what had been done in 1882, and to the misappropriation of £3,600, and to the fact that debts had been contracted to pay off the creditors who ought to have been paid off with that sum, and to the impossibility of avoiding bankruptcy and loss of social position if the arrangements then contemplated were not carried out. The plaintiff stated her desire to raise this sum of £22,000, and she spoke of the debts as "our debts" as she had done in 1882. She represented the debts to be hers quite as much as her husband's, and she treated his income and hers as one which it was desirable to maintain as far as possible.

These transactions of 1882 and 1887 having been completed, the question arises whether Mrs. Paget is entitled to be indemnified by her husband against these sums of £23,000 and £22,000 when called in, and in the meantime against the interest and premiums charged on her life interest by the above orders. The fact that the plaintiff and her husband were separated in 1893 explains how this controversy has arisen, but does not, in our opinion, affect the question of law which has to be considered. The plaintiff's rights, whatever they are, were not created in 1893, but arose in 1882 and 1887, although she might not care to enforce them while she and her husband lived happily together. What, then, were her rights in 1882 and 1887? In this action she has given evidence, and has stated that nothing was ever said about her giving anything to her husband, that he managed all her affairs and she did not understand them and did not want to do so, that in making her former affidavit in 1882 she ought not to have used such expressions as "our debts" and "my debts," that she herself was not living beyond her income, and that some of the debts which had to be paid were not for money spent for her and her husband's joint benefit. But when pressed on this point it seems tolerably plain that there is no reason for saying that the statement contained in her affidavit of 1882 did not disclose the true state of things and ought not now to be believed, although she evidently wishes to minimise the effect of it. What she now says, however, is that all she knew was that her husband was in danger of being made bankrupt and that she wished to save him from such a disaster. Her attempt to dissociate herself from her husband's racing debts was not successful. As regards the transaction of 1887, she admitted that the financial situation which needed treatment then was very much the same as in 1882 and arose from the same cause. She also stated that in 1887 her husband was in America, and that Chitty, J., who made both orders, saw her in his private room, and was told by her how these new difficulties had arisen, what the debts were, what the money was wanted for, and so on. The learned judge was, no doubt, greatly influenced on both occasions by her own statements as to her own indebtedness.

Bearing in mind this evidence we have to consider the effect in equity of the transactions in 1882 and 1887, to which we have alluded. The authorities bearing on the subject, beginning with *Earl of Huntington* v. *Countess of Huntington* (1), and coming down to *Hudson* v. *Carmichael* (2), show that, if a married woman charges her property with money for the purpose of paying her husband's debts and the money raised by her is so applied, she is prima facie regarded in equity, and as between herself and him, as lending him, and not giving him, the money raised on her property, and as entitled to have her property exonerated by him from the charge she has created. This doctrine is purely equitable, and the authorities which establish it show that it is based on an inference to be drawn from the circumstances of each particular case, the prima facie inference being in such a case as that supposed that both parties intended that the wife's assistance should be limited to the necessity of the case and should not go beyond such necessity. But even where the wife charges her property with money to pay her husband's debts incurred without reference to her,

there may be circumstances which prevent any inference from arising in her favour. Thus, if a settlement is made by the husband on his wife at the time she charges her estate, he is regarded as purchasing her assistance, and the inference that the parties intended that the wife's property should be exonerated by the husband does not arise: see *Lewis v. Nangle* (3). *Clinton* v. *Hooper* (4) is the leading authority to show that the doctrine in question is based on an inference to be drawn in each case from all the facts of that particular case.

It was long ago settled that, although under the old law a husband became liable for the antenuptial debts of his wife, she had no right in equity to compel him to exonerate property of hers charged with those debts, even although he had expressly covenanted to pay them: see *Lewis* v. *Nangle* (3); and *Earl of Kinnoul* v. *Money* (5). This shows the importance of ascertaining, and of not confounding, the wife's debts with the husband's debts when considering such cases as those to which I am alluding. To say that in all such cases there is a presumption in favour of the wife, and that it is for the husband to rebut it, is, in our opinion, to go too far and to use language calculated to mislead. The circumstances of each case must all be weighed in order to see what inference ought to be drawn; and until an inference in favour of the wife arises there is no presumption for the husband to rebut. If this is forgotten error may creep in.

The circumstances of the present case we take to be those disclosed by the plaintiff in her affidavits, especially her representations of her own indebtedness, as well as of her husband's, and we will add to these her recent statement that nothing was ever said about giving anything to her husband. Neither was anything said about lending him anything. She had a large income, and, although restrained from anticipation, she might have accrued income in respect of which she could contract debts. There is no reason to suppose that she had no debts and could contract none. She represented herself as pressed by her creditors, and we see no reason to doubt the truth of her statements. The plaintiff was as extravagant and reckless as her husband, and was quite as desirous as he of maintaining her position in society. This object, so dear to both of them, might have been entirely frustrated if she had the right against him which she now asserts. That right would, in point of law, have been her separate estate, and she might under pressure have assigned it, and her assignee might have enforced it against her husband whether she liked it or not. She had plenty of debts enforceable against any separate estate she had or might have besides income which she could not anticipate. Those circumstances, and the peculiar position of her husband with respect to his £2,000 a year, lead us to the conclusion that no inference ought in this case to be drawn in her favour of any right to be indemnified by her husband.

This conclusion is arrived at apart from the orders of the court, to which KEKEWICH, J., attached so much importance, and the effect of which we will now consider. They are based on s. 39 of the Conveyancing Act, 1881, which provided:

> "Notwithstanding that a married woman is restrained from anticipation [as to which see note, p. 1151, ante], the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

Unless the wording of the section is attended to, there is danger of regarding the section as merely authorising the court to remove the restraint against alienation which is so frequently imposed on married women when property is settled on them for their separate use. But it is to be observed that what binds the estate of a married woman is not what she does when the restraint is removed, but the order made by the court. The language of the section is that the court may, by judgment or order, bind her interest. The court is empowered to do this where it appears to the court for her benefit so to do, and with her consent. A question at once arises whether the doctrine which is applicable to charges created by a wife to pay her husband's debts is to be applied to charges created, not by her, but by

an order of the court. The learned judge in the court below has held that the doctrine in question has no application to such a case, and that where orders are obtained under that section charging her property with money to be applied in paying her husband's debts, the order should show on the face of it that her husband is to be liable to indemnify her if he is to be under any such liability.

It certainly might be convenient if such orders were so drawn as to show what was intended in this respect. But these orders are usually made without hearing the husband, and we are not prepared to say, as a matter of law, that an order silent as to the wife's rights against her husband is fatal to the existence of such rights. The circumstances under which the order was made might show that a right on her part to be indemnified by her husband ought to be inferred, although the order did not allude to it. The absence of all allusion to such right is, however, a circumstance to be considered, and in this particular case the form of the orders of 1882 and 1887 tells against the plaintiff when regard is had to the statements made by her in order to obtain them. It was urged that it could not be for her benefit that she should be deprived of her right to indemnity, but the force of this observation depends on the tacit assumption that she had the right. The question comes back to the proper inference to be drawn from all the facts including the orders themselves. And, bearing in mind that the plaintiff's paramount object was to save her and her husband's joint income, and thus, as far as possible, to preserve her and his position in society, and that this object might have been defeated if she reserved a right to be indemnified by him, the proper inference to be drawn is, in our opinion, adverse to the evidence of such right. In our opinion, therefore, the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Leman & Co.; Dawes & Sons.*

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

BRADSHAW *v.* BRADSHAW

[Probate, Divorce and Admiralty Division (Sir Francis Jeune, P., and Gorell Barnes, J.), December 1, 1896]

[Reported [1897] P. 24; 66 L.J.P. 31; 75 L.T. 391; 61 J.P. 8; 45 W.R. 142; 13 T.L.R. 82]

Husband and Wife—Summary proceedings—Desertion—Cohabitation—Breach of cohabitation—Need for parties to be living under same roof.

There cannot be desertion unless there is cohabitation which is broken by the act of desertion, but the necessary cohabitation does not require that the spouses must be physically living under the same roof.

A married female domestic servant, who never lived with her husband under the same roof, was visited from time to time by him at her employer's house, and had a child by him. The husband refused to receive her boxes into the house where he lived, or to give her any help towards her maintenance.

Held: the cohabitation was sufficient to give jurisdiction to the justices to make an order under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895 [now s. 1 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960].

Notes. The Summary Jurisdiction (Married Women) Act, 1895, was repealed by the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1 of which corresponds to s. 4 of the Act of 1895.

Referred to: *Cowley* v. *Cowley* (1897), Times, Feb. 3; *Huxtable* v. *Huxtable* (1899), 68 L.J.P. 83; *Wassell* v. *Wassell* (1899), 68 L.J.P. 127; *Kay* v. *Kay*, [1904-7] All E.R. Rep. 429; *Harriman* v. *Harriman*, [1908-10] All E.R. Rep. 85; *Papadopoulos* v. *Papadopoulos*, [1935] All E.R. Rep. 311; *Jordan* v. *Jordan*, [1939] P. 239; *Shaw* v. *Shaw*, [1939] 2 All E.R. 381; *Abercrombie* v. *Abercrombie*, [1943] 2 All E.R. 465.

As to meaning of cohabitation, see 12 HALSBURY'S LAWS (3rd Edn.) 266-7, 284; and for cases on jurisdiction of courts of summary jurisdiction, see 27 DIGEST (Repl.) 693 et seq. For the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, s. 1, see 40 HALSBURY'S STATUTES (2nd Edn.) 395.

Cases referred to:

(1) *Fitzgerald* v. *Fitzgerald* (1869), L.R. 1 P. & D. 694; 38 L.J.P. & M. 14; 19 L.T. 575; 17 W.R. 264; 27 Digest (Repl.) 334, *2784*.

(2) *R.* v. *Leresche*, [1891] 2 Q.B. 418; 60 L.J.M.C. 153; 65 L.T. 602; 56 J.P. 37; 40 W.R. 2; 7 T.L.R. 685; 17 Cox, C.C. 384, C.A.; 27 Digest (Repl.) 346, *2872*.

Appeal by Ellen Bradshaw, a domestic servant, from the decision of justices sitting at Richmond, Surrey, who had dismissed a summons taken out by her under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, on the ground of want of jurisdiction.

The deposition of the wife, Ellen Bradshaw, was to the effect that she was married to the husband, Richard Lonsdale Bradshaw, at the Register Office, Brentford, on Dec. 18, 1893; and, being pregnant at the time, she went to reside with her friends, and was subsequently confined at Queen Charlotte's Lying-in Hospital. She saw the husband, and told him the child was ill, and subsequently wrote to him again, informing him of the child's death. He made some excuse and said he could allow her nothing. The wife had to sell and pledge her things to pay the expenses of the child's burial. Prior to the marriage she had been in service, and she took another situation after her child died, and allowed the husband to visit her and occasionally pass part of the night with her, the result being that a second child was born in the hospital on July 19, 1895. The husband refused to go and see the child, although made aware of the fact that it was dying, and again the wife had to defray the funeral expenses. The husband had told her that if her boxes were sent to the house where he was living they would be returned.

The husband, who was called by the wife's solicitor, admitted the truth of her evidence. He said he was thirty years of age and assisted his father in his trade as a bootmaker. He was also a bit of an artist, but had only sold one picture. He was willing he said to maintain his wife, but he had no means. At the conclusion of the evidence the magistrates held that they had no jurisdiction, on the ground that there was not an existing state of cohabitation, and that, without this, there could be no desertion. The wife appealed.

Powles for the wife.
Lynch for the husband.

SIR FRANCIS JEUNE, P.—The only question in this case is one of jurisdiction. The magistrates have held that they had none, and they so held upon the authority of the two cases of *Fitzgerald* v. *Fitzgerald* (1) and *R.* v. *Leresche* (2). I think there is very often some misunderstanding as to what the meaning and authority of those two cases really is. It is perfectly true that there cannot be desertion unless there is a cohabitation which is broken by the act of desertion. But cohabitation does not necessarily imply—and is not meant by those cases to imply—that the parties must be physically living under the same roof. If that were indeed so, there would be a great number of persons, such, for instance, as domestic servants, who might be said never to cohabit, and who cannot live all day and all night under the same roof. The two authorities cited have this feature in common, and it is the

guiding feature in both of them: the parties in each case were living separate and apart from each other by mutual consent, and were not cohabiting in any sense of the word; and, of course, under such circumstances there could not be desertion without a previous resumption of cohabitation. In the present case, however, there does seem to have been cohabitation, because there were two children, and it would appear that the husband afterwards ceased to allow his wife anything, and refused even to receive her boxes: in point of fact, he refused to have anything more to do with her. It may, therefore, be that he has deserted her. At any rate, the fact that the parties were not living under the same roof does not imply that the magistrates had no jurisdiction to entertain the case. In my opinion, therefore, it must be remitted to them, in order that they may hear and determine it upon its merits.

GORELL BARNES, J. I am of the same opinion. I think that the magistrates made no order because they did not appreciate the two authorities cited.

Appeal allowed. Case remitted.

Solicitors: *G. W. Lay; Charles Robinson & Co.*

[*Reported by* H. DURLEY-GRAZEBROOK, ESQ., *Barrister-at-Law.*]

Re BOYD. Ex parte McDERMOTT

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), February 22, 1895]

[Reported [1895] 1 Q.B. 611; 64 L.J.Q.B. 439; 72 L.T. 348; 2 Mans. 166; 14 R. 364]

Bankruptcy—Notice—"Final judgment"—Judgment in action on order for payment of costs—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 4 (1) (*g*).

An action by the debtor against the creditor was dismissed as frivolous and vexatious and the debtor's appeal was dismissed with costs. The creditor brought an action against the debtor claiming the sum due under the order for costs, and he obtained judgment by default. The creditor then served a bankruptcy notice on the debtor in respect of the judgment.

Held: an action might be brought to recover costs payable under an order of the court and the judgment obtained by the creditor in such an action was a "final judgment" within s. 4 (1) (g) of the Bankruptcy Act, 1883 [now s. 1 (1) (g) of the Bankruptcy Act, 1914], on which a bankruptcy notice might be served on the debtor.

Notes. Section 4 (1) (g) of the Bankruptcy Act, 1883, has been repealed and is replaced by s. 1 (1) (g) of the Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 325.

Considered: *Mosey* v. *Mosey and Barker*, [1955] 2 All E.R. 391. Referred to: *Norton* v. *Gregory* (1895), 78 L.T. 10; *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q.B. 428; *Savill* v. *Dalton*, [1914-15] All E.R. Rep. 313; *Sugden* v. *Sugden*, [1956] 3 All E.R. 874.

As to non-compliance with a bankruptcy notice issued on a final judgment or order, see 2 HALSBURY'S LAWS (3rd Edn.) 272 et seq.; and for cases see 4 DIGEST (Repl.) 95 et seq.

Case referred to : A

(1) *Re Shirley, Ex parte Mackay* (1887), 58 L.T. 237; 4 Digest (Repl.) 147, *1317.*

Also referred to in argument :

Philpott v. *Lehain* (1876), 35 L.T. 855; 30 Digest (Repl.) 199, *411.*

Re Binstead, Ex parte Dale, [1893] 1 Q.B. 199; 62 L.J.Q.B. 207; 68 L.T. 31; 41 W.R. 452; 9 T.L.R. 114; 37 Sol. Jo. 117; 9 Morr. 319; 4 R. 146, C.A.; 4 Digest (Repl.) 97, *869.* B

Re Easton, Ex parte Dixon (1893), 9 T.L.R. 408; 37 Sol. Jo. 479; 10 Morr. 111, D.C.; 4 Digest (Repl.) 110, *977.*

Appeal by the creditor from an order of Registrar GIFFARD setting aside a bankruptcy notice. Acting on a doubt expressed by CAVE, J., in *Re Shirley, Ex parte Mackay* (1) the registrar held that a "final judgment" within the meaning of s. 4 (1) (g) of the Bankruptcy Act, 1883, could not be obtained by bringing an action on an order of the court for payment of costs, and set aside the bankruptcy notice on the debtor's application. C

The debtor had previously brought an action against the creditor, which had been dismissed as frivolous and vexatious, and an appeal by him from this order to the Court of Appeal had been dismissed with costs. The creditor, finding a difficulty in enforcing the order for the payment of costs, commenced an action against the debtor in the Queen's Bench Division, claiming the amount of the costs due under the order. The debtor did not appear and the creditor signed judgment by default. The creditor then served on the debtor a bankruptcy notice under s. 4 (1) (g) of the Bankruptcy Act, 1883, requiring the debtor to pay the judgment debt in accordance with the terms of the judgment. D E

Herbert Reed, Q.C., and *Pollard* for the creditor.—The creditor has obtained "final judgment" within the meaning of s. 4 (1) (g) of the Bankruptcy Act, 1883. An action may be brought to recover costs payable under a judge's order : (*Philpott* v. *Lehain*). The judgment is regular in form and the registrar has no power to go behind the judgment on which the notice is founded. All that he can consider is whether the creditor has complied with the conditions imposed by s. 4 (1) (g). If it is clearly upon its face not a final judgment, as was the case in *Re Binstead, Ex parte Dale*, the registrar may go behind it to see what it really is. But he cannot do so if it is in form a regular final judgment. The only reasons he can entertain are those specified in s. 4 (1) (g) : (*Re Easton, Ex parte Dixon*). The dictum of CAVE, J., in *Re Shirley, Ex parte Mackay* (1) (58. L.T. at p. 238), upon which the registrar acted here, was wrong, and should be overruled. F G

Turrell for the debtor.—In form this is a final judgment, but the dictum of CAVE, J., was right, and the action could not be brought on the order. The registrar had power to go behind the judgment.

LORD ESHER, M.R.—The debtor in this case had been ordered by the Court of Appeal to pay the costs of his appeal to that court. The creditor, who had been the respondent in that appeal, commenced an action by writ of summons against the debtor claiming the amount of costs payable under the order of the Court of Appeal. In my opinion, he had a perfect right to do that. The writ was served, and the defendant did not appear. He had, as is admitted, no defence to the action. The plaintiff then signed judgment for default of appearance. That was a valid judgment against the defendant which cannot be questioned except in bankruptcy. The plaintiff's next step was to serve a bankruptcy notice on the defendant claiming the amount due under the judgment. The defendant did not comply with the requirements of the notice, and thereby committed an act of bankruptcy upon which a receiving order could be made against him. Upon hearing a bankruptcy petition, the court can go behind a judgment and consider whether it can be supported, but in this case the registrar cannot do otherwise than find that there was a debt, and H I

A therefore the debtor cannot escape being made bankrupt. I am quite prepared to say that I cannot agree with the dictum of Cave, J., in *Re Shirley, Ex parte Mackay* (1), and that it must be overruled. The appeal must be allowed.

LOPES, L.J.—I am of the same opinion. I concur in what the Master of the Rolls has said as to the dictum of Cave, J., in *Re Shirley, Ex parte Mackay* (1).

B

RIGBY, L.J.—I am of the same opinion, and have nothing to add.

Appeal dismissed.

Solicitors: *Hores & Pattisson; William C. Goulding.*

C [*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

D

BURGESS *v.* MORTON

[House of Lords (Lord Halsbury, L.C., Lord Watson and Lord Shand), November 18, 19, December 16, 1895]

E [Reported [1896] A.C. 136; 65 L.J.Q.B. 321; 73 L.T. 713; 12 T.L.R. 104]

Court of Appeal—Jurisdiction—Decision extra cursum curiæ.

Where the court gives a decision in any matter extra cursum curiæ it must be taken to be of the nature of an award by arbitrators, and no appeal will lie except by consent of all parties.

F A Special Case was stated which did not raise, and was not intended to raise, any question of law, but questions of fact only. A Divisional Court, at the request of the parties, gave judgment upon a question of law.

Held: the judgment was substantially a consent order, and no appeal would lie.

G **Notes.** Distinguished: *Druce* v. *Young*, [1899] P. 84. Referred to: *Wyndham* v. *Jackson*, [1937] 3 All E.R. 677.

As to reference by agreement to courts of law, see 2 Halsbury's Laws (3rd Edn.) 8, and 30 Halsbury's Laws (3rd Edn.) 460; and for cases see 2 Digest (Repl.) 427.

Cases referred to:

H (1) *Craig* v. *Duffus* (1849), 6 Bell, Sc. App. 308.
(2) *Dudgeon* v. *Thomson* (1854), 1 Macq. 714; 24 L.T.O.S. 39, H.L.; 2 Digest (Repl.) 427, *50.*
(3) *Renfrew* (*Provost*) v. *Hoby* (1856), 4 W.R. 632; sub nom. *Robin* v. *Hoby*, 2 Macq. 478; 2 Jur.N.S. 647, H.L.; 2 Digest (Repl.) 427, *51.*
(4) *Bickett* v. *Morris* (1866), L.R. 1 Sc. & Div. 47; 2 Digest (Repl.) 428, **45.*

I **Appeal** from a decision of the Court of Appeal (Lord Esher, M.R., Lopes and Davey, L.JJ.), reversing a decision of the Divisional Court (Wills and Wright, JJ.) on a Special Case.

The following statement of facts is taken substantially from the speech of Lord Watson.

On Sept. 30, 1891, the firm of Bean and Gough, consisting of two partners, was dissolved by mutual consent on the terms that Gough should continue the business, and should, in consideration of his being permitted to take over the bulk of its assets, relieve the retiring partner of the whole liabilities of the firm. Some time

before the date of the dissolution the respondent, one Morton, had a meeting with the two partners, at which he consented, in the event of the dissolution taking place, to assist Gough towards carrying on the business. He accordingly continued to deal with Gough, who traded under the name of C. H. Gough & Co., until the concern became bankrupt in July, 1892. At the time of its dissolution the old firm owed a considerable sum to the respondent. The appellant, one Burgess, who was trustee in the bankruptcy of C. H. Gough & Co., in December, 1892, brought this action against the respondent for recovery of £1,067 10s. 10d. as the balance due on his transactions with the bankrupt. The respondent resisted the claim, mainly on the ground that he was entitled to set off against that balance the sum due to him by the old firm. The cause was set down for trial at York before LORD COLERIDGE, C.J., when, there being no likelihood of its being reached, the parties, with the consent of the learned judge, agreed to withdraw it from trial, and to state a Special Case for the decision of the court.

In the Special Case the only matter which was professedly submitted for adjudication was the respondents contention to the effect that "he is entitled to set off the moneys owing to him from the firm of Bean and Gough, at the date of the said dissolution of partnership, against the sum claimed on the writ." The Case concluded by stating the agreement of the parties that, in the event of the contention being sustained, judgment should be entered for the respondent, with costs, and that it should be declared that he was entitled to prove against the bankrupt estate for £62, and that, in the event of its being rejected, judgment should be entered for the appellant for the sum of £836 11s., with costs. The circumstances detailed in the Case were not calculated, and were not intended, to raise any question of law. There had been no dispute between the parties in regard to the law of set-off, and, in the argument in the appeal, neither party attempted to conceal that the only point upon which they desired a decision was whether the statements in the Case did or did not warrant the inference that the respondent had, before the bankruptcy of Gough, made an agreement which would entitle him to a set-off. No particular agreement was stated or put in issue.

The Case was first submitted to a Divisional Court, composed of WILLS and WRIGHT, JJ., who pointed out the incompetency and inexpediency of trying such a question by means of a Special Case, but expressed their willingness to do the best they could to decide it if the parties desired them to do so. On that footing they heard the case, and gave judgment for the present appellant on the ground that the facts and circumstances stated were insufficient to warrant an inference that the respondent had made any agreement which could support his plea of set-off. Their decision was reversed by the Court of Appeal.

Forbes, *Q.C.*, and *G. Banks* for the appellant.
Cohen, *Q.C.*, and *Scott Fox* for the respondent.

Their Lordships took time for consideration.

Dec. 16, 1895. The following opinions were read.

LORD HALSBURY, L.C.—In this case an effort has been made to try in the form of a Special Case a pure question of fact and to make it subject to the ordinary consequences of being subject to appeal first to the Court of Appeal and then to your Lordships' House. Speaking for myself, I will not be a party to such a course of procedure. It is objectionable in two ways. It is objectionable to ask your Lordships to try a question of fact without the facts themselves being put before you. It is objectionable as a matter of procedure because the legislature have provided a mode of deciding questions of law when the parties are practically agreed upon the facts. But this is an effort to use that convenient method of trying a question of law and agreeing to what is called a Special Case, when it by agreement between the parties does not state either the inferences of fact, or even all the facts from which the inferences of fact are to be drawn.

It has been candidly admitted by counsel at the Bar how this occurred. The parties could not agree upon the facts—in particular as to what had passed at a conversation between the parties, which conversation terminating in an agreement would have been decisive one way or another upon the question which your Lordships are asked to determine now. Because the parties could not agree how the fact was, they agreed upon a Special Case from which this matter is left out altogether, this intentional omission including the disputed parts of the conversation as to an agreement, and they ask first the court below and now your Lordships to grope in the dark as best one can to find out what was the real effect of the agreement between the parties which the parties themselves have deliberately withheld because they could not agree upon what passed between them. I think that this is a complete perversion of the procedure provided by the statute. When the case came before the Divisional Court it was immediately observed by the judges that this was not properly a Special Case, and both by counsel and the judges it was treated as being left to the judges not as a Special Case raising a question of law, but upon the invitation of counsel the judges agreed to hear it and to decide it as a question of fact. After the judgment was given both judges, on an application to stay, interposed with the observation that it having been left to them to decide as a question of fact they could not see how there could be any appeal. Both judges were agreed that there was no point of law, indeed, that could not have been disputed before your Lordships.

I am, therefore, of opinion that there is no appeal. The judges were invited to sit practically as arbitrators, and their decision upon the question in dispute, which is one of fact, I regard as final. In saying that, I have not omitted to observe that the Special Case allows the right to draw inferences of fact—which is a very well-understood provision. Occasionally it will happen that upon the facts as agreed upon some point is left uncovered, and in order to prevent the necessity of going back to the arbitrators or tribunal of fact that provision is inserted to enable the court upon the question of law raised to draw such inferences of fact as may not be specifically found. But the objection here is that no question of law is raised or intended to be raised, but a question of fact only, and the Divisional Court only heard it upon the understanding that they were arbitrators between the parties. It has been held in this House that where, with the acquiescence of both parties, the judge departs from the ordinary course of procedure, and, as in this case, decides upon the question of fact, it is incompetent for the parties afterwards to assume that they have then an alternative mode of procedure, and to treat the matter as if they had been heard in due course. I am satisfied that, if the parties had not agreed to take the decision of the Divisional Court as being one on a question of fact, that court would have refused to hear the case. The parties having done so, I think that they are precluded now from treating the matter as subject to appeal, and I think, therefore, that this appeal must succeed upon the ground that the Court of Appeal had no jurisdiction to entertain the question. For these reasons it becomes unnecessary to consider what would have been the proper decision, and I accordingly move your Lordshps that the judgment of the Court of Appeal be reversed, and that the original judgment of the Divisional Court be restored, the respondents to pay the appellant the costs here and below.

LORD WATSON.—Before dealing with the points which require to be considered in this appeal, it is necessary to notice the circumstances giving rise to the action, and also the peculiar course of procedure which has been taken. [His Lordship stated the facts, and continued:] The opinions delivered by the learned judges of the Court of Appeal deal exclusively with the question of fact upon which alone their decision was heard. But the present appellant objected to their competency to interfere with the judgment of the Divisional Court, which he maintained to be conclusive. The objection was, however, overruled. Lord Esher, M.R., after adverting to the terms of the Special Case, said:

"Whether it is necessary in these circumstances that a question of law should be raised, is a matter which it seems to me it is not necessary to decide in this case, because I cannot have a doubt but that there were some difficult questions of law raised in this case, as well as inferences of fact which were to be drawn, so that it is a Special Case under the ordinary circumstances of a Special Case, with power for the court to draw inferences of fact."

I am unable to assent to the view thus stated by LORD ESHER. It does not appear to me to admit of doubt that the judgment of the Divisional Court was substantially a consent order. I am also satisfied that the whole proceedings in the cause, from and after the time when the parties thought fit to retire from the proper tribunal for its trial, have been extra cursum curiæ. The rules which govern procedure on the common law side of the High Court of Justice do not contemplate or permit the use of a Special Case, except for the purpose of obtaining the decision of questions of law arising upon facts which are admitted; and the consent of a judge to its use for the purpose of trying a question of fact cannot, although the fact when found might give rise to legal questions, make it a regular proceeding in the ordinary course of law. I think the consent of the judge in this case must be presumed to have been given on the assumption that the parties meant to raise directly some question of law, although it now appears that they had no such intention.

There are several decisions of this House in cases coming from Scotland which appear to me to affirm that the judgment of a court below, pronounced extra cursum curiæ, is in the nature of an arbiter's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held on that ground to be incompetent in *Craig* v. *Duffus* (1), *Dudgeon* v. *Thomson* (2), and *Renfrew* (*Provost*) v. *Hoby* (3). All these cases had the following features in common: (i) The action had been remitted to the jury court by an interlocutor which was not subject to review; (ii) the parties had agreed, either before the trial commenced, or before the jury were asked to consider their verdict, to withdraw the action from trial by jury, and to accept the decision of the court, in one instance upon a proof to be taken by commission, and in the others upon the notes of the presiding judge and the productions made before him; and (iii) the court referred to was a Division of the Court of Session, so that the appeal was against the first and only decision which had been given upon the evidence. I may add that all of these cases involved questions of law arising upon the facts when these were ascertained.

The subsequent decision of the House in *Bickett* v. *Morris* (4) does not trench upon the authority of these precedents, although it establishes an exception in cases where the party holding the original judgment has stated no objection to an appeal from it to an intermediate court. In that case the action was one of the causes specially appropriated for trial by jury under the provisions of the Scottish Judicature Act of 1825 (6 Geo. 4, c. 120). While it depended before the Lord Ordinary, and before the usual order was made remitting it to the jury court, the parties agreed that it should be disposed of by the court upon a proof by commission. The proof was taken, and was reported to the Lord Ordinary, who, after hearing parties, assoilzied the defender. The pursuers then presented a reclaiming note, to the competency of which no objection was stated; and the Second Division recalled the interlocutor of the Lord Ordinary, and gave judgment for the pursuers. The defender brought an appeal to this House against the decision of the Second Division, and was met by a preliminary plea of incompetency. After hearing a full argument upon the point LORD CHELMSFORD, L.C., LORD CRANWORTH and LORD WESTBURY unanimously repelled the plea, heard the appeal upon its merits, and affirmed the judgment appealed from. The Lord Chancellor said:

"By taking the step of appealing to the Inner House, the pursuers, in my opinion, have precluded themselves from objecting that the interlocutor pronounced in their favour is not subject to all the consequences of other interlocutors, and therefore is appealable to this House."

LORD WESTBURY observed:

"Upon the question of competency it must be understood that the decision of your Lordships proceeds upon its being personally incompetent to the respondents to raise that objection."

In my opinion it necessarily follows from the rule laid down by the House in these cases that the Court of Appeal were incompetent to entertain the respondent's appeal to them, unless the appellant unreservedly submitted the determination of the Special Case upon its merits to their jurisdiction. So far from acquiescing in, he objected to the jurisdiction of the Court of Appeal, and there can, therefore, be no reason for holding, as in *Bickett* v. *Morris* (4), that he is personally barred from now pleading the absolute finality of the judgment of the Divisional Court. In my opinion the House has, in these circumstances, no jurisdiction except to reverse as incompetent the judgment of the Court of Appeal. I, therefore, concur in the judgment which has been moved by the Lord Chancellor.

LORD SHAND stated the facts and continued: Where a question of law arises on facts agreed on, or on alternative views of facts, the question admits of being distinctly stated, and it is usual and desirable that it should be so stated expressly. In the present case not only does the Special Case state no such question, but counsel did not suggest that any such question admitted of being formulated. It is true that the Case contains the clause usually inserted where questions of law are presented for decision, viz., "The court is to be at liberty to draw inferences of fact." But, on examination, if it turns out, as here, that the only duty which it is sought to throw on the court is to draw inferences from which certain legal consequences admittedly follow, this only shows that the question for decision is one of fact only. This being so, I am of opinion with your Lordships that the Case was one which the Divisional Court was not bound to entertain. As soon as it became apparent to the judges of that court—and this seems to have been at an early stage of the argument—that the Special Case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it; and with a Special Case which left so much to conjecture, and where the parol evidence of the parties would have, in many respects, supplied satisfactory grounds for decision one way or the other, in place of mere grounds for speculation as to what the parties meant, and said, and did, it is not unlikely that the ends of justice would have been better served had this course been taken. It is apparent that the judges yielded to the entreaties of both parties in entertaining and disposing of the Case, and I agree in thinking that the proceeding was extra cursum curiæ, and that the decision of the dispute between the parties was of the nature of an award by arbiters, as indeed the judges of the Divisional Court seem themselves to have thought. It follows, on the authority of the series of cases cited by LORD WATSON, that, as the plaintiff maintained the finality of the decision of the Divisonal Court in the Court of Appeal, their Lordships, in place of dealing with the merits of the cause, should have sustained that contention and held that the proceedings and decision having been extra cursum curiæ, they could not entertain the appeal. On these grounds I agree in thinking that the judgment of the Court of Appeal should be reversed, and that of the Divisional Court restored.

Solicitors: *Steavenson & Couldwell*, for *T. Piercy*, Leeds; *Vincent & Vincent*, for *Peckover & Scriven*, Leeds.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

DEUTSCHE BANK (LONDON AGENCY) *v.* BERIRO & CO.

[QUEEN'S BENCH DIVISION (Mathew, J.), August 9, 1895]

[Reported 73 L.T. 669; 11 T.L.R. 591]

[COURT OF APPEAL (Lindley, A. L. Smith and Rigby, L.JJ.), December 13, 16, 1895]

[Reported 73 L.T. 669; 12 T.L.R. 106; 1 Com. Cas. 255]

Mistake—Mistake of fact—Money paid under mistake—Action for recovery—Estoppel—Representation by plaintiffs that money properly payable.

A., the endorsee of a bill of exchange, resident abroad, endorsed it to the defendants, his agents in London, for the purpose of collection. The defendants endorsed the bill to the plaintiffs and sent it to them for collection, and they forwarded it to their agents. The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. The defendants intimated the same to A., and credited him with the amount of the bill. The bill not having been met, the plaintiffs sought to recover the amount paid.

Held: the plaintiffs could not recover the amount of the bill from the defendants as (i) the defendants had had nothing to do with the mistake of fact under which the bill had been paid, and (ii) the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted.

Notes. Considered: *Weld Blundell* v. *Synott*, [1940] 2 All E.R. 580. Referred to: *R. E. Jones, Ltd.* v. *Waring and Gillow, Ltd.*, [1926] All E.R. Rep. 36; *Transvaal and Delagoa Bay Investment Co.* v. *Atkinson*, [1944] 1 All E.R. 579.

As to recovery of payment of bill of exchange from an innocent holder, see 3 HALSBURY'S LAWS (3rd Edn.) 226; and for cases see 6 DIGEST (Repl.) 336-338. As to estoppel by statement, see 15 HALSBURY'S LAWS (3rd Edn.) 232-233; and for cases see 21 DIGEST (Repl.) 395.

Cases referred to:

(1) *Skyring* v. *Greenwood* (1825), 4 B. & C. 281; 6 Dow. & Ry.K.B. 401; 107 E.R. 1064; 21 Digest (Repl.) 423, *1389*.

(2) *Chambers* v. *Miller* (1862), 13 C.B.N.S. 125; 1 New Rep. 95; 32 L.J.C.P. 30; 7 L.T. 856; 9 Jur.N.S. 626; 11 W.R. 236; 143 E.R. 50; 3 Digest (Repl.) 233, *596*.

(3) *Pollard* v. *Bank of England* (1871), L.R. 6 Q.B. 623; 40 L.J.Q.B. 233; 25 L.T. 415; 19 W.R. 1168; 3 Digest (Repl.) 251, *692*.

Action by the plaintiffs, Deutsche Bank (London Agency), Ltd., against the defendants, Beriro & Co., to recover £104 1s. 10d., the amount, with interest and costs, of a foreign bill of exchange dated Dec. 23, 1894.

Atkinson, Q.C., and *F. M. Abrahams* for the plaintiffs.

Murphy, Q.C., *R. M. Bray* and *Clarke Williams* for the defendants.

MATHEW, J.—This case was tried before me upon the facts as appearing from the correspondence which was put in, and it gives rise to a question of some importance. The facts were these: A gentleman of the name of Benatar, carrying on business in Morocco, sold to a firm of Pierard & Co., of Antwerp, a quantity of canary seed, and in payment he received from Pierard & Co. a bill of a somewhat unusual kind. It was a bill drawn by Pierard & Co. on themselves, and accepted by them, and endorsed to Benatar. Benatar forwarded this instrument to the defendants, his correspondents in London. They endorsed it to the plaintiffs, for the purpose of collection only. The defendants apparently had considerable doubts and anxiety about the bill, and they handed it to the plaintiffs to collect, with

the direction that they (the defendants) were to be informed whether the bill was met or not, and that no expense should be incurred in case it was not met. That was a sufficient intimation, and a protest would not be necessary, because notice of dishonour would be of no importance. Clearly as between Benatar and the defendants there was no discount of the bill—no transfer of the bill for any consideration other than for the purpose of collection. Therefore, in the event of its dishonour no notice would be necessary. The plaintiffs sent the bill on Jan. 24, 1895, to their agents at Antwerp, and in their letter they asked their agents to advise specially of the payment of the bill. They did not intimate, and one can understand why, that it was not desired that any expense should be incurred of a protest.

On Jan. 26 the Antwerp agents wrote to the plaintiffs, and the form of the letter gave rise to the mistake which subsequently occurred. In that advice the plaintiffs were informed that they were credited with the amount of the bill as from Feb. 4, the intention being that if the bill were not paid on Feb. 4 they should be debited with the amount. But this intimation appears to have been misunderstood, and to have been treated as an intimation that the bill was met. On Feb. 4 it was then recorded by the clerk of the plaintiffs that the bill had been collected. On that day the defendants called to inquire about the bill, and to their surprise, I cannot help thinking, were informed that the bill had been collected, and on the next day they received the amount from the plaintiffs. Upon their being informed that the bill had been met, they immediately telegraphed to their correspondent abroad, Benatar, and informed him that the bill had been collected. On the same day or the next they wrote informing Benatar that the money had been received and had been credited to Benatar. On Feb. 8, without any further explanation from the Antwerp agents to the plaintiffs, the bill was returned duly protested and not paid, and on Feb. 9, the clerk of the plaintiffs called upon the defendants and demanded repayment of the amount that had been handed to them, on the ground that it had been paid under a mistake. On Feb. 11 the defendants telegraphed to Benatar informing him, in a few words, of the condition of things, and on Feb. 15, Benatar telegraphed to the defendants, the result of the telegram being that Benatar refused to return the money. He said that the money had been collected, and he would not repay it. Those are the circumstances under which the action came before me. The plaintiffs persisted in their demand on the defendants for the repayment of the amount, and they brought their action. They brought their action first on the bill as a dishonoured bill, of which they were indorsees, from the defendants, and in the alternative for money had and received—money paid under a mistake of fact. I have to decide whether that claim can be maintained or not. I have come to the conclusion that the plaintiffs cannot recover from the defendants the amount of the bill.

In the course of the argument the attention of counsel was called by me to the well-known case of *Skyring* v. *Greenwood* (1) as an authority which probably would be decisive of the present case. It was alleged by the plaintiffs here that the money had been paid under a mistake of fact to the defendants, and it may be said that, if there was a mistake, it was a mistake with which they had nothing to do. The defendants employed the plaintiffs to collect the amount of the bill, and to inform them accurately as to whether the bill had been paid or not. Unfortunately the plaintiffs, by the mistake of one of their servants, were guilty of a breach of duty towards the defendants. They failed to inform them accurately. They informed them of that which was not the fact, namely, that the money had been received, and they handed them the money. On what ground of law or of equity can they say that they can get rid of the consequences of their breach of duty because they had made a mistake? I am not aware of any such principle. The case to which I have referred is a clear illustration, as it seems to me, of the principle applicable to this litigation. In *Skyring* v. *Greenwood* (1) Cox & Co. the army agents had credited one of their customers with the amount of extra pay, to which amount

of extra pay it appears he was not entitled, and Cox & Co. were informed that he was not entitled to it, but by inadvertence they failed to inform him on the subject, and failed to cease to credit him as they might have done with the amounts which previously it appeared he had been receiving. For four or five years they had gone on crediting him with the amount, and from time to time he had drawn the money and spent it. At the time of the customer's death there was a considerable sum standing to his credit, and his administratrix who sought to recover this amount, was met by an attempt on the part of Cox & Co. to set off payments that had been previously made, or with which he was credited, as payments made under a mistake of fact. It will be found on examining the case that the judges decided that the money could not be recovered, because the mistake was one with which the customer had nothing to do, and a mistake that arose from a breach of duty on the part of Cox & Co. towards him. On principle that case would appear to be distinctly applicable to the present case.

The same principle may be detected in two other cases, namely, *Chambers* v. *Miller* (2) and *Pollard* v. *Bank of England* (3). In the one case a bill, and in the other case a cheque, was paid under the impression that the customer had got assets in the hands of the banker to meet the respective documents. It turned out that there were no effects, and that the bank in each case need not have paid, and perhaps ought not to have paid the bill or the cheque. Although the attempt was made to correct the mistake immediately, in the case of the cheque the money had been handed over, and a person to whom it was handed over was engaged in counting the money. It was held that it could not be recovered back, because it had been paid to a person, under a mistake of fact no doubt, so far as the person paying it was concerned, but a mistake of fact with which it was held that the defendants in each case had nothing to do. On these grounds alone I should have thought that the defendants here were clearly entitled to succeed.

There is another ground on which I cannot conceive how it is possible for the plaintiffs to escape, and that is the ground of estoppel. Here the money was paid, and on the faith of that payment the correspondent abroad, Benatar, was credited in account. It seems to me on principle the same as if the money had been paid to him, or the money paid to some third person by his direction. The plaintiffs, if they recovered from the defendants, would leave the defendants in the position of having to get that money back, which they paid on the faith of the plaintiffs' statement to them. That they would have uncommonly little chance, as a matter of business, of ever recovering the money from Benatar, their correspondent in Morocco, is abundantly clear from the excellent argument of that gentleman, in the two letters of Feb. 15 and 22, 1895, where he said that, when he heard that he was credited in account with the amount, he paid for this very canary seed, relying upon the fact that that bill had been met, and credit had been given him. Of course, if Benatar succeeded in showing that—this correspondence is before me to act upon—the defendants would have no ground whatever for recovering from Benatar. An account had been stated between them and him upon the faith of this representation made by the plaintiffs to the defendants. On this ground of estoppel also, I conceive that the defendants are entitled to my judgment. I, therefore, give judgment for them, and with costs. The plaintiffs appealed.

Robson, Q.C., and *F. M. Abrahams* for the plaintiffs.
R. M. Bray and *Clarke Williams* for the defendants.

LINDLEY, A. L. SMITH and **RIGBY, L.JJ.**, without considering that part of the judgment of MATHEW, J., which was based on the authorities, came to the conclusion that the view taken by him of the facts was right and dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Michael Abrahams, Sons & Co.; J. T. Freeman & Co.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

SHERRAS *v.* de RUTZEN

[QUEEN'S BENCH DIVISION (Day and Wright, JJ.), April 25, 1895]

B [Reported [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 43 W.R. 526; 11 T.L.R. 369; 39 Sol. Jo. 451; 18 Cox, C.C. 157; 15 R. 388]

Licensing—Offence—Sale of liquor to police officer while on duty—Bona fide belief of licensee that officer off duty—Licensing Act, 1872 (35 & 36 *Vict.*, *c.* 94), *s.* 16 (2).

C By the Licensing Act, 1872, s. 16 [see now s. 142 of the Licensing Act, 1953] : "If any licensed person (1) knowingly harbours or knowingly suffers to remain on his premises any constable during any part of the time appointed for such constable being on duty . . . or (2) supplies any liquor or refreshment whether by way of gift or sale to any constable on duty unless by authority of some superior officer of such constable; or (3) bribes or attempts to bribe any D constable . . . he shall be liable to a penalty."

The appellant, a licensee of a public-house much frequented by police when off duty, was convicted under s. 16 (2) of the Licensing Act, 1872, of selling liquor to a constable while he was on duty. It was proved that the constable had removed his armlet, an indication that he was off duty, and the appellant had served him in the bona fide belief that that was the case.

E **Held:** as the appellant had no intention of doing a wrongful act and had reasonable grounds for believing the constable to be off duty, the conviction must be quashed.

Per DAY, J. : The only effect of the appearance of the word "knowingly" in s. 16 (1) of the Act and its omission in sub-s. (2) is to shift the burden of proof. In cases under subs. (1) it is for the prosecution to prove knowledge, while in F cases under sub-s. (2) it is for the defendant to prove that he did not know.

Notes. Section 16 of the Licensing Act, 1872, has been repealed. See now s. 142 of the Licensing Act, 1953 (33 HALSBURY'S STATUTES (2nd Edn.) 270).

Considered : *R.* v. *Leinster* (1923), 87 J.P. 191; *Gaumont British Distributors, Ltd.* v. *Henry*, [1939] 2 All E.R. 808; *Grade* v. *D.P.P.*, [1942] 2 All E.R. 118. G Applied : *Reynolds* v. *G. H. Austin & Sons*, [1951] 1 All E.R. 606. Considered : *R.* v. *St. Margaret's Trust, Ltd.*, [1958] 2 All E.R. 289. Referred to : *Bank of New South Wales* v. *Piper*, [1897] A.C. 383; *Derbyshire* v. *Houliston*, [1897] 1 Q.B. 772; *Korten* v. *West Sussex County Council* (1903), 72 L.J.K.B. 514; *Hobbs* v. *Winchester Corpn.*, [1910] 2 K.B. 471; *Griffiths* v. *Studebakers* (1923), 87 J.P. 199; *Harding* v. *Price*, [1948] 1 All E.R. 283; *Taylor's Central Garages (Exeter), Ltd.* H v. Roper (1951), 115 J.P. 445.

As to mens rea in criminal offences, see 10 HALSBURY'S LAWS (3rd Edn.) 272 et seq.; and for cases see 14 DIGEST (Repl.) 31 et seq. As to offences in relation to constables in public-houses, see 22 HALSBURY'S LAWS (3rd Edn.) 687, 688; and for cases see 30 DIGEST (Repl.) 103.

I Cases referred to

(1) *Nichols* v. *Hall* (1873), L.R. 8 C.P. 322; 42 L.J.M.C. 105; 28 L.T. 473; 37 J.P. 424; 21 W.R. 579; 14 Digest (Repl.) 37, *66*.

(2) *R.* v. *Lolley* (1812), Russ. & Ry. 237; sub nom. *Sugden* v. *Lolley*, 2 Cl. & Fin. 567, n., C.C.R.; 15 Digest (Repl.) 891, *8588*.

(3) *R.* v. *Prince* (1875), L.R. 2 C.C.R. 154; 44 L.J.M.C. 122; 32 L.T. 700; 39 J.P. 676; 24 W.R. 76; 13 Cox, C.C. 138, C.C.R.; 14 Digest (Repl.) 52, *181*.

(4) *Davies* v. *Harvey* (1874), L.R. 9 Q.B. 433; 43 L.J.M.C. 121; 30 L.T. 629; 38 J.P. 661; 22 W.R. 733; 14 Digest (Repl.) 42, *100*.

(5) *A.-G.* v. *Lockwood* (1842), 9 M. & W. 378; 152 E.R. 160; on appeal sub nom. *Lockwood* v. *A.-G.* (1842), 10 M. & W. 464; 152 E.R. 552; Ex. Ch.; 39 Digest 235, *103.*

(6) *R.* v. *Woodrow* (1846), 15 M. & W. 404; 2 New Mag. Cas. 1; 2 New Sess. Cas. 346; 16 L.J.M.C. 122; 10 J.P. 791; 153 E.R. 907; 14 Digest (Repl.) 36, *57.*

(7) *Fitzpatrick* v. *Kelly* (1873), L.R. 8 Q.B. 337; 42 L.J.M.C. 132; 28 L.T. 558; 38 J.P. 55; 21 W.R. 681; 39 Digest 442, *710.*

(8) *Roberts* v. *Egerton* (1874), L.R. 9 Q.B. 494; 43 L.J.M.C. 135; 30 L.T. 633; 38 J.P. 485; 22 W.R. 797, D.C.; 25 Digest (Repl.) 95, *191.*

(9) *R.* v. *Marsh* (1824), 2 B. & C. 717; 4 Dow. & Ry. K.B. 260; 2 Dow. & Ry. M.C. 182; 107 E.R. 550; 14 Digest (Repl.) 37, *73.*

(10) *R.* v. *Bishop* (1880), 5 Q.B.D. 259; 49 L.J.M.C. 45; 42 L.T. 240; 44 J.P. 330; 28 W.R. 475; 14 Cox, C.C. 404, C.C.R.; 14 Digest (Repl.) 37, *77.*

(11) *R.* v. *Stephens* (1866), L.R. 1 Q.B. 702; 7 B. & S. 710; 35 L.J.Q.B. 251; 14 L.T. 593; 30 J.P. 822; 12 Jur.N.S. 961; 14 W.R. 859; 10 Cox, C.C. 340; 14 Digest (Repl.) 47, *139.*

(12) *R.* v. *Medley* (1834), 6 C. & P. 292; 14 Digest (Repl.) 46, *138.*

(13) *Barnes* v. *Akroyd* (1872), L.R. 7 Q.B. 474; 41 L.J.M.C. 110; 26 L.T. 692; 37 J.P. 116; 14 Digest (Repl.) 42, *99.*

(14) *Morden v. Porter* (1860), 7 C.B.N.S. 641; 29 L.J.M.C. 213; 1 L.T. 403; 25 J.P. 263; 8 W.R. 262; 141 E.R. 967; 25 Digest (Repl.) 387, *145.*

(15) *Lee* v. *Simpson* (1847), 3 C.B. 871; 4 Dow. & L. 666; 16 L.J.C.P. 105; 8 L.T.O.S. 340; 11 Jur. 127; 136 E.R. 349; 13 Digest (Repl.) 118, *592.*

(16) *Hargreaves* v. *Diddams* (1875), L.R. 10 Q.B. 582; 44 L.J.M.C. 178; 32 L.T. 600; 40 J.P. 167; 23 W.R. 828; 25 Digest (Repl.) 10, *76.*

Also referred to in argument:

Cundy v. *Le Cocq* (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 32 W.R. 769, D.C.; 30 Digest (Repl.) 96, *719.*

Mullins v. *Collins* (1874), L.R. 9 Q.B. 292; 43 L.J.M.C. 67; 29 L.T. 838; 38 J.P. 629; 22 W.R. 297; 30 Digest (Repl.) 103, *761.*

Case Stated by Sir Peter Edlin, Q.C., chairman of quarter sessions for the County of London.

The appellant was licensee of a public-house, and was convicted before a metropolitan police magistrate under s. 16 (2) of the Licensing Act, 1872, for having unlawfully supplied liquor to a police constable on duty without having the authority of a superior officer of such constable for so doing. The appellant's public-house was situated nearly opposite a police-station and was much frequented by the police when off duty. On July 16, 1894, at about 4.40 p.m., the police constable in question, being then on duty, entered the appellant's house and was served with liquor by the appellant's daughter in his presence. Prior to entering the house the police constable had removed his armlet, and it was admitted that if a police constable is not wearing his armlet that is an indication that he is off duty. The armlet is removed at the police-station when a constable is dismissed, and a publican seeing the armlet off would naturally think the police constable to be off duty. The police constable was in the habit of using the appellant's house, and was well known to the appellant and his daughter. Neither the appellant nor his daughter made any inquiry of the police constable as to whether he was or was not on duty; but they took it for granted that he was off duty in consequence of his armlet being off, and served him with liquor being under that belief. The appellant and his daughter were in the habit of serving a number of police constables in uniform with their armlets off each day, and the question whether they were or were not off duty was never asked when the armlet was seen to be off, and he was served with liquor under that belief by the appellant's daughter. The appellant appealed to quarter sessions against the conviction of the magistrate, contending that, in order to constitute an offence under s. 16 (2) of the Licensing Act, 1872,

A there must be shown to be either knowledge that the police constable was on duty or an intentional abstention from ascertaining whether he was on duty or not. The court of quarter sessions upheld the conviction, considering that knowledge that the police constable, when served with liquor, was on duty, was not an essential ingredient of the offence, but stated this Case for the opinion of the court.

B *Poland*, *Q.C.*, and *P. Taylor* for the appellant.
Macmorran in support of the conviction.

DAY, J.—I am clearly of opinion that this conviction ought to be quashed. A police constable comes into the house of the appellant without an armlet on, and therefore with the appearance of being off duty. The appellant's house was in the C immediate neighbourhood of the police-station, and the appellant believed, and he had very natural ground for believing, that the constable was off duty. Acting on that belief he accordingly served him with liquor. As a matter of fact the constable was on duty, and the question is, does that fact make the innocent act of the appellant an offence? I do not think it does. The appellant had no intention to do a wrongful act; he acted in the bona fide belief that the constable was off duty. D It seems to me, therefore, that the contention that the appellant committed an offence is entirely an erroneous one.

An argument in support of the conviction has been based upon the appearance of the word "knowingly" in s. 16 (1), and the omission of that word in sub-s. (2) of that section. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s. (1) of s. 16, it is for the prosecution to prove know- E ledge, while in cases under sub-s. (2) it is for the defendant to prove that he did not know. That is the only inference that I draw from the insertion of the word "knowingly" in sub-s. (1) of s. 16, and its omission is sub-s. (2) of that section. It appears to me that it would be straining the law to say that this publican, acting as he did in the bona fide belief that the constable was off duty, and having very reasonable grounds for that belief, was nevertheless guilty of an offence against F s. 16, for which he was liable to have his licence indorsed.

WRIGHT, J.—I am entirely of the same opinion. It is not very easy to reconcile the cases on the subject, but there are many of them. The presumption is, that mens rea, an evil intention or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced G either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered: *Nichols* v. *Hall* (1). One of the most remarkable exceptions was in the case of bigamy, where all the judges held, on the statute 1 Jac. 1, c. 11, that a man was rightly convicted of bigamy who had married after an invalid Scottish divorce, which had been obtained in good faith, and the validity of which he had no reason to doubt: this was *R.* v. *Lolley* (2). Another H exception, apparently grounded upon the language of a statute is *R.* v. *Prince* (3), where it was held by fifteen judges against one that a man was guilty of abduction of a girl under sixteen, although he believed, in good faith and on reasonable grounds, that she was over that age.

Apart from isolated and extreme cases of this kind, the principal classes of exceptions may be reduced to three. One is a class of acts which, in the language I of LUSH, J., in *Davies* v. *Harvey* (4), are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes: e.g., *A.-G.* v. *Lockwood* (5), where the innocent possession of liquorice by a beer retailer was held to be an offence. So, under the Adulteration Acts, *R.* v. *Woodrow* (6), as to innocent possession of adulterated tobacco; *Fitzpatrick* v. *Kelly* (7), and *Roberts* v. *Egerton* (8), as to the sale of adulterated food. So under the Game Acts, as to the innocent possession of game by a carrier, *R.* v. *Marsh* (9). So as to the liability of a guardian of the poor, *Davies* v. *Harvey* (4). To the same head may be referred

R. v. *Bishop* (10), where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics.

Another class comprehends some, and perhaps all, public nuisances. In *R.* v. *Stephens* (11) the employer was held liable on an indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and it was so in *R.* v. *Medley* (12) and *Barnes* v. *Ackroyd* (13).

There may be cases where, although the proceedings may be criminal in form, they are really only a summary mode of enforcing a civil right: see the judgments of VAUGHAN WILLIAMS and WILLES, JJ., in *Morden* v. *Porter* (14) as to an unintentional trespass in pursuit of game; *Lee* v. *Simpson* (15) as to unconscious dramatic piracy; and *Hargreaves* v. *Diddams* (16) as to a bona fide belief in a legally impossible right to fish.

Except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him generally or in the particular matter, in order to constitute an offence. It is plain that, if the guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16, sub-s. (2) since it would be easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house. I am therefore of the opinion that this conviction must be quashed.

Conviction quashed.

Solicitors: *Maitlands, Peckham & Co.; The Solicitor to the Treasury.*

[*Reported by* T. R. BRIDGWATER, ESQ., *Barrister-at-Law.*]

ROBINS & CO. *v.* GRAY

[COURT OF APPEAL (Lord Esher, M.R., Kay and A. L. Smith, L.JJ.), August 1, 2, 1895]

[Reported [1895] 2 Q.B. 501; 65 L.J.Q.B. 44; 73 L.T. 252; 59 J.P. 741; 44 W.R. 1; 11 T.L.R. 569; 39 Sol. Jo. 734; 14 R. 671]

Inn—Innkeeper—Lien—Goods not property of guest—Commercial traveller—Goods belonging to employer—Knowledge of innkeeper.

An innkeeper has a lien on all goods which are brought by a guest to the inn as his baggage and are received as such by the innkeeper, though the goods are not, to the knowledge of the innkeeper, the property of the guest, e.g., a commercial traveller in possession of his employer's property for sale.

Broadwood v. *Granara* (1) (1854), 10 Exch. 417, distinguished.

Notes. The law relating to an innkeeper's lien on a guest's property has been amended by the Hotel Proprietors Act, 1956 (36 HALSBURY'S STATUTES (2nd Edn.) 465 et seq.), by s. 2 (2) of which an innkeeper no longer has a lien on any vehicle or property left therein, or any horse or other live animal or its harness or equipment.

Distinguished: *Matsuda* v. *Waldorf Hotel Co.* (1910), 27 T.L.R. 153. Considered: *Shacklock* v. *Ethorpe, Ltd.*, [1939] 3 All E.R. 372; *Tinsley* v. *Dudley*, [1951] 1 All

A E.R. 252. Referred to: *Cassils and Sassoon* v. *Holden Wood Bleaching Co.* (1914), 84 L.J.K.B. 834; *Marsh* v. *Police Comr.*, [1944] 2 All E.R. 392; *Gee, Walker and Slater, Ltd.* v. *Friary Hotel (Derby), Ltd.* (1949), 66 (pt. 1) T.L.R. 59.

As to an innkeeper's lien, see 21 HALSBURY'S LAWS (3rd Edn.) 463 et seq.; and for cases see 29 DIGEST (Repl.) 24 et seq.

B Cases referred to:

(1) *Broadwood* v. *Granara* (1854), 10 Exch. 417; 3 C.L.R. 177; 24 L.J.Ex. 1; 24 L.T.O.S. 97; 19 J.P. 39; 1 Jur.N.S. 19; 3 W.R. 25; 156 E.R. 499; 29 Digest (Repl.) 24, *269*.

(2) *Robinson* v. *Walter* (1617), 3 Bulst. 269; Poph. 127; 1 Roll. Rep. 449; 81 E.R. 227; 29 Digest (Repl.) 7, *66*.

C (3) *Gordon* v. *Silber* (1890), 25 Q.B.D. 491; 59 L.J.Q.B. 507; 63 L.T. 283; 55 J.P. 134; 39 W.R. 111; 6 T.L.R. 487; 29 Digest (Repl.) 26, *290*.

Also referred to in argument:

Johnson v. *Hill* (1822), 3 Stark. 172, N.P.; 29 Digest (Repl.) 26, *297*.

Turrill v. *Crawley* (1849), 13 Q.B. 197; 18 L.J.Q.B. 155; 12 L.T.O.S. 398; 13 Jur. 878; 116 E.R. 1238; sub nom. *Turnill* v. *Crawley*, 13 J.P. 747; 29 Digest D (Repl.) 7, *70*.

Threfall v. *Borwick* (1875), L.R. 10 Q.B. 210; 44 L.J.Q.B. 87; 32 L.T. 95; 39 J.P. 409; 23 W.R. 312, Ex. Ch.; 29 Digest (Repl.) 25, *289*.

Mulliner v. *Florence* (1878), 3 Q.B.D. 484; 47 L.J.Q.B. 700; 38 L.T. 167; 42 J.P. 293; 26 W.R. 385, C.A.; 29 Digest (Repl.) 24, *276*.

E **Appeal** by the plaintiffs from a decision of WILLS, J., at the trial without a jury.

In April, 1894, one Green, a commercial traveller in the employment of the plaintiffs, who obtained orders and sold goods on commission for them, went to stay at the defendant's inn for the purposes of his business. He stayed at the inn until the end of July. The plaintiffs from time to time sent sewing machines and other articles to Green, at the defendant's inn, for the purpose of being sold to customers F in the district. Green became indebted to the defendant in respect of his board and lodging, and the defendant claimed to have a lien on the sewing machines which had been sent to Green by the plaintiffs, and were at the inn. Before the sewing machines were sent to the inn and before Green had incurred his debt, the defendant had been told by the plaintiffs that the goods were their goods. The plaintiffs sued the defendant for the recovery of the sewing machines, the defendant claiming G that he had a lien on them for the amount of Green's debt. WILLS, J., gave judgment for the defendant.

Arthur Powell and *Guy Granet* for the plaintiffs.

W. E. Hume Williams for the defendant.

H **LORD ESHER, M.R.**—I have had no doubt about this case from the beginning. I decline to disturb a well-known and very large business, which has been carried on for centuries, on any new discovery as to the rights of innkeepers. The rights, duties and liabilities of innkeepers are founded, not on any bailment, pledge or contract, but on the custom of the realm with regard to innkeepers and on no other law. What are the liabilities of an innkeeper? If a traveller comes to an inn and I brings his luggage with him—I do not mean merely personal luggage—the innkeeper is bound to take in both him and the luggage which he brings with him. The innkeeper cannot discriminate and say that he will take in the traveller but not the luggage. Up to this time it has never been suggested that he can so discriminate, and refuse to take in the luggage. If the traveller brought with him something unusual and unreasonable, such as a tiger or a quantity of dynamite, the innkeeper would not be bound to take in either him or his luggage. The custom of the realm is that, unless there is good reason to the contrary, the innkeeper must take in a traveller and the goods which he brings with him. He is not bound to inquire

as to the goods, nor is the guest bound to answer any such inquiries. If, on being asked, the guest says that the goods are not his property, but that he is bringing them with him as his luggage and insists on their being taken in, the innkeeper is bound to take them in. If the goods are of such a kind or of such quantity that the innkeeper is not bound to take them in, but the guest asks him to take them in as his travelling luggage and the innkeeper consents, then they are taken in under the custom of the realm. If the goods are taken in under the custom of the realm, the liability of the innkeeper is to keep them safely, and if they are lost or stolen, unless by the fault of the guest, the innkeeper is liable.

In respect of this obligation to receive and the liability for safe keeping, the innkeeper has a lien on the goods for the expenses of the guest and of keeping the goods. Not by virtue of any contract or bailment, but by virtue of the custom of the realm, the innkeeper has a lien as against the true owner of the goods, and not as against the guest only. That has been the law of England for centuries. From some of the expressions of judges, and questions left to juries, which I think were immaterial, it has been argued that, if the goods do not belong to the guest and the innkeeper knows it, he may refuse to take in the goods, or may take them in not as being luggage of the guest. That cannot be so. If such goods are taken in, the guest is entitled to deal with them in the inn as if they were his own, and they are not in the exclusive possession of the innkeeper. Is there any case where it has been held that, where goods are brought by a traveller as his luggage, and taken in by the innkeeper as the luggage of the guest, though the innkeeper knew they were not the guest's property, the innkeeper has no lien and no liability? There is not a single case of that kind. That, I think, is conclusive. It has been argued that *Broadwood* v. *Granara* (1) was such a case. But that case decides only that, if a guest brings goods as his own, they are to be treated as his own. By the expression "as his own" is meant brought and received as if they were his own luggage. In *Broadwood* v. *Granara* (1), the piano was not brought to the inn as luggage at all, but only to be used by the guest while he stayed at the inn. It was not offered to, or taken by, the innkeeper as an innkeeper. That case was decided expressly on the ground that, in such a transaction, the law of innkeeper and guest did not apply. That case, therefore, is not in point here, where the goods were brought and received as if they were the baggage of the traveller. The law rests simply on the custom of the realm as to goods brought by a guest to an inn as luggage with which he is travelling, and the question of ownership is utterly immaterial, and the knowledge of the innkeeper does not signify at all. The decision of WILLS, J., was right, and the appeal must be dismissed.

KAY, L.J.—I am of the same opinion. The plaintiffs are the owners of some sewing machines, in respect of which they have brought this action of detinue. The defendant is an innkeeper; the goods in question came into his possession as the goods of a guest, and he says that he has a lien on them for the amount of the guest's bill. To that it is answered that he knew that the goods were not the guest's but that they belonged to the plaintiffs. The question is whether that is a good answer.

The facts are shortly these: A traveller of the plaintiffs took some sewing machines with him, and went to the defendant's inn; while he was there other sewing machines were sent to him to sell, that is, for the same purpose as he had taken the other machines with him. These sewing machines were detained by the innkeeper, who says that he has a lien on them. I agree with the opinion of WILLS, J., that it makes no difference that these machines were sent to the guest while he was at the inn. They were received by the innkeeper in just the same way as any luggage brought by a traveller, that is, as the goods of the guest. I do not mean as the property of the guest, for the innkeeper knew that they were not; I mean as goods of the guest. There is not one case where it is denied that an innkeeper has a lien on the goods of a commercial traveller brought to an inn. That business

A has been carried on for a very long time, and is a very extensive business. All inns receive commercial travellers. Yet is has never been denied in any case that an innkeeper has a lien on goods brought by a commercial traveller, though an innkeeper must know that they are not the property of the commercial traveller. Is there a single case in which it has been denied that an innkeeper is liable for the safe custody of the goods, because he knew that they were not the property of the B traveller? There is not one. It is clear, therefore, that, if a commercial traveller takes goods with him which it is known are not his property to an inn, and the innkeeper takes him in with those goods which are the ordinary luggage of a commercial traveller, the innkeeper is liable for their safe custody in the same way as for the personal luggage of the commercial traveller, and that he has a lien on them in the same way.

C The only point now raised is whether the right of lien is defeated by the innkeeper's knowledge that the goods are not the property of the traveller. How does the innkeeper's lien arise? In *Robinson* v. *Walter* (2), it is said that it arises from the general custom of the realm. There is, in that case, a distinct statement that this law of an innkeeper's lien is founded on the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods coming to the inn with D a guest actually belong, and that he is bound to receive them. Then, in *Broadwood* v. *Granara* (1), where the guest hired a piano for temporary use and the innkeeper knew that that was so and allowed it to be brought to the inn for the temporary use of the guest, it was held that he had no lien. The ground of that decision is stated by all the judges thus : POLLOCK, C.B., says (10 Exch. at p. 422) that

E "this is the case of goods, not brought to the inn by a traveller as his goods, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the Case finds that it was known to the F defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose;"

and PARKE, B., says (ibid. at p. 423) that

"it is not necessary to advert to the decision, on the subject of an innkeeper's lien, because this is not the case of goods brought by a guest to an inn in that G sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn."

H As suggested by the Master of the Rolls, suppose that jewels are sent to a guest at an inn on approval, is it possible to say that the innkeeper has a lien in such a case? I think not, for the goods are sent to the guest for a special temporary purpose, and the innkeeper knows that, and, therefore, does not receive them as goods which a guest as a traveller would take about as his goods. Here the case is I precisely the contrary. Here the goods were received into the inn as the sort of goods that this guest would take with him when travelling and an innkeeper would receive. We should effect a complete revolution in the custom of the land if we were to hold that an innkeeper had no lien in such a case as this. I think that the innkeeper's right of lien does extend to such a case as this, and that the judgment of WILLS, J., was right.

A. L. SMITH, L.J.—In this case a commercial traveller in the employ of the plaintiffs went to the defendant's inn, and took with him such goods as a commercial

traveller would usually carry with him, and as an innkeeper would be bound to receive and take care of. Commercial travellers usually travel about the country with their employers' goods. What is the obligation of an innkeeper? He is bound to take in a commercial traveller with his baggage, and he is bound absolutely to keep the baggage safe. This obligation is imposed on the innkeeper by the custom of the realm. In consequence of that obligation, a lien is given to the innkeeper by the custom of the realm. I cannot express that better than in the words of LOPES, L.J., in *Gordon* v. *Silber* (3), where he says (25 Q.B.D. at p. 492):

> "The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title."

I adopt that as good law, and believe it to be an accurate statement of the law. The point is now taken that that statement of the law is correct, but does not apply if that which is brought by the guest to an inn as his baggage is not his property, but the property of his master, and that is known to the innkeeper. Is there any case which supports that contention? It is said that *Broadwood* v. *Granara* (1) does. That case does not decide that point at all, because the property there in question was not brought to the inn by the guest as his luggage, but only for temporary use. The innkeeper, therefore, had no lien, because he was not bound to receive the goods. Here all the goods were brought and received as baggage of the commercial traveller which the innkeeper was bound to receive. The only question is what is the custom of the realm? The law of pledge has nothing whatever to do with the question. It is true that, in some of the cases, the judges speak about the knowledge of the innkeeper; but there is not one decision on that question. It is mentioned only because in those cases there was no knowledge. There is no authority to the effect that the lien which an innkeeper has by the custom of the realm is abrogated by the fact that the goods are not the property of the guest and that the innkeeper knows it. Suppose half the goods brought by a guest are his property and half are not, and the innkeeper knows it. I think that the innkeeper is bound to receive them all, and is subject to the same obligations as to all. I think that the judgment of WILLS, J., was right, and must be affirmed.

Appeal dismissed.

Solicitors: *W. Wilkins; Collyer-Bristow & Russell*, for *F. Hall*, Folkestone.

[*Reported by* J. H. WILLIAMS, ESQ., *Barrister-at-Law.*]

A

Re SMITH. ARNOLD *v.* SMITH

[Chancery Division (North, J.), November 27, 1895]

[Reported [1896] 1 Ch. 171; 65 L.J.Ch. 269; 74 L.T. 14]

B *Executor—Power to carry on business of testator—Power to postpone sale—Power to postpone to enable son of 18 to join in purchasing business.*

A testator gave the residue of his estate to trustees upon trust to sell with all convenient speed, and particularly to sell his business of a pawnbroker as a going concern with power to the trustees to postpone the sale of his estate, or any part thereof, for so long as they should think fit. At the date of his C will all his children were young, but before his death his two eldest sons had been introduced into his business as assistants. After his death the sons, aged twenty and eighteen repectively, managed the business at a good profit, and in the opinion of the trustees it was desirable in the interests of all concerned that the business should be carried on until the second son attained twenty-one, to enable the two sons to purchase it.

D **Held:** the will did not give the trustees power to carry on the business indefinitely, but under the circumstances of the case they might do so for a period of two years from the testator's death.

Notes. Referred to: *Re Wragg*, *Wragg* v. *Palmer*, [1918-19] All E.R. Rep. 233; *Re Rooke's Will Trusts*, *Taylor* v. *Rooke*, [1953] 2 All E.R. 110.

E As to powers of executors to carry on the business of deceased, see 16 Halsbury's Laws (3rd Edn.) 366 et seq.; and for cases see 24 Digest (Repl.) 610 et seq.

Cases referred to:

(1) *Re Crowther*, *Midgley* v. *Crowther*, post p. 1208; [1895] 2 Ch. 56; 64 L.J.Ch. 537; 72 L.T. 762; 43 W.R. 571; 11 T.L.R. 380; 13 R. 496; 24 Digest F (Repl.) 611, *6089*.

(2) *Re Chancellor*, *Chancellor* v. *Brown* (1884), 26 Ch.D. 42; 53 L.J.Ch. 443; 51 L.T. 33; 32 W.R. 465, C.A.; 24 Digest (Repl.) 611, *6088*.

Originating Summons taken out by trustees to determine whether they would be justified in carrying on the testator's business for a certain period.

G Thomas Smith, by his will made in 1889, gave the residue of his estate and effects, both real and personal, to trustees upon trust that they

> "shall with all convenient speed sell and convert into money my real estate and residuary personal estate, or such part thereof as shall not consist of money, and particularly shall with all convenient speed, after my decease, sell and dispose of my business of a pawnbroker (as a going concern), carried on by me H at Nos. 47 and 49, Pitfield Street, Hoxton, and No. 257, Seven Sisters Road, Finsbury Park, together with the leases under which the premises are held, for the best price that can be obtained for the same."

The testator afterwards provided:

> I "I empower my trustees or trustee to postpone the sale and conversion of my real and personal estate, or any part thereof, for as long as they or he shall think fit, and in the meantime to let or demise any real estate, including chattels real, for any term of years not exceeding twenty-one years, to take effect in possession, at such rent and subject to such covenants and conditions as my trustees or trustee shall think fit."

The testator died on April 12, 1895, leaving a widow and four children, three sons and one daughter, aged twenty years, eighteen years, twelve years, and sixteen years respectively. Under the will his widow became entitled to receive, out of

the income of the investments of the proceeds of conversion of his estate, an annuity of £300 if she remained his widow, and £100 if she married again, when the trustees were to maintain the testator's infant children during her life; and on her death the estate was to be divided among his children. When the testator made his will his children were all young; but before his death his two eldest sons, Thomas Smith and Sidney Herbert Smith, had been introduced into his business as his assistants. After the testator's death the trustees sold his business at Hoxton. But the business at Finsbury Park was being managed by the two sons at a substantial profit; and, in the opinion of the trustees, is was desirable, in the interest of all concerned, that it should be carried on until the younger attained his majority, to enable the two sons to purchase it at a higher price than would in all probability be obtained in the market.

This was an originating summons taken out by the trustees, in which the principal question raised was whether, under the provisions of the will, the trustees would be justified in carrying on the Finsbury Park business until the testator's younger son should attain twenty-one, or during some other and what period, so as to give the sons the opportunity of purchasing it.

Swinfen Eady, *Q.C.*, and *Micklem* for the trustees.
Harman, for the defendants, did not oppose the application.

NORTH, J.—In this case I am asked to depart altogether from the terms of the testator's will. It is said that it is for the interest of the family that the trustees should carry on the business at Finsbury Park for some time. If it were an open question, I am not sure that I should not decide that it would be for the interest of the family that the business should be carried on by the trustees for some time, but I have to construe the will. The question is, what has the testator authorised? I cannot agree in the view that under this will the direction that the trustees

> "particularly shall with all convenient speed after my decease sell and dispose of my business of a pawnbroker (as a going concern)"

is to be ignored because of the subsequent provision,

> "I empower my trustees or trustee to postpone the sale and conversion of my real and personal estate, or any part thereof, for so long as they or he shall think fit."

I think that the testator did not consider it desirable that the business should be carried on by his trustees; but that it should be sold with all convenient speed. On the other hand, he did not intend that it should be sacrificed by a forced sale. *Re Crowther*, *Midgley* v. *Crowther* (1) does not go so far as I am asked to do here. There are no such special words in the will in that case as here. Whether that has gone too far I will not stop to consider. What is asked here seems to me to go beyond that decision. All I can do is what the Court of Appeal did in *Re Chancellor*, *Chancellor* v. *Brown* (2). I am quite prepared to say that the trustees may have two years. I think I can authorise them to postpone the sale for two years from the testator's death. Of course, if a favourable opportunity arises in the mean time, it should not be thrown away. There will be liberty to apply at the end of two years. It is quite possible that the sons may buy the business. It would be worth more to them than to a stranger.

Solicitors: *May*, *Sykes & Co.*

[*Reported by* J. TRUSTRAM, ESQ., *Barrister-at-Law.*]

A

ROBERTS *v.* SECURITY CO.

[Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.), November 30, 1896]

B

[Reported [1897] 1 Q.B. 111; 66 L.J.Q.B. 119; 75 L.T. 531; 45 W.R. 214; 13 T.L.R. 79; 41 Sol. Jo. 95]

Insurance—Policy—Completed contract—Provision in proposal that policy be in force until premium paid—Provision in policy that no insurance effective until premium paid—Loss under policy before execution of policy by insurers.

C A proposal for an insurance policy against loss by burglary signed by the plaintiff on Dec. 14, 1895, and containing a clause to the effect that no insurance should be considered in force until the premium had been paid was sent to the defendant insurance company. On Dec. 27 a policy of insurance for the period from Dec. 14, 1895, to Jan. 1, 1897, was duly executed by the defendants. It contained recitals of the proposal and stated that the first premium had been D paid, and there was also a proviso that no insurance should be held to be effected until the premium due on the policy had been paid. On the night of Dec. 26-27 (before the execution of the policy) the plaintiff's premises were broken into and goods were stolen, no premium having then been paid.

Held: on its true construction the policy was a completed contract; by the recital the defendants had waived the proviso relating to prepayment of the E premium; and, therefore, they were liable under the policy.

Notes. Referred to: *Allis Chalmers Co.* v. *Fidelity and Deposit Co. of Maryland* (1913), 29 T.L.R. 506; *Wooding* v. *Monmouthshire, etc., Mutual Indemnity Society*, [1939] 4 All E.R. 570.

As to waiver by an insurance company of proviso to a policy, see 22 Halsbury's Laws (3rd Edn.) 227-229; and for cases see 29 Digest (Repl.) 493 et seq.

F

Cases referred to in argument:

Canning v. *Farquhar* (1886), 16 Q.B.D. 727; 55 L.J.Q.B. 225; 54 L.T. 350; 34 W.R. 423; 2 T.L.R. 386, C.A.; 29 Digest (Repl.) 387, *2942*.

Xenos v. *Wickham* (1866), L.R. 2 H.L. 296; 36 L.J.C.P. 313; 16 L.T. 800; 16 W.R. 38; 2 Mar.L.C. 537, H.L.; 29 Digest (Repl.) 102, *494*.

G **Appeal** by the defendants, the Security Co., Ltd., from a decision of the Queen's Bench Division (Grantham and Wright, JJ.), affirming a decision of the judge of the Leeds County Court.

The action was brought on a policy of insurance against loss by burglary or housebreaking.

H On Dec. 14, 1895, the plaintiff, Mr. Vincent Roberts, signed and sent to the defendants a printed proposal form for an insurance policy against loss by burglary or housebreaking. The proposal form stated inter alia:

"policies are renewable on the first of the month, and the premium for the odd time over 12 months must be added to the first year's premium,"

I and

"no insurance will be considered in force until the premium has been paid."

The proposal was for the amount of £167, and it was stated that the annual premium would be 9s. 9d., the odd time 2d. extra, and the first premium 9s. 11d.

On Dec. 18, a "protection note" was sent by the defendant company to the plaintiff in the following words:

"Mr. Vincent Roberts having made a proposal to this company for insurance against loss arising from burglary and housebreaking for the sum of £167,

on property described in his proposal, and having paid to me the sum of £——, is hereby declared to be provisionally protected against that risk (subject to the conditions contained in, and endorsed on the form of policy used by the company) for seven days from this date, or until the proposal be in the meantime declined. For the Security Co., Ltd.—In the event of the above proposal being declined, the deposit now paid will be refunded, less the proportion of the premium for the period covered."

No deposit was in fact paid by the plaintiff. On the night of Dec. 26, or early in the morning of Dec. 27, the plaintiff's house was broken into, and he thereby suffered the loss in respect of which this action was brought. On Dec. 27 there was a meeting of the directors of the company, and not knowing of the burglary that had taken place, a policy of insurance made in accordance with the terms of the proposal was signed by two directors and the secretary of the company, and the company's seal was affixed. The policy was in the following form:

"Whereas Mr. Vincent Roberts, hereinafter called the assured, has made a proposal in writing dated Dec. 14, 1895, to the Security Co., Ltd., hereinafter called the company, for an assurance of the property hereinafter described for the sums herein appearing, against the risks hereinafter mentioned, and has paid to the company the sum called in the margin hereof 'first premium,' being the premium required by the company for the assurance of the said property for the period from noon of the 14th day of Dec., 1895, to noon of the 1st day of Jan., 1897, now these presents witness that if at any time during the said period, or during the continuance of this assurance the premises specified in the schedule hereto be unlawfully broken into, etc., . . . provided also that this assurance is made upon the faith and basis of the aforesaid proposal in writing, together with any further written particulars given by the assured and is subject to the several conditions indorsed hereon, which are to be taken as part of the policy, and that no assurance by way of renewal or otherwise shall be held to be effected until the premium due thereon shall have been paid."

On the margin of the policy the "first premium" was stated to be 9s. 11d., and the renewal premium 9s. 9d. The policy when executed remained in the possession of the company. The plaintiff had not in fact paid any premium to the company, and stated, when giving evidence at the trial of the action, that he had not paid it, because he had not been asked for it. The company refused to indemnify the plaintiff for the loss he had incurred on the ground that, no premium having been paid, no contract of insurance had ever been completed. The plaintiff brought this action to enforce his claim in the Leeds County Court, and there recovered judgment. The Queen's Bench Division (GRANTHAM and WRIGHT, JJ.) affirmed the judgment of the county court judge. The defendant company appealed.

Channell, Q.C., and *G. M. Cohen* for the defendant company.
Longstaffe, for the plaintiff, was not called upon.

LORD ESHER, M.R.—I do not think that the cases that have been cited govern the present case at all. The question is not one merely of the effect of the proposal for insurance and its acceptance. A formal policy had been signed and sealed on Dec. 27, 1895. Was that policy completely effected on that day or was it only a conditional policy, that is to say, is there any evidence of any condition that it was not to be a policy until certain conditions were fulfilled? The policy itself contains at the end a statement that the company have caused their common seal to be affixed and that two of the directors and the secretary of the company have thereunto set their hands. But it was contended that the policy when signed and sealed remained in the hands or in the office of the company. It was not suggested, and indeed there is no evidence to support such a suggestion, that the company ever delivered the policy to someone to hold it as an escrow. We merely have the fact that, after the

policy had been signed and sealed, and had left the board of directors, it remained in the hands of the secretary to the company. If it remained in the possession of the company it could not be an escrow, because when a deed is executed as an escrow it must be handed over to some one not a party to it to hold as an escrow. The policy might have been delivered by the company as an escrow; but they did not so deliver it, and never intended to deliver it as an escrow. It is, therefore, a policy properly executed by the company, and the only thing remaining is to construe it to see how it applies to the facts which have occurred.

Let us then see what it says. It begins with a recital that

> "the assured has made a proposal in writing, dated Dec. 14, 1895, to the Security Co., Ltd., hereinafter called the company, for an assurance of the property hereinafter described for the sums herein appearing against the risks hereinafter mentioned and has paid to the company the sum called in the margin hereof 'first premium,' being the premium required by the company for the assurance of the said property for the period from noon of Dec. 14, 1895, to noon of Jan. 1, 1897."

It then goes on to declare the assured insured by the company against certain injuries to his premises which might occur between Dec. 14, 1885, and Jan. 1, 1897. In answer to those statements it is said that part of the recital is untrue, and it is proposed to show that the premium there stated to have been paid has in fact not been paid. In the first place it seems to me that the company are not at liberty to show that against their own deed. They cannot rely upon the fact of the premium not having been paid if they have treated it as paid, and they have waived any payment. Reference was made to a custom or practice in marine insurance that the premiums on a policy may be paid at any moment. That is merely a practice for the convenience of trade. The best way of dealing with this case is to say that if the company are not estopped from saying that the premium had not been paid, they have waived its prepayment. The company could ask for it at any time and then it must be paid. If there is a loss it is a common practice among insurers to deduct from the sum payable to the assured any premiums that happen to remain unpaid at the time. That can be done here. I am clearly of opinion that the company cannot get out of the liability imposed upon them by the policy merely on the ground that the premiums had not been paid by the plaintiff. The appeal must be dismissed.

LOPES, L.J.—I agree. I think that the judgments of the county court judge and of the Divisional Court were both right. I do not myself pay much regard either to the proposal or the cover note. I think that they came to an end when the policy was executed, and the only question which we have now to consider is, whether there was a concluded agreement. My opinion is that this policy was properly executed, and established a complete transaction between the parties. Therefore it seems to me that there is no need for us to take into consideration the intimation which is to be found in the proposal that no policy is to attach until the premium is paid. In the recitals of the policy itself is to be found a positive statement that the first premium has been paid. Yet the company now seek to go against their own statement in the deed, and endeavour to show that it has not been paid. I am of opinion that by their statement in the policy they are estopped from showing that the premium has not been paid. But, even if there should not be this estoppel, there seems to me to be such clear evidence of waiver as to put the matter beyond all doubt. I therefore come to the conclusion that the policy of insurance, executed as it is, is conclusive proof of a concluded agreement between the parties. I think that if the plaintiff had gone to the company's office the day after the policy had been executed, and had tendered the premium and demanded the deed, the company would have had no answer, but would have been legally bound to deliver it up to him.

RIGBY, L.J.—I am of the same opinion. The policy of insurance which was executed on Dec. 27, 1895, by the seal of the company being affixed to it, and by the signatures of two directors and of the secretary to the company, treated the insurance of the plaintiff, which was thereby intended to be effected, as having begun on Dec. 14 then last past. The annual premium to be paid was 9s. 9d., but for the first year the premium was to be 9s. 11d., the additional 2d. being payable in respect of the days between Dec. 14, 1895, and the end of the year. That is to say, the company was charging a premium of 2d. for a period which had begun before the policy was executed, and which was to extend for some few days after the execution. In my judgment the company had, to say the least, which is enough for this case, waived the prepayment of the 2d. which was the premium payable for the period in which the loss occurred. I also think that they waived the prepayment of the whole of the first premium, but of course the waiver of 9s. 9d., part of that premium, is of no consequence because the loss took place before the expiration of the current year.

In the first place an attempt was made to show that this policy was not a deed. I do not know whether it would be of much assistance to the company to succeed in showing that, but in my judgment it is clearly a deed, and I do not see how it is possible to say that, after its execution there was no bargain between the plaintiff and the company. Even if it had been shown that the policy had been delivered as an escrow, and was not to be handed over to the plaintiff except on the condition of his having paid the premium, nevertheless I consider that when the condition had been performed it would have been as good a deed as if it had been delivered unconditionally at the moment of its execution. The result would be that the plaintiff would have been entitled to go to the secretary of the company, and, on paying the 9s. 11d. to demand the policy. That is the position he is taking up now. The company contend that he has no right to ask for the policy to be delivered up to him now, because he has not actually tendered the 9s. 11d. But he is now suing the company for what he claims to be due under the policy, and he says he was always ready to pay the premium, and that he had a right, on paying it, to ask for the policy. Of course, it would be idle for him to offer the 9s. 11d. now. It is clear that since the loss occurred the company would never have accepted it from him. The plaintiff was entitled at any time to the possession of the deed on payment of the premium, and I think that the company is liable under the policy, subject to the deduction of the 9s. 11d. which the plaintiff has not paid under it.

Appeal dismissed.

Solicitors: *Harman, Ward & Collier*, for *Walter & E. H. Foster*, Leeds; *Burchell & Co.*

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

A

EARL COWLEY *v.* INLAND REVENUE COMMISSIONERS

[House of Lords (The Earl of Halsbury, L.C., Lord Watson, Lord Herschell*, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), June 20, 27, July 4, 11, 1898, March 14, 1899]

B

[Reported [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348]

Estate Duty—Passing of property—Passing subject to incumbrances—Settled property mortgaged prior to re-settlement—Life interest charged with annuity—Allowances for incumbrances on death of life tenant—Finance Act, 1894 (57 & 58 *Vict.*, *c.* 30), *s.* 1.

C

By the Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned. . . ."

D

Property was settled on a father for life with remainder to his son in tail. The father and son joined in executing a disentailing assurance, whereby they settled the property to such uses as they should jointly appoint, and, subject thereto, in such manner as it was previously settled. They then jointly borrowed money on mortgage of the settled property, which, under their joint power, they appointed and conveyed to the mortgagees. Out of the money so borrowed, the amount secured by a previously existing mortgage of the father's life interest was paid off, but the mortgage was transferred to the new mortgagees as a further security. The balance of the money borrowed was paid partly to the father and partly to the son. Subsequently, the father charged his life interest with a payment during his life of an annuity to the son. The father died while the mortgage was still subsisting, and the son succeeded to the equity of redemption. In computing the value of the property passing on the death of the father and liable to estate duty under the Finance Act, 1894,

E

F

Held: the case fell within s. 1 of the Act, and a deduction should be made from the gross value of the settled property in respect of the mortgage debt, but no deduction should be made in respect of the annuity.

G

Notes. Considered: *A.-G.* v. *Dobree*, ante p. 1057. Distinguished: *A.-G.* v. *Montagu*, [1904] A.C. 316. Considered: *Re Abergavenny, Nevill* v. *I.R. Comrs.*, [1923] 2 K.B. 18; *Parr* v. *A.-G.*, [1925] All E.R. Rep. 578. Applied: *Re Cassel, Public Trustee* v. *Mountbatten*, [1927] All E.R. Rep. 739. Considered: *A.-G.* v. *Adamson*, [1932] All E.R. Rep. 159. Followed: *De Trafford* v. *A.-G.*, [1935] All E.R. Rep. 219. Applied: *Christie* v. *Lord Advocate*, [1936] 1 All E.R. 443. Considered: *I.R. Comrs.* v. *Crossman, I.R. Comrs.* v. *Mann*, [1936] 1 All E.R. 762; *Re Duke of Norfolk's Will Trusts, Public Trustee* v. *I.R. Comrs.*, [1950] 1 All E.R. 664; *Re Payton, Payton* v. *I.R. Comrs.*, [1951] 2 All E.R. 425. Applied: *Re Lambton's Marriage Settlement, May* v. *I.R. Comrs.*, [1952] 2 All E.R. 201. Considered: *Re Tapp, Master and Fellows of Gonville and Caius College, Cambridge* v. *I.R. Comrs.*, [1959] 1 All E.R. 705; *Public Trustee* v. *I.R. Comrs.*, [1960] 1 All E.R. 1. Referred to: *A.-G.* v. *De Prèville*, ante p. 1062; *A.-G.* v. *Hawkins*, [1901] 1 K.B. 285; *I.R. Comrs.* v. *Priestly*, [1901] A.C. 208; *Re Vernon*, [1901] 1 K.B. 297; *A.-G.* v. *Glossop*, [1906] 1 K.B. 284; *A.-G.* v. *Boden*, [1912] 1 K.B. 539; *A.-G.* v. *Milne*, [1914-15] All E.R. Rep. 1061; *A.-G.* v. *Coole*, [1921] 3 K.B. 607; *A.-G.* v. *Astor*, [1923] 2 K.B. 157; *Re Northcliffe, Arnholz* v. *Hudson*, [1928]

H

I

* Lord Herschell was present during the argument, but died before the House gave judgment.

All E.R. Rep. 310; *A.-G.* v. *Lloyds Bank, Ltd.*, [1939] All E.R. Rep. 518; *Scott* v. *I.R. Comrs.*, [1935] Ch. 246; *Burrell and Kinnaird* v. *A.-G.*, [1936] 3 All E.R. 758; *Re Hodson's Settlement, Brookes* v. *A.-G.*, [1939] 1 All E.R. 196; *A.-G.* v. *St. Aubyn*, [1950] 1 All E.R. 79; *Re Brassey's Deed Trusts, Coutts & Co.* v. *I.R. Comrs.*, [1951] 2 All E.R. 353; *Re Longbourne's Marriage Settlement, Warren* v. *I.R. Comrs.*, [1952] 2 All E.R. 933; *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Commonwealth of Australia Taxation Comr.*, [1954] 1 All E.R. 339; *Sneddon* v. *Lord Advocate*, [1954] 1 All E.R. 255; *Re Weigall's Will Trusts, Midland Bank Executor and Trustee Co., Ltd.* v. *Weigall*, [1956] 2 All E.R. 312; *Sanderson* v. *I.R. Comrs.*, [1956] 1 All E.R. 14; *Midland Bank Executor and Trustee Co., Ltd.* v. *I.R. Comrs*, [1959] 1 All E.R. 180.

As to allowances for debts and incumbrances, see 15 HALSBURY'S LAWS (3rd Edn.) 81 et seq.; and for cases see 21 DIGEST (Repl.) 8 et seq. For the Finance Act, 1894, see 9 HALSBURY'S STATUTES (2nd Edn.) 348 et seq.

Cases referred to :

(1) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L.; 21 Digest (Repl.) 10, *35*.

(2) *Lord Braybrooke* v. *A.-G.* (1861), 9 H.L.Cas. 150; 31 L.J.Ex. 177; 4 L.T. 218; 25 J.P. 531; 7 Jur.N.S. 741; 9 W.R. 601; 11 E.R. 685, H.L.; 21 Digest (Repl.) 148, *855*.

(3) *I.R. Comrs.* v. *Harrison* (1874), L.R. 7 H.L. 1; 43 L.J.Ex. 138; 30 L.T. 274; 22 W.R. 559, H.L.; 21 Digest (Repl.) 170, *997*.

Appeal from an order of the Court of Appeal (A. L. SMITH, RIGBY, and HENN COLLINS, L.JJ.), reported [1898] 1 Q.B. 355, who had reversed in part and affirmed in part a decision of the Divisional Court (POLLOCK, B., and BRUCE, J.), reported [1897] 2 Q.B. 47, on a petition by the present appellant under s. 10 of the Finance Act, 1894, on appeal from a decision of the Commissioners of Inland Revenue.

The facts are set out in the opinion of LORD WATSON.

Haldane, Q.C., and *H. Fellows* for the appellant.

The Solicitor-General (*Sir Robert Finlay, Q.C.*) and *Vaughan Hawkins* (the *Attorney-General* (*Sir Richard Webster, Q.C.*) with them) for the Inland Revenue Commissioners.

The House took time for consideration.

Mar. 14, 1899. The following opinions were read.

THE EARL OF HALSBURY, L.C.—The question in this case is, on what property the duty is payable by the appellant under the Finance Act, 1894. That statute enacts in the first section that certain duties shall be levied and paid on the principal value of all property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act.

The second Earl Cowley died possessed of the equity of redemption of certain estates, and the appellant, to whom that property had passed, is undoubtedly liable to pay the duties ascertained in the specified manner. It does not appear to me that that question is a very difficult one. What I have described as the equity of redemption is undoubtedly the true description of the property and what passed on the death of the second earl to the third earl was the equity of redemption. How the value of that is to be ascertained is for this purpose unimportant. The thing which is liable to duty is that property and no other thing.

For the purpose of my opinion I discard all reference to s. 7, which is only applicable to the mode of determining the value of an estate, whatever that estate is; and, if I am right that the estate which the second earl possessed was that which came to the third earl by the second earl's death, we have nothing to do with allowances or the series of enactments on that subject, but the whole question

must be determined on the property, real or personal, settled or not settled, which passed on the death of the second earl. I have great difficulty in following the reasoning by which in the Court of Appeal it has been held that one is at liberty to go back to the history of the property to which the third earl succeeded, and to split up that property into the different interests of which it was originally composed. If I may trace out in this case the life estate and the remainder in fee or in tail, I do not know how far back in the history of the property in question I may be entitled to go, nor am I quite certain what is intended to be effected by such an inquiry. There is no part of the Finance Act which appears to me to give ground for such an investigation, and I do not know that the adoption of any such principle by your Lordships would not have a far wider operation than on such taxation questions as arise in such cases. It would seem to me to be a very pertinent question to ask whether the deeds which were executed in 1887 by the late earl and the appellant did or did not operate as they purported to operate or not, and if not, why not? But if they did, what prevented the appellant and his father granting a mortgage to the Prudential Co. on the settled estates? What was done with the money seems to me to be immaterial. Though as a matter of fact the greater part of it was paid to liquidate the liabilities of the second earl, there was a second mortgage for the security of a further advance of £20,000; but in the view that I take of this case it is immaterial to pursue the destination of the money or the source from which it came. As a matter of fact, the whole property which is in question on this part of this case is the equity of redemption. If that is all that the appellant has received, that is all on which he is bound to pay duty.

Your Lordships have already held in *A.-G.* v. *Beech* (1) that where a tenant for life and remainderman in fee combine so as to get complete command of the estate in fee, they may dispose of it as they will, and I am unable to comprehend why, when they grant a mortgage in fee, that transaction is capable of being dissected so as to prevent the union of the two estates, and by an artificial process resolve the estate into its original elements or into its original settlement and treat them as though such new arrangement had not been made at all. It would seem as though the argument suggested (although the Act does not say so) that the ordinary transaction of a re-settlement of an estate can, for the purpose of the Finance Act, be traced back to any period, however remote, and duties exacted on the artificial theory that you must treat each death in the chain of investigation as giving rise to liability to duty under an Act passed long after the re-settlement on the death.

There is only one argument, viz., the conveyancing point referred to by HENN-COLLINS, L.J., which seems to give any ground for looking back to the history of the transactions out of which this question has arisen. It appears that the incumbrances which did or might have existed were assigned to the company advancing the money as a protection to them in case any claim should be made in respect of some dealing with his life estate by the second earl. If it had been found that any such dealing had taken place, the lenders wanted to have a right which should take precedence of any such dealing; but I confess I am unable to understand how this transaction could affect or in any way interfere with the power of the second and third earls to re-settle the estate, or, having re-settled it, to grant a mortgage in fee such as they did grant with the result which I have described. I am wholly unable to give any such interpretation to an Act which seems to me in its ordinary and natural meaning to be clear enough, and I for one decline to go into a minute investigation as to how the equity of redemption was created. It is enough for me that that is the property which under s. 1 of the Act has passed to the appellant, and that alone is the property on which he is liable to duty.

I see no ground for dealing with s. 2, since, for the reasons which I have given, I think that it is s. 1 to which you must look to see what property, real or personal, settled or not settled, passed on the death of the second to the third earl; but, if I were compelled to give a construction to s. 2 (1) (*b*), I should come to the same

conclusion in respect of the liability to duty, since I think that the benefit accruing or arising to the third earl was only to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on s. 1 alone.

As to the claim by the appellant to a deduction in respect of the cesser of the rentcharge of £3,000 a year, it is enough to say that the argument in respect of it is hardly intelligible, and certainly the appellant has made out no case to establish it. No question as to the policies has been raised, and I therefore do not refer to them. For these reasons I am of opinion that the appeal should be allowed and with costs.

LORD WATSON.—The appellant, the third Earl Cowley, succeeded by the death of his father, the second earl, in the year 1894 to an equitable interest in what I shall, for the sake of brevity, term the settled estates of Mornington. These estates were originally settled on trust by the will of Richard Arthur, the fifth and last Earl of Mornington. On the death of the testator an equitable interest in the estates passed to the first Earl Cowley, and on his death to the second earl. The interest of the first and second earls was limited to an estate in tail, but by the terms of the will the appellant, on the death of his father, was entitled to an estate expectant in fee.

By deed dated Jan. 22, 1867, the second Earl Cowley, at that time Viscount Dangan, in consideration of a contingent deferred annuity of £1,671 payable to him during his lifetime after the death of the first earl by the London Assurance Corpn., conveyed to that corporation in security the estate and interest under the will to which he might become entitled on his father's decease. And on Feb. 7, 1868, the succession having then opened to him, the second Earl Cowley obtained from the London Assurance Corpn. certain advances and obligations, and in respect thereof executed in favour of the corporation a mortgage of his life rent interest in the settled estates.

In order to explain the questions which have been raised for decision on this appeal, it is necessary to refer to certain proceedings which took place before the passing of the Finance Act, 1894, during the joint lifetime of the appellant and his father. The second Earl Cowley and the present appellant on Jan. 14, 1887, executed a disentailing assurance by which they appointed the trustees of the original settlement to continue to hold the estates, but freed and discharged of the earl's estate in tail male and all other estates in tail of the appellant, and of all rights, interests, and powers to take effect after the determination or defeasance of such estates in tail male, or in tail, to such uses, on such trusts, and with and subject to such powers and provisions and in such manner as the second earl and the appellant might at any time or times thereafter by any deed or deeds jointly direct and appoint. In default of and until such appointment the estates were to be held by the said trustees to the use of the then Earl Cowley during his life, without impeachment of waste, by way of restoration of the estate vested in him immediately before the execution of the deed of disentail. The appellant and his father thereafter borrowed the sum of £210,000 from the Prudential Assurance Co., Ltd., and, in security for its repayment, they, on June 8, 1888, by virtue of the powers reserved to them, jointly granted a mortgage to the company for that amount over the settled estates. Of the sum thus advanced by the Prudential Co., £150,853 6s. 7d. was paid by that company, at the request of the mortgagors, to the London Assurance Corpn., being the total amount of the liabilities which at that date the second Earl Cowley had incurred to the latter corporation, on the security of the life rent interest which he had before the disentail. On June 8, 1888, the London Assurance Corpn., on receiving full payment of the debts then owing to them by the second earl, executed, as had been agreed on, an assignment to the Prudential Assurance Co., Ltd., of annuities granted to the second earl, and of the mortgage debts created by the same earl, amounting in the aggregate to £79,500, together with full right and benefit of the assignors' powers and securities for compelling payment of these several debts, with interest due or to become due thereon.

The second earl and the appellant, in the further exercise of their reserved powers, executed on June 9, 1888, with consent of the trustees in whom the estates were legally vested, a deed of re-settlement of the equity of redemption. The trusts on which the estates were to be held were declared to be (inter alia): (i) Subject to such powers and provisions as the appellant and his father should by any deed or deeds, revocable or irrevocable, jointly appoint; (ii) that the appellant, his executors, administrators, and assigns, should receive, during the periods and in the manner provided by and subject to the stipulations contained in the third schedule, the annual sums or annuities therein respectively mentioned, and subject and charged as aforesaid; (iii) the continuance of the second earl's life rent estate, in restoration and by way of confirmation of the life estate limited to him by the will of the Earl of Mornington; and on the cesser of that estate (iv) on trust for the appellant and his assigns during his life, without impeachment of waste; and (v) from and after the appellant's decease, on trust for the first and every other son of the appellant successively in remainder one after the other, according to their respective seniorities, and the heirs male of their respective bodies; and (vi) in default of such issue, on trust for the second and every subsequent-born son of the appellant's father, successively in remainder one after the other, according to their respective seniorities, and the heirs male of their respective bodies. The annuities provided to the appellant and his assigns were as follows: During the lifetime of the second earl an annuity of £1,000, to be increased in certain events to the amount of £2,000, £2,200, £2,700, and £3,200 respectively. By the same deed it was mutually agreed that the second earl, his heirs, executors, and administrators, should be primarily liable for the interest accruing due on the sum of £210,000 borrowed on mortgage from the Prudential Assurance Co.; that, in the event of his predecease, the same liability should attach to the appellant; and that, after the death of the longest liver of them, the mortgaged premises should be the primary fund for payment of the said sum of £210,000, and the interest thenceforth to accrue thereon. The appellant and his father obtained a further advance of £20,000 from the Prudential Assurance Co., for which they, on Dec. 14, 1889, executed a second mortgage to the company, charging the settled estates. Of the total sum of £230,000 received by them from the company, £197,987 11s. 8d. was paid to or on behalf of the second earl, and £30,012 8s. 4d. to or for the appellant. The appellant, until the death of the second earl, which occurred on Feb. 28, 1895, was in receipt of the annuity payable quarterly, as provided in the deed of re-settlement and in the third schedule of that deed.

After the death of his father, the appellant lodged a statement and valuation of the amount on which he was liable to pay duty under the Finance Act, 1894. The Inland Revenue Comrs., the respondents in this appeal, accepted the gross estimate, but disallowed two items which were claimed as deductions from it by the appellant. These were (i) the sum of £230,000 with which the settled estates had been charged, as aforesaid, in favour of the Prudential Assurance Co.; and (ii) a sum of £65,200, being the capitalised value at twenty-one and eleven-fifteenths years' purchase of the annuities payable to the appellant during the life of his father, and amounting, at the death of the latter, to £3,000 per annum. The appellant then brought the present suit, in accordance with the provisions of s. 10 of the Finance Act, 1894, in which he craved a declaration to the effect that these two items ought to be allowed as deductions.

The case was first heard before a Divisional Court consisting of POLLOCK, B., and BRUCE, J., who made a declaration as craved with respect to the first of these items, and, as regards the second, affirmed the decision of the Inland Revenue Comrs. The Court of Appeal, which consisted of A. L. SMITH, RIGBY, and HENN COLLINS, L.JJ., reversed the judgment of the Divisional Court on the first item, and affirmed it on the second. The legal questions raised by these points are so different in their character that I shall notice them separately.

I have come without much difficulty to the conclusion that the order of the

Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored. With regard to the second deduction claimed by the appellant, I have had no difficulty in coming to the conclusion that the decisions of both courts below were right. Very little was said about the point in the argument of the learned counsel for the appellant, and, so far as I can see, their reticence was not injudicious. The annuities, the capitalised value of which forms the subject of the claim, were regularly paid to the appellant during his father's lifetime, and they ceased to be payable on his death. No part of them formed a charge on the equitable estate to which the appellant has succeeded, under the deed of re-settlement, not in fee, but in life rent. In these circumstances I do not think it can with any degree of plausibility be maintained that the estate which passed to the appellant on his father's death has been thereby diminished or affected.

The argument addressed to us with reference to the other point, the charge of £230,000 advanced on mortgage by the Prudential Assurance Co., Ltd., did not, so far as I could discern, involve any serious question as to the construction of the Finance Act. It turned mainly, if not exclusively, on the real character and legal effect of the deeds by which the advance was secured. On the one hand, it was not disputed by the appellant's counsel that if the original settlement of the Mornington estates had remained unaltered, and those deeds had been executed by the late earl as life-renter, and by the appellant as expectant fiar, no part of the sum of £230,000 would have formed a proper deduction from the amount on which the appellant is liable for duty. In that case the appellant would have derived benefit from his father's decease to the extent to which he had borrowed on the security of his right in expectancy, and would thereby have been enabled to pay his own debt. On the other hand, counsel for the Crown hardly ventured to dispute that if the £230,000 had been duly charged by the original settlor or had been subsequently validly charged on the fee of the settled estates, the appellant must be held to have taken the estates cum onere and could not be held on his father's death to have taken any benefit from the charge of £230,000, or in the estates, so far as these were affected by it.

The learned counsel for the respondents accordingly addressed themselves to the bold and, in my opinion, somewhat extravagant contention that, notwithstanding the tenor of the securities held by the Prudential Assurance Co., the reality of the transaction between the company and the mortgagors, apart from any question as to the form of conveyancing adopted in the deeds, consisted in the second Earl Cowley and the appellant merely pledging their respective rights of life rent and expectant fee. I should not have thought that the argument was deserving of much consideration, had it not been that it appears to have found favour with the learned judges of the Court of Appeal. A. L. Smith, L.J., who was of the same opinion with the other learned lords justices, after stating that the second earl's life estate was not extinguished or merged into an equitable estate in fee in the Prudential Co., goes on to say :

> "The real substance of what was done, and this is what is to be looked at apart from the form of conveyancing, was that the second earl mortgaged his life estate in the settled estates to the Prudential Co. and that his son mortgaged his reversion in such estates to that company to secure the repayment of the £230,000, and that this was the real transaction, whether it was bound to be carried out by one deed or by two."

The argument thus stated appears to me to ignore these facts, that, in the first place, the Finance Act, 1894, does not prohibit the alteration or modification of the terms of the settlement by any legitimate means; and, in the second place, that, assuming the proceedings taken in the years 1887, 1888, and 1889, for disentailing, charging with debt, and resettling the estates, to have been at the time valid, the Act of 1894 does not contain a single provision which, either directly or indirectly, denies effect

to them. It is not maintained on behalf of the Crown that any one of these proceedings was illegitimate or invalid. The disentailing assurance had the legal effect of vesting the second earl and his son with the full right and title to dispose of the life rent and the fee of the settled estates; and in virtue of that right and title they entered into onerous contracts with the Prudential Co., by which they professed to convey, and did convey, to the company in security the immediate fee of the estate. Notwithstanding the reasoning of the learned lords justices, I fail to comprehend how the merger or non-merger of the second earl's life estate could possibly affect the title of the earl and his son to convey the immediate fee. I see no reason to doubt that, under their two conveyances, the company acquired, and from the date of the completion of their securities was possessed of, an interest in the fee which was effectual against the beneficiaries under the settlement made by the last Earl of Mornington, including the appellant. I think the appellant took the estate cum onere of the charge of £230,000, which, under the settlement as modified, affected the settled estates in th same way as if it had been created by the original settlor; and that on his father's death no interest or benefit accrued to the appellant in respect of any part of the estates which was covered by the securities of the Prudential Assurance Co. Any other conclusion is, to my mind at variance with the substance and reality of the transaction.

A certan degree of colour was lent to the respondent's argument by the circumstance that the Prudential Co. took an assignment of the debts due by the second earl to the London Assurance Corpn. which were charged on his life estate, with the same powers of recovery which were competent to their assignors. The object of the company in taking the assignment apparently was not to impair the security which they had obtained from the appellant and his father over the immediate fee of the settled estates, but to enable them to compete with creditors, if any, to whom the second earl might possibly have previously conveyed his life estate. In short, the assignment was a precautionary device resorted to in order to meet the possibilities of events which have never occurred.

LORD MACNAGHTEN.—The principle on which the Finance Act, 1894, was founded is that whenever property changes hands on death the State is entitled to step in and take toll of the property as it passes, without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Section 1 gives effect to that principle. Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property "settled or not settled" which passes on death. Section 2 is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought, perhaps, to be within the spirit though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Section 2, therefore, declares that the expression "property passing on the death of the deceased" shall be "deemed to include" property classified under four different heads, to no one of which does that expression literally apply. The rest of the Act deals with matters of detail, valuation, and machinery. Section 1 contains the pith and substance of the enactment. It is comprehensive, broad, and clear. The other provisions of the Act which were dragged into the discussion, rather unnecessarily as it seems to me, are strangely confused and singularly ill-drawn. But still I do not think that the Act is wholly to blame for the perplexity in which the learned judges below found themselves entangled. I think that they took a wrong turn at starting. They left the broad highway for a narrow by-path which led in a wrong direction and presented difficulties increasing at every step. Is it any wonder if they came to a wrong conclusion?

The first question, as it seems to me, the question that lies at the very threshold of our inquiry, is simply this: Under which section of the Finance Act, 1894, does the present case fall? Is it the ordinary and normal case of property passing on

death, or is it one of those exceptional cases in which property is deemed to pass, though there is no passing of property in fact? Does it come under s. 1 or under s. 2? The learned judges of the Court of Appeal, one and all, have held that the case is not within s. 1. The reason is given by A. L. SMITH, L.J. His Lordship quotes the words of s. 1, and then goes on to say:

> "This section would not, I think, embrace the present case, for the life estate of the second earl ceased at his death and passed to no one."

I must say I cannot think that reasoning satisfactory. What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which, if it be a limited interest, can never pass. With an interest that ceases on death the Act is not directly concerned except in the one case where, without any passing of property, a benefit accrues or arises by reason of the cesser of a determinable interest, such as a charge that expires. In every case in which property comprised in a settlement passes on death, the life estate or other limited interest of the preceding owner must have ceased for good and all. If the criterion proposed by the learned lord justice were the true criterion, settled property could not in any case come within s. 1. But then that section expressly and in terms applies to settled property. You might just as well strike the word "settled" out of s. 1 altogether as hold that the section does not embrace a case where a limited interest under a settlement ceases on death and passes to no one.

I am therefore compelled to differ from the Court of Appeal at the very outset. I think that the present case falls within s. 1. I think that it belongs to a class of cases which the authors of the Act had directly in view when they framed that section. If the case falls within s. 1, it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed "With regard to property passing on death, be it enacted as follows." Section 2 might with equal propriety be headed, "And with regard to property not passing on death, be it enacted as follows." I cannot therefore agree with RIGBY, L.J., when he says that s. 2 is a provision "explanatory" of s. 1. In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of "property in which the deceased . . . had an interest ceasing on the death of the deceased." And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section. For if property passing on death was in the lifetime of the deceased subject to a charge or interest which ceased on the death, the property must of course pass free from that charge or interest, and so passing it must of course be valued accordingly. That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2, for that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act. It is interesting, and I think instructive, to refer to s. 4 and s. 5 of the Succession Duty Act, 1853 [repealed], from which the provisions of s. 2 (1) (a) and s. 2 (1) (b) are evidently adapted. The marginal note to s. 4 is this: "General powers of appointment to confer successions." In the Succession Duty Act a power of appointment confers a succession when it is exercised, but only then. In the analogous provision of the Finance Act, "property of which the deceased was competent to dispose at the time of his death" is deemed to pass though the power be not exercised. Then the marginal note to s. 5 of the Succession Duty Act runs as follows: "Extinction of determinable charges to confer successions." The section itself provides that

> "Where any property shall . . . be subject to any charge, estate, or interest determinable by the death of any person . . . the increase of benefit accruing to any person or persons upon the extinction or determination of such charge, estate, or interest shall be deemed to be a succession."

A It is quite plain, I think, that the provisions of s. 2 (1) (b) of the Finance Act, 1894, have been borrowed and adapted from that section. But they do not, as I said just now, refer to the cesser of an interest in property which passes, but to the cesser of an interest in property which does not pass. On reading the Act I think that this is made tolerably clear not only by the opening sentence of s. 2 (1), but also by the directions for valuing "the benefit accruing or arising from the cesser of an interest B ceasing on the death of the deceased" in s. 7 (7). If property passes, you can put a value on it by considering what it would fetch in the open market. You must resort to other means in order to estimate the value of property deemed to pass when an interest ceases. And here I would venture to say that, in my opinion, the provisions of s. 7 (7) (b) are not open to the severe censure passed on them in the Court of Appeal. They are quite intelligible if s. 2 (1) (b) be confined to the case C which it was really intended to meet. The difficulty, so far as there is any, comes from the drafting of s. 2 (1) (b). There would have been none, I think, if the draftsmen had been content to follow the wording of the Succession Duty Act. But the general word "interest" without the word "charge" preceding it at first sight seems to point rather to a life interest than to a determinable charge. And thus it was, I think, that the Court of Appeal were led into the error which seems to run through D their judgment.

If the present case is within s. 1, and not within s. 2, the only remaining question is, what was the settled property that passed on the death of the second earl? "Settled property," according to the definition of that expression in the Finance Act, 1894, "means property comprised in a settlement." It is difficult to see what else it could possibly mean. But at any rate it is a comfort to find something in the E Act about which there can be no dispute. The settled property in this case is the property comprised in the re-settlement of June 9, 1888. What was that property? Why, the equity of redemption of the Mornington estates, which were subject to certain incumbrances described as the over-riding charges, and subject also to the mortgage in fee simple in favour of the Prudential Assurance Co. to secure £230,000. There can be no doubt about that. What, then, was the principal value of the F settled property? That, according to s. 7 (5), must be estimated at the price which, in the opinion of the commissioners, the property comprised in the re-settlement would have fetched, if sold in the open market at the time of the second earl's death. What right the commissioners can have to swell that estimate by adding to it a sum equal to the amount of the Prudential mortgage, I cannot understand. The mortgage did not pass on the death of the second earl. The mortgage debt was no G part of the settled property. It diminished the property before re-settlement. I may remark in passing that we are not concerned with s. 7 (1). Whatever the meaning of that section may be, as to which I do not hazard a conjecture, it can have nothing to do with the present case, for in the present case the property which had to be brought into the aggregated estate "for determining the rate of duty" was H not subject to any debt. It was only the equity of redemption that was re-settled.

Then we had a long argument about the doctrine of merger, and an argument, longer still, intended to persuade the House that, for the purpose of this Act, the transaction with the Prudential ought to be split up into two distinct mortgages, one by the second earl and one by the present earl, one by the father mortgaging his life estate and one by the son mortgaging his reversion. The Court of Appeal I say that was the real transaction. In my opinion it was nothing of the kind. The Prudential Co. bargained for a mortgage in fee simple and a mortgage in fee simple they got. Why the commissioners should seek to reform a deed which carried out the transaction between the parties in the way in which everybody wished to have it carried out is beyond my comprehension. The argument seems to be founded on a fallacious analogy. Because in the case of succession duty it is necessary and proper to trace a disposition of property to its origin for the purpose of seeing out of whose interest the succession is derived, and so discovering the predecessor, therefore it seems to be thought that you are at liberty in the case of the Finance

Act to dissect and pull to pieces one entire and completed transaction in order to enable the Crown to exact duty in respect of property which neither passed nor can be deemed to pass.

Nor, again, can I see how the question is affected by the circumstance that mortgages, in fact paid off, were transferred and kept alive for the purpose of forming a protection against mesne incumbrances during the life of the tenant for life. That is every-day practice. Every beginner is acquainted with that device. HENN COLLINS, L.J., thinks it decisive in favour of the commissioners. With deference I think it has nothing to do with the question. If, indeed, it could be shown that by the cesser of that protective interest any benefit arose or accrued to anybody under s. 2 (1) (b) which has not already been taken into account and could be valued under s. 7 (7), there might be some show of reason in the argument. But that would be a hopeless contention under the circumstances. The result is that in my opinion the commissioners are wrong from beginning to end on the main point. Some people think the Act a harsh Act as it stands. It would be intolerable if it could be construed as the commissioners desire to construe it.

As regards the minor point urged by counsel for the appellant, I think that the claim to deduct the value of the £3,000 annuity must fail. There is no foundation for it; the property passed free from the annuity, and the Act makes no provision for any such allowance. There was a provision to that effect in the Succession Duty Act, 1853 [repealed]. At any rate, s. 38 of that Act was so construed in this House: (*Lord Braybrooke* v. *A.-G.* (2); *I.R. Comrs.* v. *Harrison* (3)). But there is no analogous provision in the Finance Act, 1894.

I agree that the appeal must be allowed, with costs here and below.

LORD MORRIS.—I agree a priori it would be expected that an estate duty accruing on a death would be calculated on the amount of property left by the deceased at the time of his death, and would be payable by the person getting the property so left to the extent to which he did get it. Has the Finance Act, 1894, enacted anything more than that? The appellant on the death of his father succeeded to an equity of redemption in the Cowley estate, a mortgage of £230,000 affecting it. Much of the argument in the case has been addressed to the state of the title under the Mornington will, which in my opinion is beside the question, as are all considerations of how the title stood antecedent to the indenture of re-settlement of June 9, 1898, that was the settlement under the provisions of which the property passes. It also appears to me to be irrelevant to inquire into the conveyancing mazes or devices by which that was effected. The substance is that the estate was mortgaged, and that an equity of redemption remained. If the property passed to the appellant on the death of his father under s. 1—as I consider it did—I ask, what passed? Surely a property subject to a mortgage; or if the property is to be deemed to pass under s. 2, sub-s. (1) (b) enacts that it is to be deemed to pass to the extent to which a benefit accrues. I ask what extent of benefit in the res of the Cowley property comes to any person by reason of the death of Lord Cowley? Surely the difference between the value of the Cowley estate and the amount of the mortgage or prior charge.

With respect to the allowance claimed by the appellant by reason of the ceasing of the rentcharge payable to him during the lifetime of his father, I fail to see any sound argument for such contention. He succeeded to the Cowley property onerated with its charges; and that he at the same time ceased to enjoy a rentcharge is an indifferent fact.

LORD SHAND.—On the point on which LORD MACNAGHTEN has strongly insisted, I agree in holding that this case falls within the Finance Act, 1894, s. 1. The property in question, having been disentailed, formed the subject of a deed of re-settlement under which it again became "settled estate," as defined in the Act. What, then, was the settled estate beneficial in its nature which passed to the

appellant on the death of his father, the late Earl Cowley? The answer to that question is, I think, the right to the possession and enjoyment of the settled estate as a right of absolute property no longer burdened by the right of life rent of his father, the late earl. This right may be well described in technical legal language as the equity of redemption, which is so described, I presume, because of the power which the appellant has to acquire and enjoy not only an absolute but an unburdened right of fee or property by payment of the amount secured by mortgages on the estate and to which that estate was subject. But in ordinary language one would justly say the estate itself passed on the death of the deceased earl to the appellant his son, and so estate duty became due. What, then, is the value of that estate? It was well and validly charged with a debt of £230,000 which formed a burden on the succession which opened to the appellant, and I confess that I can see no answer to the appellant's demand to have the amount of that charge or burden taken into view as a deduction from the value of the estate in estimating the estate duty payable, and which became due on free estate only.

I have only to add that I agree in thinking that the circumstances that the Prudential Assurance Co., in transacting with the late earl and the appellant in the advances they made, took an assignment of the debts due by the second earl to the London Assurance Corpn., and the securities given for these debts can have no effect on the determination of the present question. That assignment was given and taken obviously for a purpose quite in common use, that purpose being only to enable the Prudential Co. to compete with creditors, if there were any, in whose favour the second earl might have granted securities affecting his life rent right.

LORD DAVEY.—I entirely concur in the observations which have been made, and I should not add anything were it not that we are differing from a unanimous and carefully considered judgment of the Court of Appeal.

The first and principal question is whether the mortgage for £230,000 ought to be deducted in assessing the value of the settled estates for the purpose of the payment of estate duty under the Finance Act, 1894. I agree with the views so fully and clearly expressed by LORD MACNAGHTEN as to the construction of that Act, and I think that the present case—the facts of which I need not recapitulate—clearly falls within s. 1. But in my opinion, whether it falls within s. 1 or s. 2, we arrive at the same result.

By s. 1 of that Act the tax is imposed on all property, settled or unsettled, which passes on the death of any person, and by s. 2 (1) property passing on the death of the deceased is to be deemed to include the property following. The only material words for the present purpose are in sub-s. (1) (b):

> "Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest."

I ask myself, therefore, what property passed on the death of the second earl, or—which appears to me in this case to be the same question in other words—in what property had the second earl an interest ceasing on his death, and did a benefit then accrue or arise? The Court of Appeal have held that the property passing was the whole value of the estates without deduction of the Prudential Company's mortgage. And they have come to that conclusion on the grounds that the mortgage was not really a mortgage in fee, but was in truth two mortgages—one on the life estate of the second earl, and one on the remainder of the appellant. Since the decision in *A.-G.* v. *Beech* (1) it cannot be denied that if tenant for life and remainderman in fee combine to sell settled property, it is thereby taken out of the settlement, and does not pass and is not to be deemed to pass on the death of the life tenant. And I think that the result must be the same if, instead of selling, they combine to create a mortgage in fee upon the settled property. Pro tanto the property is taken

out of the settlement, and what passes on the death of the tenant for life is the equity of redemption only, and the benefit accruing or arising in that event is in that equity alone. In the present case the mortgage was antecedent to the settlement under which the appellant now claims title in remainder. But it is said that the conveyancing arrangements in the present case, by which the incumbrances on the life estate were purposely kept alive for the better security of the mortgagees, prevented any union of the life estate and remainder in them, and they were not mortgagees on the fee in possession during the second earl's lifetime. HENN COLLINS, L.J., said:

> "It is the existence of this mortgage [on the life estate] so kept alive and determining, so far as it was a charge on the life estate, on the death of the second Earl Cowley, that is decisive in favour of the Crown in this case."

With the most sincere respect for the learned judges in the Court of Appeal, I find myself unable to concur in this view, which seems to me to overlook the substance and real character of the transaction. The joint power created by the disentailing deed was the appropriate machinery for enabling the parties to make a conveyance of their respective interests by a simultaneous act, and so as to create one estate. By the exercise of that power a mortgage was created which was expressed to be and intended to be a mortgage on the fee, and in my opinion was a mortgage of the equitable fee, subject, of course, to all existing burdens. There was no intervening estate or interest which prevented a union in the appointees of whatever equitable estate was left in the life tenant (subject to the charges thereon) with the equitable estate in remainder of the appellant. The money due to the holders of the incumbrances effected by the second earl on his life estate was paid out of the mortgage money.

If the matter had rested there, or if the incumbrances had been left outstanding and undischarged, there could not, in my opinion, have been any question that a mortgage was created on the corpus of the property, subject to the subsisting charges created by the will of the first earl, and subject also, during the life of the second earl, to whatever prior incumbrances effected by him on his life estate were subsisting. But the incumbrances were assigned to the Prudential Co., and this is said to make all the difference, and to be decisive of the case. I am really unable to understand how or why the rights of the mortgagees conferred by the exercise of the power were altered, or (as is said) split into two mortgages; because by a conveyancing device they had also a collateral right, in case a mesne incumbrance turned up, to claim priority over it during the life of the second earl. I am, therefore, of opinion that the property in which the second earl had an interest ceasing with his death was the equity of redemption only, or (in other words) his interest was in the income of the estate after deduction of the interest on the Prudential Co.'s mortgage (laying aside the paramount charges); and the benefit which accrued or arose on the second earl's death under s. 2 (1) (b), if the case falls under that sub-section, was the principal value of that income only, or (shortly) the value of the equity of redemption.

All the learned judges in both courts below, except perhaps RIGBY, L.J., have agreed that s. 7 (1) applies only to the case of an estate passing from a deceased owner subject to his debts and incumbrances. That sub-section is not an easy one to construe, and I am not satisfied that I have quite mastered the meaning of it, but I do not think that it applies to the present case.

There is only one other point I wish to mention. The policies which formed part of the security of the incumbrancers on the life estate were assigned to trustees on trust to apply the proceeds on the death of the second earl in reduction of the Prudential Co.'s mortgage, and not, as A. L. SMITH, L.J., seems to have thought, to the Prudential Co. themselves. No claim to estate duty on the proceeds of the policies, or to deduct the proceeds of these policies from the mortgage debt, is made by the Attorney-General in this appeal, and no argument was addressed to your

Lordships on the point. Consequently no opinion is expressed or implied on it in the decision of the case.

As to the other point—whether the appellant is entitled to any deduction in respect of the cesser of the rentcharge of £3,000 a year to which he was entitled during the second earl's lifetime—I agree with your Lordships that he is not entitled to that deduction, and I need not repeat the reasons which have been given.

THE EARL OF HALSBURY, L.C.—Before putting the question I think it right to add that my lamented friend **LORD HERSCHELL** authorised me to say that he concurred in the conclusion at which your Lordships have now arrived.

Appeal allowed.

Solicitors: *Collyer-Bristow, Russell, Hill, Curtis & Dods; Solicitor of Inland Revenue.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

WILD *v.* SOUTHWOOD

[QUEEN'S BENCH DIVISION (Vaughan Williams, J.), November 16, 1896]

[Reported [1897] 1 Q.B. 317; 66 L.J.Q.B. 166; 75 L.T. 388; 45 W.R. 224; 41 Sol. Jo. 67; 3 Mans. 303]

Bankruptcy—Protected transaction—"Transaction"—Charging order on debtor's interest in partnership—Execution—"Completed execution"—Money, on direction of court, paid into court in redemption of partnership interest charged—Partnership Act, 1890 (53 *& 54 Vict., c.* 39), *s.* 23—*Bankruptcy Act*, 1883 (46 *& 47 Vict., c.* 52), *ss.* 45, 49, 168.

A charging order of a debtor's interest in a partnership under s. 23 of the Partnership Act, 1890, **held** not to be a "transaction" protected by s. 49 of the Bankruptcy Act, 1883 [now s. 45 of the Bankruptcy Act, 1914] so as not to be invalidated in the case of the debtor's bankruptcy. *Re O'Shea's Settlement, Courage* v. *O'Shea* (1), [1895] 1 Ch. 325, applied.

Where at the direction of the court money was paid into court in redemption of the interest charged the transaction was not a "completed execution" for the purposes of s. 45 of the Bankruptcy Act, 1883 [now s. 40 of the 1914 Act] so as to prevent the money forming part of the bankrupt's estate.

Semble, that if the amount paid in had been paid direct to the execution creditor the execution would have been "complete."

Notes. Sections 45 and 49 of the Bankruptcy Act, 1883, have been repealed and replaced by ss. 40 and 45 of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 376, 382).

Considered: *Re Love, Ex parte Official Receiver* v. *Kingston-upon-Thames County Court Registrar*, [1951] 2 All E.R. 321.

As to the effect of bankruptcy on antecedent transactions, see 2 HALSBURY'S LAWS (3rd Edn.) 541 et seq.; and for cases see 5 DIGEST (Repl.) 978 et seq. For the Partnership Act, 1890, see 17 HALSBURY'S STATUTES (2nd Edn.) 579 et seq.

Case referred to :

(1) *Re O'Shea's Settlement, Courage* v. *O'Shea*, [1895] 1 Ch. 325; 64 L.J.Ch. 263; 71 L.T. 827; 43 W.R. 232; 39 Sol. Jo. 168; 2 Mans. 4; 12 R. 70, C.A.; 5 Digest (Repl.) 979, *7900*.

Also referred to in argument :

Butler v. *Wearing* (1885), 17 Q.B.D. 182; 3 Morr. 5; 5 Digest (Repl.) 878, *7342*.

Dibb v. *Brooke & Sons*, [1894] 2 Q.B. 338; 63 L.J.Q.B. 665; 71 L.T. 234; 42 W.R. 495; 38 Sol. Jo. 493; 1 Mans. 245; 10 R. 352, D.C.; 5 Digest (Repl.) 887, *7385*.

Summons by the plaintiff, one Wild, the execution creditor, for an order that a sum of money paid into court in the following circumstances be paid out to him.

On April 20, 1896, the plaintiff obtained judgment in the Queen's Bench Division on a dishonoured cheque for £125 and costs against the defendant, William Southwood, and on April 27, he obtained a charging order for £147 8s. 6d. in respect of the judgment and costs on the defendant's share and interest in a business he was carrying on in partnership with two other persons. The two other partners were elected under s. 23 (3) of the Partnership Act, 1890, to redeem the interest charged and on June 2 an order was made that they pay into court the sum of £156 10s., the amount in respect of which the charging order had been made plus costs. The order was expressed to be without prejudice to the rights of the Official Receiver, or any other receiver appointed by the court, to whom the plaintiff was to give notice of any application for the payment of the money into court.

On May 23 when the plaintiff took out the summons to enforce his charging order he had been unaware of the fact that on April 17 the defendant had committed an act of bankruptcy. This act formed the ground of a bankruptcy petition which had been presented on June 1, and on which a receiving order was made on June 15. The summons for payment out of the money in court was taken out by the plaintiff on July 13.

By s. 23 of the Partnership Act, 1890 :

"(1.) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm. (2.) The High Court, or any judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon. . . . (3.) The other partner or partners shall be at liberty at any time to redeem the interest charged. . . ."

By the Bankruptcy Act, 1883 :

"Section 45.—(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2.) For the purposes of this Act, an execution against goods is completed by the seizure and sale; an attachment of a debt is completed by the receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

"Section 49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, . . . nothing in this Act shall invalidate, in the case of a bankruptcy—(a) Any payment by the bankrupt to any of his creditors; (b) Any payment or delivery to the bankrupt; (c) Any conveyance or assignment by the bankrupt for valuable con-

A sideration; (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration. Provided that both the following conditions are complied with, namely—(1.) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2.) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, B or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

Terrell in support of the summons.

C *Hansell* for the trustee in bankruptcy.

VAUGHAN WILLIAMS, J.—This is a summons on behalf of the plaintiff for an order for the payment out to him of the sum of £147 8s. 6d., paid into court under an order dated June 2, which was made under the following circumstances: [HIS LORDSHIP stated the facts of the case and continued:] I am of opinion that I D ought not to make any order for the payment of this money out of court to the plaintiff. There was on April 17 an act of bankruptcy, and all the orders which have been made are subsequent to it. The plaintiff is an execution creditor, and in considering what were his rights as such, I will first deal with his rights irrespective of any protective enactments like s. 49 of the Bankruptcy Act, 1883. He had a right to seize the goods and property of the execution debtor, but he E had no right against the property of any other person. The first step to execution was the summons which was issued on April 20, and this question, therefore, arises: Was the interest in the partnership property at that time the property of the judgment creditor? In my opinion, it was not. It had vested in the trustee of the defendant's bankruptcy owing to the relation back of the title of the trustee to the date of the act of bankruptcy. This law of relation back as from a date ante- F cedent to the transaction without any petition in bankruptcy operates very hardly in many cases, and it is for this reason that protective sections have been inserted in many Acts of Parliament.

But, apart from those sections, it is plain that this execution cannot hold good against the trustee in bankruptcy, on the ground that it was a seizure of property not belonging to the execution debtor. The protective section is s. 49 of the Bank- G ruptcy Act, 1883; but the decision in *Re O'Shea's Settlement*, *Courage* v. *O'Shea* (1), which held that a charging order under s. 14 of the Judgments Act, 1838 [repealed], is not a protected transaction within that section, prevents the plaintiff from relying upon it. It has been said, however, that that decision was a decision on the Judgments Act, 1838, s. 14, and has no application to the case of a charging order under s. 23 of the Partnership Act, 1890. With that contention I do H not agree. In both cases the obtaining of a charging order is a proceeding, and cannot be called a transaction within the meaning of s. 49 of the Bankruptcy Act, 1883.

With regard to s. 45 of the same Act, if it is a protective section, the decision in *Courage* v. *O'Shea* (1) deprives the execution creditor of its benefit, and if it is a restrictive section, the question does not arise.

I It remains for me to deal with the argument that this money never formed part of the estate of the trustee in bankruptcy. The Partnership Act, 1890, gives to the continuing partners the right to buy out the claims of an execution creditor against the interest of their late partner in the partnership property. They might in this case have paid the amount to the execution creditor direct, and I do not say what would have been the effect if this money had been paid out of court to the execution creditor. I think he would have completed his execution, and would have obtained a good title to the money; but that is not a point I have to decide. In my judgment, this money which has been paid into court is just as much the pro-

ceeds of the goods and property of the bankrupt as if his goods had been sold, and that, as the judgment debtor's interest in the partnership property had passed to his trustee in bankruptcy, this money formed part of the trustee's estate. A

Order for the payment out of the fund in court to the trustee in bankruptcy of William Southwood.

Solicitors: *Wild & Wild; Field, Roscoe & Co.* B

[*Reported by* J. A. THEOBALD, ESQ., *Barrister-at-Law.*]

C

BRACE *v.* CALDER AND OTHERS D

[COURT OF APPEAL (Lord Esher, M.R., Lopes and Rigby, L.JJ.), February 28, May 30, 1895]

[Reported [1895] 2 Q.B. 253; 64 L.J.Q.B. 582; 72 L.T. 829; 59 J.P. 693; 11 T.L.R. 450; 14 R. 473] E

Master and Servant—Wrongful dismissal—Damages—Employment by partners for fixed term—Dissolution of partnership before expiration of term—Willingness of remaining partners to continue employment.

The four defendants, who were in partnership, agreed to employ the plaintiff as manager of one of their offices for two years. Before the expiration of that period, the partnership was voluntarily dissolved by the retirement of two of the partners, the business being carried on by the other two partners, who were willing to continue to employ the plaintiff for the remainder of the two years on the same terms as before. The plaintiff declined to do so and brought an action for, inter alia, wrongful dismissal against the defendants. F

Held (LORD ESHER, M.R., dissenting): the dissolution of the partnership operated as a wrongful dismissal of the plaintiff, but he was only entitled to nominal damages. G

Notes. Applied: *Ogdens* v. *Nelson*, *Ogdens* v. *Telford*, [1903] 2 K.B. 287. Distinguished: *Midland Counties District Bank* v. *Attwood*, [1904-7] All E.R. Rep. 648. Applied: *Payzu* v. *Saunders, Ltd.*, [1919] 2 K.B. 581. Considered: *Titmus and Titmus* v. *Rose and Watts*, [1940] 1 All E.R. 599. Referred to: *Jaeger's Sanitary Woollen System Co.* v. *Walker* (1897), 77 L.T. 180; *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; *Income Tax Comrs.* v. *Gibbs*, [1942] 1 All E.R. 415. H

As to breach of contract of service by a master, see 25 HALSBURY'S LAWS (3rd Edn.) 519 et seq.; and for cases see 34 DIGEST 99 et seq.

Cases referred to: I

(1) *Tasker* v. *Shepherd* (1861), 6 H. & N. 575; 30 L.J.Ex. 207; 4 L.T. 19; 9 W.R. 476; 158 E.R. 237; 1 Digest (Repl.) 630, *2113*.

(2) *Hoey* v. *MacEwen and Auld* (1867), 5 Macph. (Ct. of Sess.) 814; 39 Sc. Jur. 450; 36 Digest (Repl.) 499, **320*.

Also referred to in argument:

Frost v. *Knight* (1872), L.R. 7 Exch. 111; 41 L.J.Ex. 78; 26 L.T. 77; 20 W.R. 471, Ex. Ch.; 12 Digest (Repl.) 380, *2973*.

Stirling v. *Maitland* (1864), 5 B. & S. 840; 5 New Rep. 46; 34 L.J.Q.B. 1; 11 L.T. 337; 29 J.P. 115; 11 Jur.N.S. 218; 13 W.R. 76; 122 E.R. 1043; 34 Digest 63, *383*.

Dobbin v. *Foster* (1844), 1 Car. & Kir. 323, N.P.; 36 Digest (Repl.) 486, *570*.

Rhodes v. *Forwood* (1876), 1 App. Cas. 256; 47 L.J.Q.B. 396; 34 L.T. 890; 24 W.R. 1078, H.L.; 12 Digest (Repl.) 700, *5355*.

Re English and Scottish Marine Insurance Co., Ex parte Maclure (1870), 5 Ch. App. 737; 39 L.J.Ch. 685; 23 L.T. 685; 18 W.R. 1123, C.A.; 1 Digest (Repl.) 632, *2119*.

Hamlyn & Co. v. *Wood & Co.*, [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266*.

Hobson v. *Cowley* (1858), 27 L.J.Ex. 205; 6 W.R. 334; 36 Digest (Repl.) 498, *659*.

Aspdin v. *Austin* (1844), 5 Q.B. 671; 1 Dav. & Mer. 515; 13 L.J.Q.B. 155; 8 Jur. 355; 114 E.R. 1402; 12 Digest (Repl.) 681, *5251*.

Appeal by the plaintiff from an order of WRIGHT, J., at the trial of the action without a jury.

In 1892, the four defendants, Calder, Alexander, Macdonald and Brown, were carrying on business in partnership as whisky merchants in Scotland and London. On Dec. 23, 1892, an agreement in writing was entered into by the plaintiff with the defendants by which they agreed to employ him as manager of their office in London. By that agreement it was agreed that the plaintiff should, during the term of two years from Nov. 1, 1892, be the manager of the office part of the business of Scotch whisky merchants then being carried on by the employers in the city of London, and should receive for his services the salary of £300 a year, paid monthly. By cl. 5, the defendants were to be at liberty to terminate the agreement at any time during the period of two years on giving to the plaintiff one calendar month's previous notice in writing of their desire so to do, but should in such case pay to the plaintiff a sum equivalent to the salary he would have received if he had been retained as manager for the full period of two years. On May 6, 1893, the partnership between the four defendants was voluntarily dissolved by the retirement of two of them, but the business continued to be carried on under the same firm name by the two remaining partners. The plaintiff, in ignorance of the change in the partnership, continued for two months to serve as manager. In July, 1893, the continuing partners gave notice to the plaintiff of the change that had taken place in the firm, and offered to continue him in their employ at the same salary as that which had been agreed to in December, 1892. The plaintiff thereupon refused to act as manager for the transferees of the business, and brought this action for wrongful dismissal or, alternatively, for damages for breach of contract. WRIGHT, J., gave judgment for the defendants. The plaintiff appealed.

Cock, Q.C., and *Clavell Salter* for the plaintiff.

William Willis, Q.C., and *T. Willes Chitty* for the defendants.

Cur. adv. vult.

May 30, 1895. **LORD ESHER, M.R.** In this case the plaintiff had entered into a contract with the four defendants, who were then in partnership, to serve them in their business for a term of two years. Before the expiration of the term the partnership was dissolved by the retirement of two of the partners. The two partners who continued the business offered to keep the plaintiff in their employ at the same rate of wages as he had been receiving before, but he refused. He clearly had a perfect right to refuse to serve the new firm. He then brought this action, which, it is agreed, is for a wrongful dismissal. It was also suggested that a question arises whether the action ought not to be for a breach of the contract to employ him for two years. He did serve for about two months after the date on which he claims to have been dismissed, and no wages have been paid him for that period, but, as that matter is one which has not been raised in this action, it is unnecessary that I should say more about it.

As to the claim for wrongful dismissal, the defendants never assumed to dismiss the plaintiff. The old firm merely ceased to carry on business. The business now being carried on is carried on by a new firm. The question, therefore, is this: does the ceasing to carry on the business constitute a wrongful dismissal of the plaintiff? In my opinion it does not, and I think that the law has been so laid down over and over again. The defendants simply ceased to carry on business; they did not dismiss the plaintiff. They did not bind themselves by their agreement with him that they would continue to carry on their business in partnership for two years. Certainly there is no express stipulation in the agreement to that effect, and, in my opinion, no such stipulation can be implied, because it is not perfectly clear that it was understood by both parties that every reasonable man who bound himself by a contract for service for a fixed period would do so on such terms. It is not true to say that every reasonable man would bind himself to carry on his business at a loss rather than dismiss a servant. In my opinion, therefore, the plaintiff cannot succeed on a claim for wrongful dismissal.

Then it was said that there was a breach of the contract to employ him for two years, and that the plaintiff is entitled to succeed on that ground. If he were entitled to succeed on that ground, the damages would, prima facie, be obviously very considerable. But the probability of his getting other employment for the rest of the two years would have to be taken into consideration, and, in the present case, the plaintiff could obviously have got it. The same employment as he had lost was offered to him by the two partners who constitute the new firm. Therefore, the damages in this case could only be nominal. But, in my opinion, there has not been any breach of contract. The contract was only to employ him in the business carried on by the four partners. As I have said, there is no contract by them that they will continue to carry on that business for two years. The breach alleged is that they did not carry it on; but if, as I think, they never agreed to carry it on, it follows that there is no breach. Their real agreement was to employ the plaintiff for two years, if they continued to carry on business for that period. The payment to him for his services is not a lump sum; he is to be paid wages monthly.

In my opinion, the plaintiff has no cause of action, either for wrongful dismissal or for breach of contract, and I think that the defendants are entitled to judgment, and that this appeal ought to be dismissed.

LOPES, L.J.—In my opinion, it is important to consider the terms of the agreement of Dec. 23, 1892. If, in pursuance of cl. 5 of that agreement, the defendants had given to the plaintiff one calendar month's notice in writing of their desire to terminate the agreement, he would then have been entitled to the whole salary for the agreed term of two years. But what happened was that, before the expiration of the two years, two of the partners retired from the business, and the plaintiff, in ignorance of what had happened, continued to act as manager for a short time afterwards—namely, up to July, 1893. The two partners who now carry on the business that belonged to the four defendants are willing to keep on the plaintiff on the terms of the agreement of Dec. 23, 1892. The question is: what was the effect of the dissolution of partnership by the retirement of two of the partners? There is authority to show that the dissolution put an end to the agreement for the employment of the plaintiff, unless the agreement contained some stipulation to the contrary: see *Tasker* v. *Shepherd* (1), and *Hoey* v. *MacEwan and Auld* (2). It was expressly stated in *Tasker* v. *Shepherd* (1) that the death of a partner would put an end to an agreement for personal service; and the present case, where the partnership was voluntarily dissolved, seems to me to be a stronger one. Therefore, in my opinion, the dissolution operated either as a wrongful dismissal of the plaintiff or as a breach of contract. There is no stipulation in the agreement that shows any intention of the parties that this should not be so. The agreement was to last for a fixed term of two years, and the clause as to the defendants' power of dismissal on one month's notice shows strongly that the employment was intended by both

parties to be for two years. The plaintiff was discharged in May, 1893, and, subject to what I am about to say, he would be entitled to his salary for the remaining part of the two years from Nov. 1, 1892. The continuing partners, however, are willing to keep on the plaintiff in their employ on the terms of the agreement of Dec. 23, 1892, and, therefore, if the plaintiff has suffered any loss by the breach of contract it is his own fault. He is, therefore, entitled only to nominal damages, because he has not in fact suffered any loss at all. Under these circumstances, the plaintiff is entitled to judgment and the appeal will be allowed, but without costs.

RIGBY, L.J., read the following judgment.—In this case, the plaintiff entered into an agreement on Dec. 23, 1892, with the defendants, who were then partners in a business of whisky dealers, to act as their agent for a term of two years from Nov. 1 of that year at a fixed salary of £300 a year, and there was a clause entitling the employers to determine the agreement altogether before the expiration of the two years on giving a month's notice and paying the unpaid amount of his agreed salary for the unexpired residue of the two years' term. If that clause had been acted on, the agreement would have been brought entirely to an end, and the plaintiff would have had no cause of complaint. What took place was, that, before the expiration of the two years' term—that is to say, on May 6, 1893—the partnership between the four defendants was put an end to, and the business transferred to two of them, who continued to carry on a business under the same firm name. No notice of this dissolution of partnership was given to the plaintiff, and he continued to act as agent in the business as he had done before, until the end of July, 1893. In a letter of July 26, from the firm of Alexander and Macdonald, which was the old firm's name, to the plaintiff, mention is made of a transfer of the firm's business. In a reply of July 28, the plaintiff says that he shall be glad to hear in regard to himself as he cannot be handed over as a chattel, and adds that the contract was with certain individuals, none of whom he can release from their obligation until the conditions of their contract with him are fulfilled. On July 29, the firm write to the plaintiff, giving express notice of the retirement of two of the defendants from the partnership, and the plaintiff replies by stating that he has not consented to transfer his contract from its original subscribers in any way. Further correspondence then took place, in which the two transferees of the business insisted on their right to the services of the plaintiff under the agreement of Dec. 23, whilst the plaintiff refused to recognise their right to claim such services, and declined to act as the agent of the two transferees.

The question now arises as to the rights, if any, of the plaintiff. Numerous cases were cited with reference to the construction of the agreement; but, in the result, I am of opinion that the only principle to be derived from them is that the contract is to be construed according to its express terms, and that no term is to be implied which is not rendered reasonably necessary to carry out the plain intention of the parties. In accordance with this principle, it seems to me impossible to imply a term that the partnership business shall be conducted by its partners during the two years' term. On the other hand, I think it equally impossible to imply a term that the employers may get rid of their contract by a simple dissolution of partnership, or that the contract implies that, in the event of the retirement of any of the employers, which retirement altogether puts an end to the existing partnership, the defendants' contract may be transferred to the new partnership formed to continue the business. A contract to serve four employers cannot, without express language, be construed as being a contract to serve two of them. In my judgment, the dissolution of the partnership operated as a dismissal of the plaintiff not authorised by law. The clause as to dismissal on a month's notice not having been acted on, the plaintiff cannot recover as liquidated damages the unpaid part of his salary for the two years' term; on the other hand, the defendants are liable to him for the usual damages for a dismissal without due cause. The plaintiff brought his action on Dec. 22, 1893, before the two years' term came to an end.

In my judgment, the defendants are entitled in mitigation of damages to put forward the offer of an engagement on the same terms made by the continuing partners. I see nothing in the evidence to show that this in a pecuniary sense would have been of a less value to him than his engagement to serve the four defendants. So far it would seem that the plaintiff's damages would be nominal. But, as he actually continued to render services until the end of July, and his salary was only paid to the end of May, I am of opinion that he would be entitled to two months' salary at the rate of £300 a year—that is to say, to £50. But that question was not raised in this action. I, therefore, concur in the view of LOPES, L.J., that the appeal must be allowed and judgment entered for the plaintiff for nominal damages without costs either here or in the court below.

Appeal allowed.

Solicitors: *W. H. Dale; Hatchett-Jones & Co.*

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

GWILLIAM *v.* TWIST

[COURT OF APPEAL (Lord Esher, M.R., A. L. Smith and Rigby, L.JJ.), May 16, 1895]

[Reported [1895] 2 Q.B. 84; 64 L.J.Q.B. 474; 72 L.T. 579; 57 J.P. 484; 43 W.R. 566; 11 T.L.R. 415; 14 R. 461]

Master and Servant—Liability of master for act of servant—Servant agent of necessity—Opportunity of consulting master.

While the defendants' omnibus was being driven by their servant, a police inspector, being of the opinion that the driver was drunk, ordered him to discontinue driving. The omnibus was then about a quarter of a mile from the defendants' yard. The driver authorised a by-stander, whom he knew but who was not a driver, to drive the omnibus to the defendants' yard. That person drove negligently and injured the plaintiff.

Held: as the driver could have communicated with the defendants, there was no evidence of such a necessity as to constitute him an agent of necessity and justify him in handing over the omnibus to a third person to drive it to the yard, and, therefore, the defendants were not liable for the third person's negligence.

Notes. Considered: *Beard* v. *London General Omnibus Co.*, [1900-3] All E.R. Rep. 112. Applied: *Harris* v. *Fiat Motors* (1906), 27 T.L.R. 556. Distinguished: *Ricketts* v. *Tilling*, [1915] 1 K.B. 644. Considered: *Prager* v. *Blatspiel, Stamp and Heacock, Ltd.*, [1924] All E.R. Rep. 524. Referred to: *Sachs* v. *Miklos*, [1948] 1 All E.R. 67; *Munro* v. *Willmott*, [1948] 2 All E.R. 983.

As to an agent's authority to delegate, see 1 HALSBURY'S LAWS (3rd Edn.) 169 et seq.; and for cases see 1 DIGEST (Repl.) 444 et seq.

Cases referred to:

(1) *Hawtayne* v. *Bourne* (1841), 7 M. & W. 595; 10 L.J.Ex. 224; 5 Jur. 118; 151 E.R. 905; 1 Digest (Repl.) 370, *413*.

(2) *Nicholson* v. *Chapman* (1793), 2 Hy. Bl. 254; 126 E.R. 536; 32 Digest 251, *371*.

A Also referred to in argument:
Booth v. *Mister* (1835), 7 C. & P. 66, N.P.; 34 Digest 142, *1115*.
Lynch v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 34 Digest 144, *1138*.

Appeal by the defendants from a decision of the Divisional Court (LAWRANCE and B WRIGHT, JJ.), affirming a decision of the judge of the Birmingham County Court.

Edward Pollock for the defendants.
Boydell Houghton for the plaintiff.

LORD ESHER, M.R.—A question of great importance has been raised in this C case, whether a servant can, in a case of necessity, delegate his authority to another person and so make his master liable for the negligence of that person in carrying out the servant's duties. That question we have not now to decide. A servant employed for a particular purpose clearly cannot delegate his duty to anyone else unless, possibly, in cases of necessity. The question for our decision is not what will happen, assuming that there is a case of necessity; it is, whether there was D any evidence before the county court judge on which he could reasonably find that a necessity existed for the driver of the omnibus to delegate his duty to Veares. I do not think that the county court judge has found that any case of necessity existed. He seems to have said that the facts found by him raised in law an inference that a necessity existed. But I will assume that he has in his judgment found that there was a necessity.

E The question for us to consider is, whether there was any evidence on which he could reasonably find that. Has a servant power to delegate his authority without first consulting his master? If a servant has an opportunity of consulting his master, there can be no need for him to act on his own view of affairs. The facts of this case are that there was an omnibus in the street, the driver being incapacitated through the orders of the police from driving it, and the yard of the driver's master F being only a quarter of a mile away. Could not the omnibus have been left in reasonable safety to stand in the street while someone was sent to the yard to ask the master what was the best thing to do? It is obvious that the omnibus might well have been left where it was while the owner was being communicated with as to what should be done. Then the judge, if sitting with a jury, should have directed them that there was no evidence of any necessity justifying any delegation of G authority, or, if sitting without a jury, he should have held that there was no necessity for the driver to act without first communicating with his master. The question for the Divisional Court was whether there was any such evidence. In my opinion, there was no evidence on which it can be said that a necessity arose for the driver to act without first communicating with his master.

I may add that I strongly agree with what was said by PARKE, B., in *Haurtayne* v. H *Bourne* (1) and EYRE, C.J., in *Nicholson* v. *Chapman* (2), that the implied authority of a servant to act according to the necessity of a case is confined to certain well-known instances, such as that of a master of a ship, and the acceptor of a bill of exchange for the honour of the drawer, and in salvage cases. These cases are all exceptions from the general rule.

I **A. L. SMITH, L.J.**—I am of the same opinion. Harrison was sent out by his master as driver of an omnibus, and, while driving, was ordered by a police inspector to get down from the box. Harrison then authorised Veares, whom he knew but who was not a coachman, to get up and drive the omnibus home. Veares drove the omnibus back to the yard, but drove so negligently as to knock down and injure the plaintiff, who has now brought an action against the defendants. The question is whether the defendants are liable for the negligence of Veares.

The ordinary rule is that a master is only liable for the negligence of his servant while acting within the scope of his employment. The question in this case, there-

fore, seems to be whether it was within the scope of Harrison's authority to put up Veares to drive the omnibus home under the circumstances which had happened. That question is prima facie capable of only one answer. It is not within the scope of a coachman's authority to put up someone else on to the box to drive for him. It is a coachman's duty to drive personally. But then it is said that circumstances may exist under which a coachman may be constituted an agent of necessity. It may be that such circumstances might arise constituting a servant an agent of necessity, but I think that they must be such that the servant is unable to communicate with his master and obtain from him instructions how to act. A master of a ship, it has been said, is not to delay for instructions where delay would be clearly imprudent. But, if there is a fair expectation of obtaining directions, either from the owners of the goods or from agents known by the master to have authority to deal with the goods, within such a time as would not be imprudent, the master of the ship must make every reasonable endeavour to get those directions; and his authority to sell does not arise until he has failed to get them. It is true that, in the present case, we have no specific findings on this point by the county court judge, but in his judgment he said that it was "clearly necessary that someone should drive the omnibus home," but he does not say that it was necessary that Harrison should immediately appoint someone to drive it back. It seems to me that there is no evidence on which he could find that Harrison became an agent of necessity. The police ordered Harrison to cease driving when the omnibus was only a quarter of a mile from the defendants' yard, and, therefore, there was obviously a possibility of communicating with them for the purpose of obtaining directions from them as to what they wished done. Harrison was not constituted an agent of necessity, and, as the putting up of Veares to drive in his place was not within the scope of the authority given him by his master, the defendants are not responsible for the results of Veares' negligence.

RIGBY, L.J.—I am of the same opinion. Certain facts have been found by the county court judge, but there is no evidence of any such necessity as would be required by law to enable the driver and the conductor of an omnibus to employ someone else to drive it under the circumstances that existed in this case. No case can be cited in point, unless necessity be first proved; and, for the reasons that have been given, I agree that no necessity has been shown to have existed here.

Appeal allowed.

Solicitors: *W. E. Aldis*, for *H. Parry*, Birmingham; *T. A. Dennison & Co.*, for *Tanner*, Birmingham.

[*Reported by* E. Manley Smith, Esq., *Barrister-at-Law.*]

Re NOTTAGE. JONES *v.* PALMER

[Court of Appeal (Lindley, Lopes and Rigby, L.JJ.), July 12, 1895]

[Reported [1895] 2 Ch. 649; 64 L.J.Ch. 695; 73 L.T. 269; 44 W.R. 22; 11 T.L.R. 519; 39 Sol. Jo. 655; 12 R. 571]

Charity—Benefit to community—Gift "to encourage the sport of yacht racing."

By his will, dated October, 1894, a testator, who died in December, 1894, bequeathed a sum of money to trustees in trust to purchase annually a cup to be given to the most successful racing yacht of the season, declaring that his object in giving the cup was "to encourage the sport of yacht racing."

Held: the object of the gift was a sport primarily calculated to promote the amusement of individuals, rather than that of the community at large, and thus the gift could not be said to be charitable, but was void for perpetuity.

Notes. By the Recreational Charities Act, 1958, s. 1 (38 Halsbury's Statutes (2nd Edn.) 122) certain trusts for the provision of "facilities for recreation or other leisure-time occupation" are declared to be charitable "if the facilities are provided in the interests of social welfare." However the trusts must still be for the public benefit to be charitable and in the present case it was held that the trust was not for the benefit of the community at large. It is therefore not affected by the Act.

Considered: *Re Clifford, Mallam* v. *McFie* (1911), 81 L.J.Ch. 220; *Re Gray, Todd* v. *Taylor*, [1925] All E.R. Rep. 250. Applied: *Re Patten, Westminster Bank* v. *Carlyon*, [1929] All E.R. Rep. 416. Referred to: *Re Wedgwood, Allen* v. *Wedgwood*, [1914-15] All E.R. Rep. 322; *Re Hadden, Public Trustee* v. *More*, [1931] All E.R. Rep. 539; *Peterborough Royal Foxhound Show Society* v. *I.R. Comrs.*, [1936] 1 All E.R. 813; *I.R. Comrs.* v. *Baddeley*, [1955] 1 All E.R. 525.

As to essentials of a charitable gift, see 4 Halsbury's Laws (3rd Edn.) 206 et seq.; and for cases see 8 Digest (Repl.) 357 et seq.

Cases referred to in argument:

Income Tax Special Purposes Comrs. v. *Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 7 T.L.R. 657; 3 Tax Cas. 53, H.L.; 8 Digest (Repl.) 312, *1*.

Re Stratheden and Lord Campbell, Alt v. *Stratheden and Lord Campbell*, [1894] 3 Ch. 265; 63 L.J.Ch. 872; 71 L.T. 225; 42 W.R. 647; 10 T.L.R. 574; 38 Sol. Jo. 602; 8 R. 515; 8 Digest (Repl.) 346, *277*.

Re Stephens, Giles v. *Stephens* (1892), 8 T.L.R. 792; 36 Sol. Jo. 713; 8 Digest (Repl.) 350, *300*.

Thomson v. *Shakespear* (1860), 1 De G.F. & J. 399; 29 L.J.Ch. 276; 2 L.T. 479; 24 J.P. 309; 6 Jur.N.S. 281; 8 W.R. 265; 45 E.R. 413, L.C. & L.JJ.; 8 Digest (Repl.) 391, *843*.

Loscombe v. *Wintringham* (1850), 13 Beav. 87; 51 E.R. 34; 8 Digest (Repl.) 417, *1084*.

Beaumont v. *Oliveira* (1869), 4 Ch. App. 309; 38 L.J.Ch. 239; 20 L.T. 53; 33 J.P. 391; 17 W.R. 269, L.JJ.; 8 Digest (Repl.) 346, *272*.

Appeal from a decision of Kekewich, J., reported [1895] 2 Ch. 649, that a bequest to encourage yacht racing was not charitable and therefore void for perpetuity.

The testator, Charles George Nottage, by his will, declared as follows:

"I bequeath to the Yacht Racing Association of Great Britain, out of such part of my estate as may be legally bequeathed for such a purpose, the sum of £2,000, the same to be invested in the names of three trustees to be appointed by the council of the said association, and to be invested in the debenture bonds or debenture stock of any railway in the United States of America paying at the time of investment not less than 4 per cent. per annum upon the amount

invested, but so that not more than one-fourth of the capital shall be invested at the same time in the same security, or in such other securities as the trustees so to be appointed as aforesaid shall deem expedient. And I direct that the trustees so to be appointed as aforesaid shall, out of the annual income of the trust fund, purchase annually a cup to be called 'The Nottage Cup,' which is to be given to the most successful yacht of the season of over 19 rating, or what may in future be held to be the equivalent of that rating; and the council of the said association shall decide annually which yacht has in their opinion the best claim to the cup, and in the event of there being any difference of opinion the vote of the majority of the said council is to decide the question; or the said council may, if they think fit, order the said cup to be specially raced for. My object in giving this cup is to encourage the sport of yacht racing, and I declare that, in the event of the Yacht Racing Association being dissolved, or ceasing to exist, the trustees of the said fund shall pay and make over the same to three trustees to be appointed by the council or committee of the Royal Thames Yacht Club, by whom the said fund shall be held upon similar trusts to those hereinbefore declared with regard to the purchase of a cup to be called 'The Nottage Cup.' ''

An originating summons was taken out by the trustees and executors of the will against the Yacht Racing Association of Great Britain and other persons beneficially interested under the will to determine the question (inter alia) whether the above-mentioned bequest was valid. The summons was adjourned into court, and on May 23, 1895, came on to be heard before KEKEWICH, J., who decided that the bequest being remotely and not directly beneficial to the community, was not charitable, and was therefore void for perpetuity. From that decision the defendants, the Yacht Racing Association of Great Britain, now appealed.

Warrington, Q.C., and *Kenyon Parker* for the defendants.
Pattullo for the residuary legatees.
J. G. Fawcus for the trustees and executors of the will.

LINDLEY, L.J.—We are all quite aware of the extreme difficulty of drawing a line between gifts which are charitable in the sense in which lawyers use that term —that is to say, in a very wide sense—and gifts which are not; but this is really a new experiment. The testator here tells us exactly what he has in mind. This is an institution of members for mere sport—it is a mere game; the testator treats it so, and he tells us so himself. At the end of the bequest he says: ''My object in giving this cup is to encourage the sport of yacht racing.'' Taking a wide view I should say that, in my opinion, every healthy sport is good for the nation. I do not draw much distinction between cricket, football, fencing, yachting, or anything else. If that were a lawyer's idea of a charity, this would not have been the first time we should have heard of it, and I cannot find any case which tends that way—that is to say, any case which would authorise us in saying that a mere legacy to promote a game or a sport is a charitable legacy within the extended doctrine of the Court of Chancery. I find it very difficult to draw the line, and I do not attempt to draw the line. It is a case in which it is exceedingly difficult to do it. The cases in the books show that sometimes there is a case a little on one side, and sometimes a little on the other of the line. But I deal with the present case on the broad ground that I am not aware of any authority which warrants the inference that a legacy for the encouragement of a mere sport is a charitable gift. I think that is enough to decide this case. The appeal must, therefore, be dismissed with costs.

LOPES, L.J.—It is indeed most difficult to draw a line in this matter, but probably the safest way to deal with this case will be to say, what does not come within the definition of a charitable gift. I am clearly of opinion that a gift, the object of which is a mere sport or game which is primarily calculated to promote

A the amusement of individuals as distinguished from the community at large, upon the authorities cannot be said to be a charitable gift. If we were so to hold, we should indeed open a very wide door, because, if we were to hold that this is a charitable gift, I should feel very great difficulty in saying that a gift for the purpose of promoting bicycling, cricket, football, lawn tennis, or any other game you like to name, would not come within the same category. All those sports are B calculated to promote the health, physique, and good constitution of the community at large. But legacies to encourage them are not of that kind which can be said to be charitable gifts.

RIGBY, L.J.- I am of the same opinion. I daresay it is impossible, and certainly it would not be advisable, to define in general words what is a charitable C bequest. One must always go back to the analogy of the statute, and that is the only test which has ever really been applied. If this could succeed—if the gift of a fund to found a prize for yacht racing could succeed—it must be on the ground that it is a general public purpose. I know no other head under which it could come. I think the very terms of the will itself explain that. The Yacht Racing Association is spoken of as an association of yacht owners; and the prizes are to be won by the D owners of the yachts. I think, however much we might favour the sport of yachting, we cannot go to the extent of saying that it is a general public purpose. There are a great many things which are highly laudable, and in many ways very useful, which are yet not charities within the meaning of the statute, and in my opinion this is one of them.

Appeal dismissed.

E

Solicitors: *G. H. Barber & Son; Lake & Lake; N. C. Barraclough; Neish, Howell & Macfarlane.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

F

Re FOLLOWS. Ex parte FOLLOWS

G

[QUEEN'S BENCH DIVISION (Vaughan Williams and Wright, JJ.), August 6, 1895]

[Reported [1895] 2 Q.B. 521; 65 L.J.Q.B. 15; 73 L.T. 222; 39 Sol. Jo. 726; 2 Mans. 495; 15 R. 621]

Bankruptcy -Notice—Debtor's goods seized by sheriff in execution of judgment— H *Claim to goods by third party—Interpleader summons—Bankruptcy notice served after issue of summons—Creditor not in position to issue execution—Bankruptcy Act*, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 4 (1) (*g*).

Where a third party claims goods seized in execution against a debtor, but no return has been made by the sheriff and an interpleader summons is taken out, a bankruptcy notice subsequently served by a petitioning creditor will be bad I as it can only demand what a creditor can enforce by execution and the petitioning creditor is not in a position to issue execution.

Notes. Section 4 (1) (g) of the Bankruptcy Act, 1883, has been repealed and replaced by s. 1 (1) (g) of the Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 325).

Distinguished: *Re Fredericke and Whitworth, Ex parte Hibbard*, [1927] 1 Ch. 253.

As to circumstances preventing issue of a bankruptcy notice, see 2 HALSBURY'S LAWS (3rd Edn.) 276, 277; and for cases see 4 DIGEST (Repl.) 90 et seq.

Cases referred to:

(1) *Re Ford, Ex parte Ford* (1886), 18 Q.B.D. 369; 56 L.J.Q.B. 188; 56 L.T. 166; 3 Morr. 283; 4 Digest (Repl.) 91, *815*.

(2) *Re Phillips, Ex parte Phillips* (1888), 5 Morr. 40, P.C.; 4 Digest (Repl.) 90, *813*.

(3) *Re Bates, Ex parte Lindsey* (1887), 57 L.T. 417; 35 W.R. 668; 4 Morr. 192, D.C.; 4 Digest (Repl.) 91, *816*.

Also referred to in argument:

Re Miller, Ex parte Nugent (1893), 69 L.T. 260; sub nom. *Re Miller, Ex parte Miller*, 10 Morr. 183; 5 R. 498, D.C.; 4 Digest (Repl.) 105, *943*.

Morland v. *Pellatt* (1829), 8 B. & C. 722; 3 Man. & Ry.K.B. 411; 7 L.J.O.S.K.B. 54; 108 E.R. 1211; 5 Digest (Repl.) 897, *7453*.

Appeal from a decision of the registrar of the Birmingham County Court making a receiving order against the debtor.

The debtor was a farmer, and was tenant to a landlord named Mr. Grove who, on Mar. 23, 1895, obtained judgment against him, under Ord. 14, for the sum of £89 16s. 9d. for rent due, etc. On Mar. 27, the sheriff levied execution on the debtor's goods for the amount of the debt. On April 9 the goods were sold, and realised £42 gross and £29 16s. 9d. net. On April 22 the landlord, as petitioning creditor, issued a bankruptcy notice for the whole sum of £89 16s. 9d. A claim having been made to the proceeds of the sale of the goods, the sheriff, on April 26, took out an interpleader summons. On April 29 the bankruptcy notice was served, and on April 30 an issue was ordered to be tried on the interpleader summons, the sheriff to retain the proceeds of sale to abide the result. A petition was presented against the debtor, alleging the debt to be £84 10s., and the act of bankruptcy to be non-compliance with a bankruptcy notice. On May 27 a receiving order was made against the debtor by the registrar of the Birmingham County Court. On June 19 the interpleader issue was heard, and judgment was given for the petitioning creditor. The debtor appealed against the decision of the registrar making the receiving order.

Hansell for the debtor.

Muir Mackenzie for the petitioning creditor.

VAUGHAN WILLIAMS, J.—One ground of appeal in this case was that no act of bankruptcy had been committed on which a receiving order could be made; the act of bankruptcy alleged was non-compliance with a bankruptcy notice. By s. 4 (1) of the Bankruptcy Act, 1883:

> "A debtor commits an act of bankruptcy. . . . (g) If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or by leave of the court elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not, within seven days after service of the notice in case the service is effected in England, and in case the service effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

That being the section, the facts are as follows. Judgment was obtained for £89 16s. 9d. against the debtor, and a fi. fa. was delivered to the sheriff for execution, and on Mar. 27 the sheriff levied and sold the debtor's goods and realised the sum of £29 16s. A claim was made to the goods the exact date of which was not given,

but it is a reasonable inference that the sheriff did not at once make a return to the writ and pay over the amount realised. On April 26 an interpleader summons was taken out by the sheriff, a bankruptcy notice having been issued on April 22. It followed from these dates that when the bankruptcy notice had been issued a fi. fa. had been placed in the sheriff's hands and a levy had been made, but no return. The date of the service of the bankruptcy notice was on April 29 and so after the issue of the interpleader summons. In my judgment, it followed from these facts and dates that on the date of the issue of the bankruptcy notice, and also at the date of the service of it, the execution creditor was not in a position to issue execution for the £89 16s. 9d. Up to the date of the issue of the bankruptcy notice he was not in a position to issue execution, because execution had been issued and no return made; and according to the common law you can only issue a second fi. fa. after a previous one if a return has been made to the first one, and this had not been made, as the second must recite the amount realised by the first.

It seems to me also that at the date of the service of the bankruptcy notice the execution creditor could not issue execution for the whole amount for the same reason, as there had been no return to the writ, and also because at the date of the service of the bankruptcy notice there was already the interpleader summons in existence. That such a summons had been issued brings the case within the principles of *Re Ford, Ex parte Ford* (1) and *Re Phillips, Ex parte Phillips* (2). If it is correct that no execution could issue for the whole amount of the debt, it seems to me that the bankruptcy notice which gave the debtor notice to pay the whole amount of the debt was bad, not on the ground of any right to stay of execution—and I do not say that there are any words in the section that the bankruptcy notice shall not issue under these circumstances—but on the plain intention of the Act of Parliament, i.e., that a bankruptcy notice shall only demand what a creditor can enforce by execution. It was conceded that, if part of the judgment debt had been paid, the execution creditor could not levy execution or issue a bankruptcy notice for more than was due. Under these circumstances, in order to decide this case, it is enough to say that at the moment of the issue of the bankruptcy notice there was no right to issue execution for £89 16s. 9d.

The question might have been raised as to whether there was a matter for amendment. If one takes the view of MATHEW, J., in *Re Bates, Ex parte Lindsey* (3), there is strong ground for saying that this was a good ground for amendment. If, however, one takes the view of CAVE, J., in *Re Phillips* (2), then there was no ground for amendment. But we have not to decide this question, as counsel for the petitioning creditor declined to ask for leave to amend. The question then is, Can a bankruptcy notice issue for a sum for which execution cannot issue? The answer is, it cannot; and when once you arrive at that conclusion then the only question is, could execution have been issued at the date of the issue of the bankruptcy notice or at the date of its service for the whole amount of the debt? It is clear it could not, for you must deduct the £29.

WRIGHT, J.—I desire to express no opinion on the general question whether a bankruptcy notice can be issued when execution has been issued and not perfected by a return being made to the writ.

Solicitors: *Ralph Raphael & Co.*, for *Blackham & Taylor*, Birmingham; *T. White*, for *Tonbridge*, Birmingham.

[*Reported by* W. B. YATES, ESQ., *Barrister-at-Law.*]

Re CROWTHER. MIDGLEY *v.* CROWTHER

[CHANCERY DIVISION (Chitty, J.), May 1, 1895]

[Reported [1895] 2 Ch. 56; 64 L.J.Ch. 537; 72 L.T. 762; 43 W.R. 571; 11 T.L.R. 380; 13 R. 496]

Executor—Powers—Power to postpone sale—Testator's businesses—Power to postpone for "as long as shall seem expedient"—Income pending such sale or conversion to be paid to the testator's widow and children—Business carried on for twenty-two years—Profits claimed by testator's grandson as accretion to capital.

The testator devised and bequeathed his two businesses to trustees upon trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and after her death for his children. The testator empowered the trustees to postpone the sale "for such period as to them shall seem expedient," the income until sale or conversion to be paid to the persons who would be entitled under the will to the proceeds or income thereof if such sale and conversion had actually taken place. The testator's businesses were carried on for twenty-two years, until the death of his widow, and the profits thereof had been paid to her as annual income. The plaintiff, a grandchild of the testator, entitled to a share of capital, claimed that the businesses ought to have been sold within a reasonable time after the testator's death, and that the profits of the businesses, less 4 per cent. per annum, should be brought into account as part of the capital.

Held: the trustees were justified in carrying on the businesses and paying the whole income to the tenant for life.

Notes. Considered: *Re Smith, Arnold* v. *Smith*, ante p. 1175; *Stainer* v. *Hodgkinson* (1903), 73 L.J.Ch. 179. Followed: *Re Elford, Elford* v. *Elford*, [1910] 1 Ch. 814.

As to power to carry on business of testator, see 16 HALSBURY'S LAWS (3rd Edn.) 366 et seq.; and for cases see 24 DIGEST (Repl.) 610 et seq.

Cases referred to:

(1) *Re Norrington, Brindley* v. *Partridge* (1879), 13 Ch.D. 654; 44 J.P. 474; 28 W.R. 711, C.A.; 24 Digest (Repl.) 620, *6160*.

(2) *Re Chancellor, Chancellor* v. *Brown* (1884), 26 Ch.D. 42; 53 L.J.Ch. 443; 51 L.T. 33; 32 W.R. 465, C.A.; 24 Digest (Repl.) 611, *6088*.

Action brought by the plaintiff, a grandchild of the testator, claiming that profits from two businesses carried on by the testator's trustees for the benefit of his widow for twenty-two years after his death should be brought into account as part of the capital of the testator's estate.

Byrne, Q.C., and *Tanner* for the plaintiff.
Farwell, Q.C., and *J. G. Wood* for the defendants.

CHITTY, J.—The executors and trustees of the testator's will, of whom his widow was one, carried on the testator's business of a general shopkeeper, to which he was entitled at his death, and also a rope and twine manufacturing business, to which he had been entitled in partnership with his son, Thomas Crowther, one of the defendants, from the year 1872—the date of the testator's death—to 1894, when the widow died. This action is brought by a grandchild of the testator, and the only point now raised by the plaintiff relates to the profits of these two businesses, the plaintiff claiming that all profits beyond 4 per cent. should be brought into account as part of the capital of the testator's estate. The question I have to decide is, whether the executors and trustees were authorised, on the

A construction of this will, in carrying on these businesses as they did for a period of nearly twenty-two years.

After the usual trusts for conversion and investment, the testator gives his son—the defendant Thomas Crowther—an option to purchase either of these businesses, which was never exercised, during the period I have mentioned; and then he empowers his trustees—and it is upon this power that the question turns—to B postpone the sale and conversion of his estate, or any part thereof, "for such period as to them shall seem expedient"; and he directs that, until such sale, the income arising therefrom

> "shall belong to the person who would be entitled under the trust hereinbefore contained to the moneys arising from such sale and conversion, or the income C arising therefrom if such sale and conversion had actually taken place."

It is said by the plaintiff that the trustees have committed a breach of trust in carrying on these businesses under this power, though it is not suggested that the value of the businesses has decreased, or any loss been thereby occasioned to the estate; and it has been argued that this power to postpone conversion does not mean, as the testator says, that these trustees may postpone "for such period as to D them shall seem expedient," but that some limitation must be imposed on this period—a limitation arising, in the language of the Court of Appeal, in *Re Norrington*, *Brindley* v. *Partridge* (1), out of an artificial rule laid down by the Court of Chancery, which, according to the plaintiff's argument, is, that the trustees may postpone for such period as they deem expedient, "provided such postponement is only made with a view to a subsequent sale," or something to that effect. E

It seems extraordinary that there should be any such arbitrary rule compelling me to insert such additional words in the testator's will, and I fail to find any authority for it. When the estate becomes divisible, the power to postpone ceases, and comes to an end of itself; but when the power is existing, why it should not be read so as to justify the trustees in carrying on the testator's business, if they think right to do so, I am at a loss to understand. I take it to be an unanswerable F proposition that a power to postpone the sale of a business involves a power of carrying on the business until sale. Thus, in *Re Chancellor*, *Chancellor* v. *Brown* (2), COTTON, L.J., says (26 Ch.D. at p. 46):

> "Without impugning any of the authorities that have been referred to, there is in this will an implied authority to the trustees to carry on the business, and the G testator has said how the profits of the business, pending a sale, are to be paid and applied."

So here, as long as the trustees carry on the business under this implied power, the language of the will is unmistakable. The income, or yearly profit, derived from the businesses is annual income for all the purposes of the will, and passes, under the words of the will, to the tenant for life. To hold otherwise would be to invent H a trap to catch unwary trustees. There is nothing in any of the authorities that have been cited which compels me to come to such a conclusion; and some of the observations, indeed, in *Re Chancellor* (2) are quite opposed to the plaintiff's contention, though in that case it was only necessary to consider whether the postponement of the sale for some two years was justified. The Court of Appeal held I that it was. In my opinion, therefore, the plaintiff's contention fails.

Solicitors: *Elliott & Ash* for *W. H. Steward*, Birstall; *Flower, Nussey & Fellowes*, for *Carr & Cadman*, Gomersal.

[*Reported by* H. M. C. MACPHERSON, ESQ., *Barrister-at-Law.*]

A

Re LENG. TARN *v.* EMMERSON

[COURT OF APPEAL (Lord Halsbury, Lindley and A. L. Smith, L.JJ.), February 8, March 11, 1895]

B

[Reported [1895] 1 Ch. 652; 64 L.J.Ch. 468; 72 L.T. 407; 43 W.R. 406; 11 T.L.R. 286; 39 Sol. Jo. 329; 12 R. 202]

Bankruptcy—Administration of estate of person dying insolvent—Claim by widow for money lent for husband's trade—Applicability of bankruptcy law—Insolvency—Ascertainment—Inclusion of cost of administration.

C

When a deceased husband's estate is being administered in the Chancery Division, there are not sufficient assets to pay the creditors in full, and the widow claims in the administration against the estate of her husband in respect of money lent by her to him for the purposes of his trade, the rule which applies in bankruptcy as to the wife's proof in such circumstances is to be followed.

In ascertaining whether the deceased husband's estate could pay his liabilities in full the costs of administration are to be added to the other liabilities.

D

Notes. Section 3 of the Married Women's Property Act, 1882, and s. 10 of the Supreme Court of Judicature, 1875, set out infra at pp. 1211 and 1212, have been repealed. See now Bankruptcy Act, 1914 (2 HALSBURY'S STATUTES (2nd Edn.) 321), s. 36 (2) and s. 130, and Administration of Estates Act, 1925, Sched. 1, Part 1 (9 HALSBURY'S STATUTES (2nd Edn.) 718).

E

Applied: *Re Heywood, Parkington* v. *Heywood*, [1897] 2 Ch. 593. Followed: *Re Whitaker, Whitaker* v. *Palmer*, [1901] 1 Ch. 9. Applied: *Re Ambler, Woodhead* v. *Ambler*, [1905] 1 Ch. 697. Considered: *A.-G.* v. *Jackson*, [1932] All E.R. Rep. 936. Referred to: *Re Webb (Smithfield, London)*, [1922] 2 Ch. 369; *Re Patten, Official Receiver* v. *Patten*, [1936] 2 All E.R. 1119.

F

As to the administration in bankruptcy of the estate of a deceased person, see 2 HALSBURY'S LAWS (3rd Edn.) 358-364, and ibid., vol. 19, pp. 872, 873; and for cases see 4 DIGEST (Repl.) 542-547.

Cases referred to:

G

(1) *Re Genese, Ex parte District Bank of London* (1885), 16 Q.B.D. 700; 55 L.J.Q.B. 118; 34 W.R. 79; 2 Morr. 283; 4 Digest (Repl.) 351, *3195*.

(2) *Re Withernsea Brickworks* (1880), 16 Ch.D. 337; 50 L.J.Ch. 185; 43 L.T. 713; 29 W.R. 178, C.A.; 24 Digest (Repl.) 879, *8782*.

(3) *Re Maggi, Winehouse* v. *Winehouse* (1882), 20 Ch.D. 545; 51 L.J.Ch. 560; 46 L.T. 362; 30 W.R. 729; 24 Digest (Repl.) 880, *8791*.

H

(4) *Pratt* v. *Inman* (1889), 43 Ch.D. 175; 59 L.J.Ch. 274; 61 L.T. 760; 38 W.R. 200; 6 T.L.R. 91; 24 Digest (Repl.) 879, *8785*.

(5) *Re Baker, Nichols* v. *Baker* (1890), 44 Ch.D. 262; 59 L.J.Ch. 661; 62 L.T. 817; 38 W.R. 417; 6 T.L.R. 237, C.A.; 4 Digest (Repl.) 544, *4747*.

(6) *Re Neville, Lee* v. *Nuttall* (1879), 12 Ch.D. 61; 48 L.J.Ch. 616; 41 L.T. 363; 27 W.R. 805, C.A.; 23 Digest (Repl.) 386, *4570*.

I

(7) *Re May, Crawford* v. *May* (1890), 45 Ch.D. 499; 60 L.J.Ch. 34; 63 L.T. 375; 38 W.R. 765; 6 T.L.R. 461; 23 Digest (Repl.) 381, *4519*.

(8) *Smith* v. *Morgan* (1880), 5 C.P.D. 337; 49 L.J.Q.B. 410; 24 Digest (Repl.) 880, *8789*.

(9) *Re Albion Steel and Wire Co.* (1878), 7 Ch.D. 547; 47 L.J.Ch. 229; 38 L.T. 207; 42 J.P. 279; 26 W.R. 348; 24 Digest (Repl.) 878, *8770*.

(10) *Re Land Financiers Association* (1881), 16 Ch.D. 373; 50 L.J.Ch. 201; 43 L.T. 753; 29 W.R. 277; 10 Digest (Repl.) 994, *6836*.

A Also referred to in argument:

Re Williams, Jones v. *Williams* (1887), 36 Ch.D. 573; 57 L.J.Ch. 264; 57 L.T. 756; 36 W.R. 34; 3 T.L.R. 805; 23 Digest (Repl.) 358, *4274*.

Re West of England Bank, Ex parte Brown (1879), 12 Ch.D. 823; 48 L.J.Ch. 604; 41 L.T. 27; 27 W.R. 869; 10 Digest (Repl.) 983, *6769*.

B *Re Hopkins, Williams* v. *Hopkins* (1881), 18 Ch.D. 370; 45 L.T. 117; 29 W.R. 767, C.A.; 24 Digest (Repl.) 877, *8763*.

Re Grason, Ex parte Taylor (1879), 12 Ch.D. 366; 41 L.T. 6; 28 W.R. 205, C.A.; 4 Digest (Repl.) 524, *4572*.

Appeal from a decision of the Chancellor of the county palatine of Durham.

The testator, George Leng, who was a farmer, died on March 15, 1893, and by C his will he appointed his niece, the defendant, Jane Raine Emmerson, sole executrix, and devised to her the whole of his real and personal estate absolutely for her own benefit. The plaintiff was a creditor of the testator in respect of a claim for £100 on a promissory note, and she instituted this action on behalf of herself and all other creditors. The testator's widow claimed to prove as a creditor for the sum of £181 7s. 6d., which she alleged she had lent to the testator for payment D of rent, wages of labourers, and other farming expenses. The widow's claim was disputed by the defendant, and was ultimately allowed by the registrar at £71 3s., which, together with taxed costs for proving same and interest, amounted to £105 16s. 8d. On the action coming on before the registrar for further consideration the plaintiff's solicitors raised the objection on behalf of the creditors that the estate was insolvent, and that, therefore, the widow's claim was, by the joint effect of E s. 3 of the Married Women's Property Act, 1882, and of s. 10 of the Judicature Act, 1875, liable to be postponed to the claims of all other creditors for value. The widow contended that the estate at the testator's death was solvent, and would still be so but for the costs of the action; and that, though s. 10 of the Judicature Act, 1875, specially mentioned the costs of winding-up a company, there was no such reference to the costs of an administration suit, and the section, therefore, F could not apply. The registrar decided that the widow's claim must be postponed, and that s. 10 of the Act of 1875 applied, because the question was not one as between secured and unsecured creditors, but was one of a debt or liability provable. On appeal the Chancellor of the County Palatine of Durham upheld the decision of the registrar. From the Chancellor's decision the widow appealed.

G *J. H. Redman* for the widow.
Gatey for the plaintiff.
G. W. M. Dale for the executrix.

Cur. adv. vult.

Mar. 11, 1895. **LINDLEY, L.J.**, read the following judgment, in which **LORD HALSBURY** concurred: This case turns on the combined effect of s. 3 of the Married H Women's Property Act, 1882, and s. 10 of the Judicature Act, 1875. Section 3 of the Married Women's Property Act is curiously framed. It provides:

> "Any money . . . of the wife lent . . . by her to her husband for the purpose of any trade or business carried on by him . . . shall be treated as assets of her husband's estate in the case of his bankruptcy, under reservation I of the wife's claim to a dividend as a creditor for the amount . . . of such money . . . after, but not before, all claims of the other creditors of the husband for valuable consideration . . . have been satisfied."

Money lent always becomes the property of the borrower as soon as he gets it. The money is his, although he owes money to the same amount with or without interest as the case may be. The section, nevertheless, first of all makes money lent or entrusted by a wife to her husband for the purposes of his trade his assets in the event of his bankruptcy. This, I suppose, is intended to be a qualification of the previous s. 2, which, as regards property, treats a married woman as

feme sole. The qualification, however, is not general, but is confined to the case of her husband's bankruptcy, by which is meant when he has been adjudicated. If the section had stopped there the wife would have had no claim against the assets of her bankrupt husband even after payment of his other creditors; her assets would have to be treated in bankruptcy as his. To prevent this, words are added to preserve her rights when all his creditors for money or money's worth are paid. Subject to their payment she may claim a dividend as a creditor. But she can claim nothing in the bankruptcy until after payment of all her husbands' other creditors. In other words, in bankruptcy she has no provable debt until her husband's other creditors are paid. This is the short effect of the section, although it is most awkwardly expressed. *Re Genese, Ex parte District Bank of London* (1) is quite in accordance with this view. It was there held that a wife could not prove against her husband's estate until his other creditors had been paid 20s. in the pound.

I pass now to the Supreme Court of Judicature Act, 1875, s. 10, which provides:

> ". . . in the administration by the court of the assets of any person . . . whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail . . . as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities, respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt . . ."

Few sections in the Judicature Act have created more difficulty than this, but certain points are now settled. It is settled that the rules in bankruptcy which increase a bankrupt's assets—e.g., the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions—do not apply to the administration in Chancery of the assets of a deceased person. Those assets must be ascertained by applying the general laws of property and not the special rules applicable only to cases of bankruptcy. The authorities for this proposition are *Re Withernsea Brickworks* (2), which was followed in *Re Maggi* (3), and *Pratt* v. *Inman* (4): see also *Re Baker* (5). Two further rules have been settled, viz., first, that the common law right of an executor or administrator to retain a debt due to himself is not affected by s. 10 of the Judicature Act, 1875: *Re Neville, Lee* v. *Nuttall* (6); *Re May* (7); secondly, that this section has not deprived judgment creditors of their right to be paid in priority to other creditors in an administration action, although they have no priority in bankruptcy: see *Smith* v. *Morgan* (8); and *Re Maggi* (3).

In *Re Maggi* (3), FRY, L.J., came to this conclusion. But in commenting on s. 10 of the Judicature Act, 1875, he seems to have overlooked the words "as to debts and liabilities provable," and he considered that s. 32 of the Bankruptcy Act, 1869, which enacted that subject to certain specified exceptions all debts should in bankruptcy be paid pari passu, was not made applicable to administration actions. No doubt, if that section were held applicable in all cases, it would exclude the right of an executor to retain his own debt and would deprive judgment creditors of their priority. But these persons are entitled to preference on grounds peculiar to themselves, and the rules which favour them are rather exceptions to ordinary rules as to payment of debts than illustrations of those rules. While I recognise the exceptions, I cannot myself go so far as to say that the general rule in bankruptcy which requires debts (with some exceptions) to be paid pari passu is not applicable in administration actions where the estate being administered is insolvent. Whether debts entitled to priority in bankruptcy are to be treated as entitled to similar priority in administering the assets of a deceased insolvent was a question on which decisions were conflicting: cf. *Re Albion Steel and Wire Co.* (9) and *Re Land Financiers Association* (10). All doubt on this point was, however, removed by s. 1 (6) of the Preferential Payments in Bankruptcy Act, 1888

A [repealed by Bankruptcy Act, 1914], which makes the rules in bankruptcy applicable.

Construing s. 10 of the Judicature Act, 1875, by the decisions and by the express provision of s. 1 (6) of the Act of 1888, the rules in bankruptcy as to debts and liabilities provable must now, I think, include all rules as to priorities expressly enacted by any statute and made applicable in the event of bankruptcy. The B priority conferred in the case of bankruptcy by the Married Women's Property Act, s. 3, must therefore, in my opinion, be treated as imported by s. 10 of the Judicature Act, 1875, into the administration of the estates of deceased insolvents. It was urged that the last part of s. 3 of the Married Women's Property Act was only a qualification of the first part, and that, as the first part of the section does not affect debts provable, but relates only to what are to be treated as assets, that C part of the section is not one of the rules in bankruptcy to which s. 10 of the Judicature Act, 1875, applies, and that consequently the second part, which is in effect a proviso to the first, cannot be regarded as one of such rules. I confess that I was at first disposed to think this view correct, but on reflection I cannot adopt it. If we were to accede to this argument we should be attaching too much weight to the first part of the section and too little to the second part, and we should D miss the true meaning of the section as a whole. I have already stated what I take to be its effect, and, although it is badly drawn, the section is really a statutory rule postponing a wife's claim against her husband's estate in bankruptcy to the claims of his other creditors. This is, therefore, one of the rules, as to debts provable, which by s. 10 of the Judicature Act, 1875, have to be observed in E administering the estates of deceased insolvents.

This conclusion is not inconsistent with *Re May, Crawford* v. *May* (7), which was not a case of proof but of retainer by the wife as her husband's administratrix. The legislature has not yet thought proper to alter the law of retainer, and s. 3 of the Married Women's Property Act is not addressed to that subject. It only remains to notice the point that the husband's estate is not proved to be insolvent. F When he died his assets exceeded his debts, but unfortunately the costs of the administration action have to be provided for, and it is admitted that his estate is insolvent if the costs of the administration action are to be taken into account. But these costs must be paid out of the estate of the deceased before any question can arise which concerns the payment of his creditors. With reference to their payment and to their priorities inter se it would be contrary to common sense to G call an estate solvent when the amount divisible among them is not sufficient to pay them all in full. Reliance was placed on the phraseology of s. 10 when dealing with companies, and on the maxim expressio unius est exclusio alterius. This maxim, however, is seldom satisfactory unless some good reason can be given for supposing that the speaker really intended to exclude what he did not expressly mention. In this particular case such an intention would be unreasonable and H cannot be imputed to the legislature. The express mention of costs in dealing with companies being wound-up and the omission of all mention of costs in dealing with the estates of deceased persons are easily accounted for. The section applies to all modes of winding-up companies, but only to one mode of administering the estates of deceased persons—viz., administration by the court. It may well have been considered desirable to point out to liquidators winding-up insolvent companies I without the assistance of the court that they must deduct the costs of winding-up, and then see whether the assets left are sufficient to pay the debts in full or are insufficient for that purpose. It was quite unnecessary to instruct the judges of the High Court on such a subject. For these reasons I am of opinion that the decision of the Chancellor of the Duchy was correct, and that the appeal must be dismissed with costs.

A. L. SMITH, L.J.—The first and main question is whether, when a deceased husband's estate is being administered in the Chancery Division, and there is not

sufficient to pay the creditors in full, the rule which applies in bankruptcy as to the wife's proof against her husband's estate for money lent by her to him for the purposes of his trade is to be imported when the widow claims in the administration against the estate of her deceased husband.

The statutes which relate to this point are as follows. By s. 25 (1) of the Judicature Act, 1873, it was enacted that,

> "in the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities, and future or contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

By s. 10 of the Judicature Act, 1875, that sub-section is repealed, and is re-enacted with the addition that the enactment is made applicable to the winding-up of companies in addition to the administration of estates of deceased persons by the court, which are insufficient to pay the debts in full. In 1882 the Married Women's Property Act of that year became law. By s. 3 it is enacted:

> "Any money . . . of a wife lent . . . by her to her husband for the purpose of any trade or business carried on by him, shall be treated as assets of her husband's estate in the case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount . . . of such money . . . after, but not before, all claims of the other creditors of the husband . . . have been satisfied."

If the husband becomes bankrupt it is clear that the rule which is enacted by statute is that for money lent by the wife to her husband for the purposes of his trade, she is not to prove till her husband's other creditors have been satisfied; and this was rightly so held by CAVE, J., in *Re Genese* (1). We have, therefore, one statute (Married Women's Property Act, 1882) laying down in clear terms what the rule of bankruptcy is to be as regards the proof of a wife in the case of bankruptcy of her husband, and another statute (Judicature Act, 1875) enacting that in administering insolvent estates of deceased persons the same rules shall be observed as may be in force for the time being under the law of bankruptcy. So far matters are apparently clear; but it is said that, although there are these two statutes standing together, it has been decided that the rule laid down in s. 3 of the Married Women's Property Act, 1882, is not, by s. 10 of the Judicature Act, 1875, imported into administrations of deceased husbands' estates which are insolvent. In the first place, I know of no case which deals with the conjoint operation of s. 10 of the Act of 1875 and s. 3 of the Act of 1882, with the exception of *Re May* (7), which was not a case—as the learned judge himself pointed out—of the widow seeking to prove, but of the right of retainer by the widow, to which s. 3 of the Act of 1882 did not apply. It is true that it has been held by authority which cannot be controverted that all the rules of bankruptcy are not incorporated into the administration of insolvent estates by s. 10 of the Act of 1875, and the question now is whether the rule in s. 3 of the Act of 1882 is so or not.

It is difficult to extract from the cases the principle upon which each has been decided with this exception, that I think it may be stated that the courts have held that s. 10 of the Judicature Act, 1875, does not import into administrations those provisions of the bankruptcy law which merely go to swell the assets of the estate which is being administered; such, for instance, as the provisions by which a judgment creditor is not allowed to reap the benefit of his execution by reason of a bankruptcy intervening before its completion (*Re Withernsea Brickworks* (2)), followed by CHITTY, J., in *Pratt* v. *Inman* (4), or the provision that money received

by way of a fraudulent preference must be returned. But has any binding authority gone further, and held that the rules as to proof of debts in bankruptcy are not incorporated? If there be such an authority, what becomes of the express words in s. 10 of the Act of 1875, "the same rules shall prevail . . . . . as to debts and liabilities provable"? Cotton, L.J., in *Re Withernsea Brickworks* (2), stated what I take to be the principle, if there be one to be extracted from the cases, when he said (16 Ch.D. at p. 341):

> "What is proposed to be done in the present case is not to apply a particular rule to the administration of the assets of the company, but to bring into the assets something which, apart from this section [s. 10], would not be assets because it has been seized by a creditor under such circumstances that he can hold it as a security for his debt."

As regards swelling the assets to be distributed, it appears to me that the cases have decided that the law of bankruptcy does not apply; but as regards the distributing of the assets, i.e., as regards the proofs to be allowed, I find no case binding me to hold that the rules of bankruptcy do not apply. It is true that in 1882 Fry, J., in *Re Maggi* (3), held that the bankruptcy rule that all debts shall be paid pari passu (s. 32 of Bankruptcy Act, 1869) was not imported into the administration of insolvent estates, and that consequently a judgment creditor took priority over other creditors; and he placed what he termed the narrower construction upon s. 10 of the Judicature Act, 1875, and held it was confined to cases in which the rights of a class of secured creditors were conflicting with a class of unsecured creditors, and had no application to the rights inter se of the members of those classes. This is not a decision upon the conjoint operation of the statutes which we have now to consider, and I, therefore, do not inquire if the construction of s. 10 is not too narrow, and moreover that case does not bind me.

What is the true reading of s. 3 of the Act of 1882? It is said that the first part of the section goes to swell the assets of the estate which is being administered, and this is true, for without the first link of the section the wife's money would have been a provable debt, and it not being so until after the other creditors are satisfied the assets are pro tanto enhanced. But this is not all the section enacts, for it expressly and in unmistakable terms enacts that her proof shall be postponed until the other creditors of the husband are satisfied. It appears to me that s. 3 of the Married Women's Property Act is explicit as to the proof of the wife. I cannot get over the enactment, and I do not see that the cases cited bind me to hold otherwise. I, therefore, am of opinion that the Chancellor arrived at a right conclusion. As to whether the costs of administration were to be added before ascertaining whether the deceased husband's estate could pay its liabilities in full, I am of opinion that they must be, though in this case they certainly appear to me to be very large.

Solicitors: *A. S. C. Doyle*, for *J. Ingram Dawson*, Barnard Castle; *Huntington & Leaf*, for *Richardson & Piper*, Barnard Castle; *Belfrage & Co.*, for J. H. Holmes, Barnard Castle.

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

A

LABOUCHERE *v.* HESS AND ANOTHER

[CHANCERY DIVISION (North, J.), November 26, 27, 1897]

[Reported 77 L.T. 559; 14 T.L.R. 75]

B

Copyright—Letters—Right of writer to restrain publication—Circumstances justifying publication.

The court will restrain a person who is in possession of letters from publishing them against the will of the writer, except under special circumstances, e.g., where the publication is necessary for the purpose of clearing the defendant's character. The first defendant not having shown that his purpose in publishing certain letters, as he threatened to do, was to clear his character, an injunction was granted against him. An injunction was refused against the second defendant, the widow of the recipient of the letters which had been written to him by the plaintiff, on her stating that she was about to publish a book about her husband's life in which she proposed to publish some of the letters.

C

D

Notes. Referred to: *Philip* v. *Pennell*, [1907] 2 Ch. 577.

As to copyright in letters, see 8 HALSBURY'S LAWS (3rd Edn.) 377, 378; and for cases see 13 DIGEST (Repl.) 99-101.

Cases referred to:

E

(1) *Pope* v. *Curl* (1741), 2 Atk. 342; 26 E.R. 608, L.C.; 13 Digest (Repl.) 99, *410*.

(2) *Thompson* v. *Stanhope* (1774), Amb. 737; 27 E.R. 476, L.C.; 13 Digest (Repl.) 100, *422*.

(3) *Lord and Lady Perceval* v. *Phipps* (1813), 2 Ves. & B. 19; 35 E.R. 225; 13 Digest (Repl.) 99, *419*.

F

(4) *Gee* v. *Pritchard* (1818), 2 Swan. 402; 36 E.R. 670; 13 Digest (Repl.) 100, *421*.

(5) *Earl of Granard* v. *Dunkin* (1809), 1 Ball & B. 207; 13 Digest (Repl.) 101, **98*.

(6) *Boosey* v. *Jefferys* (1851), 6 Exch. 580; 20 L.J.Ex. 354; 17 L.T.O.S. 110, Ex. Ch.; reversed sub nom. *Jefferys* v. *Boosey* (1854), 4 H.L.Cas. 815; 24 L.J.Ex. 81; 23 L.T.O.S. 275; 1 Jur.N.S. 615; 3 C.L.R. 625; 10 E.R. 681, H.L.; 13 Digest (Repl.) 75, *189*.

G

(7) *Earl of Lytton* v. *Devey* (1884), 54 L.J.Ch. 293; 52 L.T. 121; 1 T.L.R. 41; 13 Digest (Repl.) 99, *413*.

(8) *Hopkinson* v. *Lord Burghley* (1867), 2 Ch. App. 447; 36 L.J.Ch. 504; 15 W.R. 543, C.A.; 13 Digest (Repl.) 99, *412*.

Action for an injunction to restrain the defendants from publishing letters written by the plaintiff to the husband of one of the defendants.

H

The plaintiff, Henry Labouchere, M.P., was the proprietor and editor of the weekly paper "Truth." The first defendant, Hess, was the editor and publisher of a weekly paper called the "African Critic." On Oct. 2, 1897, the defendant published a supplement to his paper headed:

> "The stock-jobbing of Henry Labouchere, M.P. for Northampton, proprietor of 'Truth' and late member of the British South Africa Committee,"

I

which consisted of an attack on Mr. Labouchere in respect of his transactions on the Stock Exchange many years before. The supplement contained the following passage:

> "I have, however, in my possession complete proofs that Mr. Labouchere also carried on his stock-jobbing transactions in later years, and, if necessary, I shall be quite willing to publish them; but before doing so, I desire to challenge Mr. Labouchere to refute, if he can, the charges already proved

against him by me. This is Oct. 2, 1897. I will give him until the last day of this year—i.e., three months—to have his innings, as his friends call it, and take such steps to vindicate his character as the aspersions I have cast upon it call for. If by Dec. 31, 1897, he shall not have taken any such measures, I intend, beginning with my issue of Jan. 1, 1898, to commence a series of revelations about his latter-day conduct which I promise will pale the disclosures already made into utter insignificance."

In "Truth" of Oct. 7 Mr. Labouchere published his answer to the charges in an article which contained the following passage:

"You have my leave to comment on my articles in the 'World' as you please. You may publish and republish my letters to Mr. Beer as often as you please. I should not have to bring an action in order to hinder this. A letter belongs to the writer, and I might obtain an injunction tomorrow to prevent your publication of any of mine. I have, however, you will be glad to hear, not the remotest intention to take this course. You may continue to scatter broadcast gratis copies of your journal in which you prove that I was a quarter of a century ago worthy of penal servitude, or, if you prefer it, that I ought to have been hanged a quarter of a century before that. You will not draw me."

On Oct. 6 the defendant in his paper referred to an action brought by Mr. Holloway against a newspaper for libel, in which Mr. Holloway had objected to having any Jews on the jury, and quoted from the current issue of "Truth" a passage which he said showed that Mr. Labouchere rather fancied Jews as jurors and added:

"One of the first Labouchere letters which I shall publish in facsimile next year will show the reason why Mr. Labouchere considers Jews to make good jurymen."

On Nov. 15, 1897, the plaintiff brought this action against Hess and the second defendant, Mrs. Sala, the widow of G. A. Sala, to restrain them from publishing any letters written by the plaintiff to Mr. G. A. Sala, to which he believed that the defendant's threats referred, and from informing any person or persons of their or any of their contents. The plaintiff stated in an affidavit that he had been an intimate friend of Mr. Sala, who died in 1895; that he had written to him many letters extending over a period of twenty years; that these letters were wholly of a private nature; and that the plaintiff was informed and believed that Mrs. Sala, acting in collusion with Hess, had recently made over to him a considerable number of letters written by the plaintiff to G. A. Sala, for the purposes of publication, and intended to supply him with others for the purpose of publication. The fact that some letters from the plaintiff to G. A. Sala were in the possession of Hess was admitted. Mrs. Sala stated that upon her marriage in 1890 G. A. Sala handed over to her, as a wedding present, all his manuscripts, letters, and documents, and literary notes, and that she had in his lifetime, when he was in financial difficulties, at his request, disposed of and charged a considerable number of his MSS. letters and autographs for his benefit. She denied that she was acting in collusion with Hess for the purpose of publishing the plaintiff's letters, which she still had in her possession, or had any intention of publishing them, except that she was about to publish a life of her husband, in which she proposed including certain letters to him from the plaintiff and persons of eminence. Hess admitted that he had acquired from Mrs. Sala certain letters from the plaintiff to G. A. Sala, and that one of them was the letter referred to in the "African Critic" of Nov. 6. He denied that he had undertaken to publish, or told anyone that he intended to publish, the letters, but he claimed that he was entitled to do so.

Sir Edward Clarke, *Q.C.*, and *Rowden* for the motion.
Carson, *Q.C.*, *Charles Gill*, and *J. W. Leonard* for the defendants.
Cooper Willis and *Abinger* for Mrs. Sala.

NORTH, J., after reading the passages from the "African Critic" hereinbefore set out, and stating the facts :—The first point argued before me was the general one that, as a matter of law, the court cannot restrain the publication of letters written by the plaintiff Labouchere to Mr. Sala. There may be particular exceptions which would justify the use of these letters, but the defendants' case is based on general grounds—that the defendant has the right independently of any particular reasons to publish these letters.

I think the authorities are very clear and specific against his having any such right. First of all, in *Pope* v. *Curl* (1), a case relating to the sale of a book containing letters from SWIFT to POPE, and others, LORD HARDWICKE, L.C., says (2 Atk. 342) :

> "Another objection has been made by the defendant's counsel, that where a man writes a letter, it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him; but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer. . . . It has been insisted on by the defendant's counsel, that this is a sort of work which does not come within the meaning of the Act of Parliament [Copyright Act, 1709], because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work. It is certain that no works have done more service to mankind than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this that makes them so valuable; for I must confess for my own part that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading."

In *Thompson* v. *Stanhope* (2), a case relating to the publication of the letters of the then late Lord Chesterfield, LORD APSLEY says :

> "[It] was very clear that an injunction ought to be granted. That the widow had no right to print the letters without the consent of Lord Chesterfield or his executors; that she had obtained neither the one nor the other; that Lord Chesterfield, when he declined taking the letters, and said she might keep them, did not mean to give her leave to print and publish them; that she did very ill in keeping copies of the characters, when Lord Chesterfield meant that they should be destroyed and forgot; that the executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had applied earlier, before the expense of printing was incurred. He said it was within the reason of several cases where injunctions had been granted, and cited the case of Mr. Forrester, of Mr. Webb, of Mr. Pope's LETTERS, printed by Curl, and LORD CLARENDON'S LIFE, advertised to be published by Dr. Shebbeare."

The next case to which I have to refer on this subject is *Lord and Lady Perceval* v. *Phipps* (3). That was a case in which, upon the facts stated in the bill, LORD ELDON, L.C., had granted an injunction. The injunction was in common form then, an injunction before answer. Then the answer was put in, and the application reported is an application to PLUMER, V.-C., to discharge the injunction upon the reading of the answer. The substance of the answer was that Lady Perceval had written a letter which had been published, and after the publication she denied that it was by her authority, and the intention in using the other letters, which were letters from her, was to show that it was by her authority that the letter in question had been written. On the case made by the answer no one could doubt that it was a case in which the injunction could not be maintained, and no doubt it would not have been granted if matters had been stated in the bill which

appeared on the face of the answer. It is one of the cases which shows the inception of the rule that a letter cannot be published by the receiver; but I do not think I should be doing justice to that case if I did not say this. I draw the inference from the language of the Vice-Chancellor that if the matter had come before him as a new case he would have doubted whether the court could have granted the injunction which had been granted by the Lord Chancellor. It had been granted, and, as he said in his judgment, he admits that the injunction originally was proper for this purpose, but he dissolved it upon the merits disclosed by the answer of the defendant.

Then, again, there is *Gee* v. *Pritchard* (4). That was a case before LORD ELDON, L.C. It is the leading case on this subject, and I think it is strengthened by the fact that, I gather, if the matter had come before LORD ELDON as an entirely new matter, he might have had some doubt whether he would have granted the injunction in such a case or not, but, finding what the law was, recognising the law, he says that injunctions of such a nature can be granted. He says (2 Swan. at pp. 414, 424):

"The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me, and it will not be easy to remove the weight of the decisions of LORD HARDWICKE and LORD APSLEY. The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case, I cannot agree that the doctrines of this court are to be changed with every succeeding judge. . . . I am of opinion that the plaintiff has a sufficient property in the original letters to authorise an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. Wetherell has urged with so much ingenuity, I say only that, though a letter is a subject of property, capable of being much more largely dealt with in communication than books, as, by reading to others, repeating passages, etc., yet the court has never been alarmed out of the practice of granting injunctions relative to letters, to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them, it is not deterred from giving that relief because it cannot give other relief more effectual. . . . In stating what LORD HARDWICKE says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of the court."

I think, therefore, that he was not only referring to LORD HARDWICKE's judgment in *Pope* v. *Curl* (1), but to the tradition of the profession as to such cases having existed, and injunctions having been granted in them. He was not referring to decided cases, because he especially says that he cannot at the moment refer to cases; then he goes on to refer to *Pope* v. *Curl* (1) and *Thompson* v. *Stanhope* (2). Then he says (ibid. at p. 426):

"The doctrine is thus laid down, following the principle of LORD HARDWICKE. I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the plaintiff, but if mischievous effects of that kind can be apprehended in cases in which this court has been accustomed, on the ground of property to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it. Such is my opinion, and it is not shaken by the case of *Lord and Lady Perceval* v. *Phipps* (3). I will not say that there may not be a case of exception, but if there is, the exception

must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found beween private letters of one nature and private letters of another nature. For the purposes of public justice publicly administered according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case such as the Vice-Chancellor thought the case before him where the acts of the parties supply reasons for not interfering; but that differs most materially from this case."

He continued the injunction, the terms of which are found on page 406:

"To restrain the defendants from printing or publishing the said original letters, or copies or copy of the original letters written by the plaintiff, or extracts or extract."

In addition to those cases, there are many others where a similar jurisdiction has been exercised. For example, there is the Irish case *Earl of Granard* v. *Dunkin* (5); there is the dictum of Lord Campbell in *Boosey* v. *Jefferys* (6); and there is *Earl of Lytton* v. *Devey* (7), before Bacon, V.-C., one of the latest cases on the subject, which I entirely accept subject to the qualification that I am not quite sure that the question in whom the property in the paper lies is quite as clear upon the authorities as the Vice-Chancellor seems to think it, but that is not relevant at all to the present case. There are several other cases referred to, in which forms of decree are given in Seton on Decrees. There is also *Hopkinson* v. *Burghley* (8), the question there being whether documents could be produced for the purposes of justice in a case. Turner, L.J., says (2 Ch. App. at p. 448):

"The writer of a letter trusts the receiver with his letter, and he must take the consequences of its being in his possession. The question which now arises is between a stranger and the receiver. If the sender of a letter wishes to restrain the receiver from showing it to any other person he must file a bill for that purpose. Unless that is done, the property is in the receiver. There must, however, be an undertaking not to use the documents, or any copies of them, for any collateral object."

Then Lord Cairns, one of the soundest lawyers and most able judges who ever sat on the bench, says this (ibid. at pp. 448, 449):

"The question in all these cases is, what was the purpose or object in the mind of the person sending the letter? The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used it is the production of it in a court of justice for the furtherance of the ends of justice."

Then it was required in that case to be produced, subject to the undertaking to which I have already referred.

The cases seem to me to make the law as clear as possible, and there can be no doubt that, unless there is some reason why the rule should not be applied in this case, the court has jurisdiction, and ought to restrain the defendant from publishing letters written by the plaintiff to Mr. Sala.

[His Lordship referred to the evidence and said that there appeared no reason why the publication of the letters should not be restrained in the present case. In particular, he said:] Then the defendant's counsel relies strongly on the line of argument which was successful in *Lord and Lady Perceval* v. *Phipps* (3), and he suggested that the defendant has the right to publish these letters to clear his character, to justify something he has done, or to vindicate himself. The defendant does not say that he is publishing those letters for any such reson, and, as far

as I can gather from the materials that are before me, there is no ground whatever for suggesting that he intends to publish these letters to vindicate himself or to clear his own character, which he does not suggest has been attacked in any way or requires vindication. His only purpose in publishing these letters is not to whitewash himself but to blacken the plaintiff. It is not to prove that he is an honest man, but for the purpose of proving that the plaintiff is not. It seems to me, therefore, that, as regards the first defendant, I must grant the injunction substantially as asked. The injunction asks to restrain him from using the letters for the purposes of publication; and then comes these words—"and from informing any person or persons of their or any of their contents." I think that, if I were to grant the injunction in those terms, I should be going too far. I do not know under what circumstances they might possibly be used. It may be that on some occasion they could properly be used for a legitimate purpose, but I think that I should be going too far in inserting those words in the present case. As regards Mrs. Sala, her case stands somewhat differently. Whatever may be the fact as to the time when, and the circumstances under which, she parted with the possession of the letters, she says that they were parted with during her husband's lifetime to assist in supporting them when they were in pecuniary difficulties. She adds:

> "I am not acting in collusion with the defendant, Henry Hess, for the purpose of publishing the plaintiff's letters, but I am about to publish a book entitled 'The Life and Letters of George Augustus Sala,' in which I propose publishing certain of my husband's letters received from Mr. Labouchere and persons of eminence, with copies of letters written by Mr. Sala to others, and letters to myself. I am, and have been, acquainted with the plaintiff, Henry Labouchere, but I have no ill-feeling against him, nor have I ever threatened to publish any letters of a libellous nature concerning him. I have in my possession, under the circumstances before mentioned, certain letters written by the said Henry Labouchere to my late husband, George Augustus Sala; but I have no intention of publishing the same or parting with the said letters, or divulging the contents of same, other than as before mentioned."

Therefore, there is that express denial of her intention to publish except under the circumstances that she voluntarily states—that she contemplates writing a book containing an account of her husband's life, and possibly containing letters from Mr. Labouchere and persons of eminence. I think that she ought to be advised as to how far she might publish those letters or not when the time comes, but that matter is not the subject of this action. It is a mere voluntary statement of hers of something that she intends. She denies altogether any collusion with Mr. Hess, and, as regards the letters in her own possession, she says that she has no intention of publishing them or parting with possession of them, or of divulging the contents of them. That is her statement, and I must take it to be correct, and I think, therefore, that as against her the action fails.

Solicitors: *Lewis & Lewis; Guedalla & Cross; Bernard Abrahams & Co.*

[*Reported by* J. R. BROOKE, ESQ., *Barrister-at-Law.*]

A

AJELLO *v.* WORSLEY

[CHANCERY DIVISION (Stirling, J.), March 25, 26, 27, 30, 31, April 1, 1897, January 18, 1898]

[Reported [1898] 1 Ch. 274; 67 L.J.Ch. 172; 77 L.T. 783; 46 W.R. 245; 14 T.L.R. 168; 42 Sol. Jo. 212]

B

Sale of Goods—Goods expected to be acquired—Offer by dealer by advertisement to sell manufacturer's goods at wholesale price—Goods not in dealer's possession at time of advertisement—Damage to manufacturer's trade—Injunction—Sale of Goods Act, 1893 (56 & 57 *Vict.*, *c.* 71), *s.* 5.

C

As a general rule any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he hopes or expects to acquire, and he may offer such goods for sale by advertisement or in any other lawful way and his motive in so acting cannot be inquired into.

By the Sale of Goods Act, 1893, s. 5 (1): "The goods which form the subject of a contract for sale may be either existing goods . . . or goods to be manufactured or acquired by the seller after the making of the contract of sale. . . ."

D

The defendant, a retail dealer, by advertisements in newspapers, offered for sale at trade price a new piano of the plaintiffs' manufacture. In doing so he thereby damaged the plaintiffs' trade by causing their customers to cease to give them further orders on the ground that they could not compete with the defendant if he sold pianos at that price. At the time of the first advertisements the defendant did in fact have such a new piano in stock, but the advertisements continued after it was sold. The plaintiffs refused to supply the defendant with further pianos, but the defendant expected to acquire some from other dealers. In an action by the plaintiffs for an injunction to restrain the defendant from issuing further advertisements,

E

F

Held: (i) having regard to s. 5 (1) of the Sale of Goods Act, 1893, the defendant was entitled to offer for sale by means of the advertisements goods which he expected to acquire in the future; (ii) the misrepresentation in the advertisements that the defendant had in his possession a new piano of the plaintiffs' manufacture at the dates of the issue of the advertisements was not the direct cause of the damage to the plaintiffs' trade as the same consequences would have followed had the representation been true; consequently, the plaintiffs had no right of action and were not entitled to sue.

G

Notes. Distinguished: *Spalding* v. *Gamage and Benetfink* (1914), 110 L.T. 530. Referred to: *Spalding* v. *Gamage* (1918), 35 R.P.C. 101; *Gordon Hill Trust, Ltd.* v. *Segall*, [1941] 2 All E.R. 379.

H

As to the subject-matter of a contract for the sale of goods, see 34 HALSBURY'S LAWS (3rd Edn.) 30 et seq.; and for cases see 39 DIGEST 524 et seq. For the Sale of Goods Act, 1893, s. 5, see 22 HALSBURY'S STATUTES (2nd Edn.) 989, 990.

Cases referred to:

I

(1) *Allen* v. *Flood*, ante p. 52; [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 43 Digest 111, *1164*.

(2) *Richardson* v. *Silvester* (1873), L.R. 9 Q.B. 34; 43 L.J.Q.B. 1; 29 L.T. 395; 38 J.P. 628; 22 W.R. 74; 35 Digest 36, *284*.

(3) *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598; 58 L.J.Q.B. 465; 61 L.T. 820; 53 J.P. 709; 37 W.R. 756; 5 T.L.R. 658; 6 Asp.M.L.C. 455, C.A.; affirmed, [1892] A.C. 25; 61 L.J.Q.B. 295; 66 L.T. 1; 56 J.P. 101; 40 W.R. 337; 8 T.L.R. 182; 7 Asp.M.L.C. 120, H.L.; 42 Digest 968, *6*.

(4) *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524; 61 L.J.Q.B. 535; 66 L.T. 794; 56 J.P. 837; 40 W.R. 578; 8 T.L.R. 597; 36 Sol. Jo. 539, C.A.; 32 Digest 170, *2086*.

Also referred to in argument.

Bradford Corpn. v. *Pickles*, ante p. 984; [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 42 Digest 972, *34*.

Glover v. *London and South Western Rail. Co.* (1867), L.R. 3 Q.B. 25; 37 L.J.Q.B. 57; 17 L.T. 139; 32 J.P. 39; 17 Digest (Repl.) 124, *350*.

Sharp v. *Powell* (1872), L.R. 7 C.P. 253; 41 L.J.C.P. 95; 26 L.T. 436; 20 W.R. 584; 17 Digest (Repl.) 115, *279*.

Canham v. *Jones* (1813), 2 Ves. & B. 218; 35 E.R. 302; 43 Digest 296, *1226*.

White v. *Mellin*, [1895] A.C. 154; 64 L.J.Ch. 308; 72 L.T. 334; 59 J.P. 628; 43 W.R. 353; 11 T.L.R. 236; 11 R. 141, H.L.; 28 Digest (Repl.) 766, *204*.

Action for an injunction to restrain the defendant from advertising for sale goods of the plaintiffs' manufacture at trade price unless such goods were actually in the defendant's possession at the time of the issue of the advertisement.

The plaintiffs were manufacturers of pianos carrying on business in London, who made and supplied their customers with various classes of pianos, including class 1, the Britannia model, supplied to the trade at 15 guineas; class 2, supplied to the trade at 17 guineas; and class 6a, described in the price list as an "upright grand, iron frame, check action trichord," supplied to the trade at £23 10s., in all cases with 5 per cent. discount for cash and four months' credit allowed.

The defendant was a furnishing contractor, who carried on business in an extensive way at Manchester. In the early part of 1895 the plaintiffs supplied the defendant with several pianos—two of class 2, at the trade price, on Jan. 26 and Feb. 15; one of class 6a on April 25; and two of the Britannia model on April 23 and May 5. The last two (the Britannia models) formed part of an order for twelve pianos of that class which had been given by the defendant to the plaintiffs, but which, in consequence of some dissatisfaction of the plaintiffs with the advertisements issued by the defendant, the plaintiffs refused to execute. Their definite refusal so to do became known to the defendant at an interview between him and the senior partner of the plaintiffs' firm in August, 1895. On Feb. 22, 1896, the defendant published in the "Manchester Evening News" (a newspaper having a large circulation in Manchester and the neighbourhood) an advertisement in the following form:

"Great Sale of Pianos at Worsley's.
Hundreds of Bargains on View.
Pianos by all the Great Makers.
Worsley's, the Pantheon Gaythorne.

. . . . . .

Special List.

. . . . . .

New Instruments at Worsley's.

. . . . . .

A fine upright Grand by Ajello, iron frame, check action, trichord. Price 15 guineas, or 15s. per month."

A similar advertisement appeared in the same paper from Feb. 24 to 29, both dates inclusive, and on Mar. 2 to 7; and a similar advertisement appeared in the "Northern Daily Telegraph" on Mar. 5, 25 and 28, and on April 2, 4, 6, 7, 8, 16 and 17. The object of the action was to restrain the continuance of these advertisements. By the statement of claim the plaintiff sought (i) an injunction to restrain the defendant from maliciously or for the purpose of injuring the plaintiffs in their trade, advertising or otherwise offering for sale (a) either a new pianoforte of the plaintiffs' manufacture at the price of 15 guineas (such being less than the plaintiffs' wholesale price for a similar pianoforte) or any other sum less than the wholesale price, or

(b) that which is not in fact a new pianoforte of the plaintiffs' manufacture as a new pianoforte of the plaintiffs' manufacture; (ii) an injunction to restrain the defendant, his servants and agents, from passing off or attempting to pass off pianofortes not of the plaintiffs' manufacture as or for the goods of the plaintiffs by advertisement or in any other way; (iii) damages for injuring the plaintiffs in their trade; (iv) damages for passing off; and (v) costs. So far as it sought to restrain the defendant from passing off or attempting to pass off goods of other manufacturers as those of the plaintiffs' the case was abandoned at the trial, it being admitted that there was no evidence to support any such charge against the defendant. At the Bar what was sought was an injunction not in the form asked by the statement of claim, but in a modified form.

The defendant in cross-examination admitted that he had one new instrument in stock, and it was admitted that at the dates of several of the advertisements complained of the defendant had no pianos of the plaintiffs' manufacture in stock. Therefore the advertisements were not in accordance with the fact. It was established by the evidence that the plaintiffs suffered damage by reason of the defendant's advertisement. This was proved by certain of their customers who were retail dealers in pianos and who declined to give the plaintiffs further orders on the ground that, buying as they did at the list price of fifteen guineas, they could not sell new pianos of the plaintiffs at the price advertised by the defendant, and that so long as these advertisements continued the public, believing that they could be supplied at the price advertised for the plaintiffs' pianos, would refuse to deal at a higher price. Henry Sharples, one of the plaintiffs' customers and witnesses and a pianoforte and musical instrument dealer at Blackburn, said that at the time when these advertisements began to be issued one of the plaintiffs' Britannia model pianos was in stock for which he had paid fifteen guineas. He had an application for it from a customer and asked £24. The customer refused to give it and called attention to the defendant's advertisements. He further stated that, though there was no difficulty in selling the plaintiffs' pianos, yet, that after the advertisements he was unable to sell the one he had, and ultimately sent it away to a town in Yorkshire where it was sold.

The defendant described his business as that of a general furnishing contractor, carpet factor, and piano manufacturer and dealer. He stated that the practice in his business was to advertise for sale articles in which he dealt, and in order to attract the public, to select goods which had been for some time in stock and offer them at a low price yielding little or no profit, while other goods were offered at prices which yielded considerable profit; and that on the whole he was enabled to carry on his business and make a profit. He further stated that, at the commencement of 1896, he fixed on pianos as the subject of advertisement, and began to advertise them as early as February, 1896; that at that date he had in stock an instrument of the plaintiffs', of the Britannia model class, and that he selected it (among others) as to be offered at a low price, and that the advertisement was intended originally to refer to this particular piano. This particular piano must, having regard to the admissions in the action, have been sold before Feb. 22, but the advertisement still continued. One explanation given by the defendant of this was, that for a time he was prepared to take orders from customers for the plaintiffs' pianos. Though, if he could not get them direct from the plaintiffs he had, he said, lots of dealers who could supply him, though no doubt the plaintiffs would refuse to sell to such dealers if they knew who they were. He said also, that it was difficult, or at all events would cause additional expense, to alter the advertisements in the newspapers after directions had been given for their insertion.

With reference to the question whether the defendant's advertisement was a fair description of a piano of the Britannia model class, Ajello the senior member of the plaintiffs' firm, in cross-examination admitted that a piano of that class was trichord, had an iron frame, and a check action of a kind, but could not be called properly an "upright grand." Thus the term appeared, even according to the

plaintiffs' witnesses, to have an elastic character, and not to have any definite meaning in the trade. It was applied by different dealers differently.

Hastings, *Q.C.*, and *J. Cutler*, *Q.C.*, for the plaintiffs.
Woods, *Q.C.*, and *Macnaghten*, *Q.C.*, for the defendant.

[HIS LORDSHIP considered that the judgment in the case ought to stand over until the decision of the House of Lords in *Allen* v. *Flood* (1) (ante p. 52) had been given.]

Cur. adv. vult.

Jan. 18, 1898. **STIRLING, J.**, having stated the facts and reviewed the evidence, came to the conclusion that the advertisement was a highly coloured, but not inaccurate, description of the piano in question and that there were no grounds to disbelieve the defendant's account of the circumstances of the insertion of the advertisement. He continued.—What the plaintiffs claimed at the Bar by their counsel was an injunction to restrain the defendant from advertising for sale any of the plaintiffs' pianos unless he had in his possession a piano of the plaintiffs' manufacture and of the class advertised. By limiting the claim to an injunction so limited they virtually admit—and I think rightly—that if the defendant had in his possession a piano of the plaintiffs' manufacture and of the class advertised at the time, he might offer it for sale at any price he chose. Indeed, it appears plain that the owner of any property is entitled to sell or dispose of it for such consideration as he may see fit and either at a profit or at a loss.

I take it that it is settled by *Allen* v. *Flood* (1) that the motive of the owner in so acting cannot be inquired into. I further think that as a general rule any person may sell or offer for sale at any price whatsoever goods of which he is not the owner, but which he hopes or expects to acquire. It is expressly provided by s. 5 of the Sale of Goods Act, 1893:

> "(1.) The goods which form the subject of a contract for sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act entitled 'future goods.' (2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. (3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

And these last-mentioned goods in the Act are designated by the convenient term "future goods." If a seller contracts to sell future goods he must be at liberty as a first step of such contract to offer them for sale. And I see nothing to prevent his making such an offer by advertisement or in any other lawful way. Again, it seems to me that he is entitled to make the offer at any price he pleases, remunerative or not. It may be worth a tradesman's while to sell some goods at a loss, so long as he is able to sell others at a countervailing or more than countervailing profit.

In all this I assume that the seller is acting honestly. If what he does is tainted with fraud he may be guilty of an actionable wrong. An illustration is afforded by *Richardson* v. *Silvester* (2). There (L.R. 9 Q.B. at p. 34):

> "The particulars of the plaintiffs' claim in an action in a county court were as follows: 'The plaintiff sues the defendant in tort for legal fraud and deceit committed under the following circumstances: for that the defendant in March, 1872, caused to be inserted in a public newspaper an advertisement for the letting by tender with immediate possession of a farm; and the plaintiff, believing in the bona fides of such advertisement, and desiring to become tenant of a place of the description advertised, did take trouble and pains and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of becoming tenant

thereof, whereas afterwards it appeared that the defendant had no power to let the property as advertised and caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. And that the defendant knew at the time he caused that advertisement to be published that he had not the power to let the farm and that the farm was not to be let.' The county court judge ruled that the particulars disclosed no cause of action and non-suited the plaintiff. *Held*: that the particulars contained allegations amounting to a fraudulent representation for which an action would lie."

In the present case the plaintiffs had, in the autumn of 1895, refused to supply the defendant with any of their pianos, and they continued such refusal down to the commencement of the action. The defendant, therefore, could not get from the plaintiffs any of their new pianos, but in my opinion he might by indirect means have acquired new pianos of theirs upon terms which would not indeed enable him to sell at a profit, but which need not have involved a ruinous loss. If, then, the defendant had seen fit to advertise that he was prepared to supply new pianos of the plaintiffs' manufacture of the Britannia model type, then I think he would have been within his legal rights.

It is said, however, that the advertisement actually published contained two misrepresentations, first, that the piano to which it related (being according to the defendant's statement of the Britannia model type) was described as "upright grand, with check action and trichord," and second, that such piano was in the possession of the defendant at the several dates when the advertisement appeared. As regards the first point, as I have already stated, in my opinion the description cannot be treated as inaccurate, and in argument the main stress was laid on the second point. In my judgment this misrepresentation does not make the advertisement fraudulent, and in order that a misrepresentation may be actionable it must not only be untrue, but must cause damage. Therefore beyond the damage to the plaintiffs it must be attributable as a cause of damage to the person who complains of it. The question then arises, is the damage complained of by the plaintiffs attributable to the misrepresentation of fact contained in the advertisement. It appears that this question must be answered in the negative, for an advertisement such as, in my opinion, the defendant might legally have issued, would have produced precisely the same consequences, and have been followed by the same damaging results.

No decision in support of such an action as the present was cited in argument. What was mainly relied on by the plaintiffs' counsel was the general statement of the law laid down by BOWEN, L.J., in the Court of Appeal in *Mogul Steamship Co.* v. *MacGregor, Gow & Co.* (3). He states the law thus (23 Q.B.D. at p. 614):

> "What then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it."

Then he proceeds to give a number of illustrations, and what, I think, are general propositions. I do not think it necessary to inquire whether the law laid down by the House of Lords in *Allen* v. *Flood* (1) imposes any limitations or qualifications on the views there expressed; for, in my opinion, the present case does not fall within the class in which damage caused by misrepresentation arises within the

meaning of the lord justice. The class of cases which he had in mind was that of which *Ratcliffe* v. *Evans* (4) is an example. It was there held that, where a defendant had intentionally published an untrue statement regarding the plaintiff's business, and thereby had in the ordinary course caused damage to the plaintiff, he was liable. Here the untrue statement related to the defendant's own business, and I may point out that, if it affected the plaintiffs' business at all, it did not affect it exclusively, for Mr. Sharples and every music-dealer in the neighbourhood of Manchester who happened at the time to have the plaintiffs' pianos in his shop, suffered damage as well as the plaintiffs. However, for the reasons I have already stated, I think the damage to the plaintiffs was not caused by the misrepresentation contained in the advertisement; consequently, the action fails and must be dismissed.

I cannot, however, approve of the defendant's conduct. The advertisement was not such as ought to have been published, and great negligence was shown as regards the withdrawal of it. I think, therefore, that the defendant is not entitled to any costs of the action, except in so far as these costs have been increased by the unfounded charge (namely, that of passing off as of the plaintiffs' manufacture a piano that was not so) which forms the subject of para. (ii) of the prayer in the statement of the claim. These costs will be paid by the plaintiffs.

Solicitors: *R. Raphael & Co.; Pritchard, Englefield*, for *G. R. Lloyd & Davies*, Manchester.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

CONSOLIDATED EXPLORATION AND FINANCE CO. *v.* MUSGRAVE

[CHANCERY DIVISION (North, J.), November 2, 3, 1899]

[Reported [1900] 1 Ch. 37; 69 L.J.Ch. 11; 81 L.T. 747; 64 J.P. 89; 48 W.R. 298; 16 T.L.R. 13]

Criminal Law—Bail—Indemnity against possible loss given to bailor by third person—Legality.

A contract by a third party to indemnify a person who has agreed to go bail against a loss to him occasioned by the non-appearance of the accused to stand trial in a criminal matter is contrary to public policy and illegal.

In consideration of the defendant agreeing to go bail for A. and J., who were being prosecuted on a charge of fraud, A. procured a transfer of shares, the property of the plaintiff company, to be made to the defendant in the usual form for a nominal consideration as an indemnity to the defendant for any loss he might incur through agreeing to go bail. The defendant wrote to A. setting out the terms of the agreement. In the result the defendant went bail on the terms of the agreement for J. only, who absconded. The defendant's recognisances were estreated and he was obliged to pay a considerable sum of money. He therefore retained the shares. The plaintiff company went into liquidation, and the investigation of its affairs resulted in an action against the defendant to compel him to re-transfer the shares.

Held: the indemnity being against public policy and illegal, the transfer of the shares to the defendant was also illegal and void and the defendant must re-transfer the shares to the plaintiff company.

Notes. Approved: *R.* v. *Porter*, [1908-10] All E.R. Rep. 78.

As to bail, see 10 HALSBURY'S LAWS (3rd Edn.) 373 et seq.; and for cases see 14 DIGEST (Repl.) 170 et seq.

Cases referred to : A

(1) *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548; 50 L.J.M.C. 145; 45 L.T. 219; 45 J.P. 831; 14 Cox, C.C. 624; 14 Digest (Repl.) 171, *1358.*

(2) *Herman* v. *Jeuchner* (1885), 15 Q.B.D. 561; 54 L.J.Q.B. 340; 53 L.T. 94; 49 J.P. 502; 33 W.R. 606; 1 T.L.R. 445, C.A.; 14 Digest (Repl.) 171, *1361.*

Action by the plaintiff company for a declaration that the defendant should be declared a trustee for them of 1,500 preference shares transferred to him as indemnity against loss occasioned by estreated bail, and that the defendant should be compelled to re-transfer the shares to them. B

In October, 1897, William H. Ainsworth and Francis R. Jordan with others were prosecuted for fraud in connection with the promotion of a company known as Thomas Edward Brinsmead & Sons, Ltd.; and the defendant Christopher G. Musgrave, at the request of W. H. Ainsworth, agreed to become bail for him and F. R. Jordan on receiving as security 1,500 preference shares in the London Woollen Co., Ltd., who were also made defendants to the action. The terms of the agreement were set out in a letter dated Dec. 23, 1897, written by the defendant Musgrave to W. H. Ainsworth, as follows : C

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"In consideration of your transferring into my name 1,500 shares in the London Woollen Co., Ltd., I agree to become surety for you and Mr. Francis R. Jordan in the sum of £1,500 each to appear at the High Court of Justice on the trial of *R.* v. *Brinsmead and others*, and also to enter into the required recognisances with regard thereto and as to payment of costs. And I further agree, in the event of my not being called upon under the terms of my recognisances to make any payment, to re-transfer the said shares to you, or, in the event of my being called upon to provide any sum of money, to dispose only of sufficient shares to recoup for me the amount so paid by me, it being clearly understood, on the other hand, that, should I be called upon to pay such an amount as the shares in question are not sufficient to realise, you will pay me any such amount over and above the amount realised by the sale of the shares." E F

The minute book of the Consolidated Exploration and Finance Co., Ltd., contained a minute of a resolution passed by the board of directors of the company on Dec. 23, 1897, as follows :

"The matter of guaranteeing costs *Re Brinsmead* was considered, and, the Consolidated Contract Corpn. having agreed to pay by way of premium £100, and guaranteeing to indemnify this company against loss, it was resolved that 1,500 shares (London Woollen Preference) be lodged with Mr. Christopher George Musgrave on receipt of cheque from the Consolidated Contract Corpn., and a further 1,000 London Woollen Preference shares with Mr. J. Pronk." G

The transfer of the 1,500 shares to the defendant Musgrave was in the following form : H

"We, the Consolidated Exploration and Finance Co., Ltd., of 15, Queen Street, Cheapside, in the city of London, in consideration of the sum of five shillings paid by Christopher George Musgrave, of 23, Martin's Lane, Cannon Street, in the city of London (hereinafter called the said transferee), do hereby bargain, sell, assign, and transfer to the said transferee 1,500 preference shares of £1 each fully paid and numbered from 60,865 to 60,964 and from 66,504 to 67,903 inclusive of and in the undertaking called the London Woollen Co., Ltd., to hold unto the said transferee, his executors, administrators, and assigns, subject to the several conditions on which we held the same immediately before the execution hereof; and I, the said transferee, do hereby agree to accept and take the said shares subject to the conditions aforesaid.—As witness our hands and seals the 23rd day of December in the year of our Lord 1897." I

The transfer was duly executed on behalf of the company, and the seal of the company was affixed thereto in accordance with the articles of association of the company.

When these events took place, an application for a writ of certiorari to remove the indictment from the Central Criminal Court to the High Court was being made, so that the defendant Musgrave originally became bail for the appearance of W. H. Ainsworth and F. R. Jordan in the High Court. This application, however, fell through, and W. H. Ainsworth found another surety; but, at his request, the defendant Musgrave became bail on the terms of the letter of Dec. 23, 1897, for the appearance of F. R. Jordan to take his trial at the Central Criminal Court. In the result F. R. Jordan absconded, so that the defendant Musgrave was compelled to pay £1,500 and £15 for costs and expenses, and consequently retained the 1,500 shares which had been transferred to him. The Consolidated Exploration and Finance Co., Ltd., afterwards went into liquidation, and the investigation into its affairs resulted in the present action, which was brought against the defendant Musgrave to compel him to re-transfer the 1,500 shares to the company, which he refused to do on the ground that he held them under a contract with W. A. Ainsworth, who had procured their transfer to him as security for the amount he had been compelled to pay as bail for F. R. Jordan.

Haldane, Q.C., and *Kenyon Parker* for the plaintiff company.
E. C. Macnaghten, Q.C., and *Felix Cassel* for the defendant Musgrave.
Stewart Smith for the London Woollen Co., Ltd.

NORTH, J., stated the facts of the case, and, after saying that apart from the illegality of an indemnity to bail the security would have been valid, continued: The next question is whether the security given to the defendant Musgrave, through Ainsworth, was an illegal bargain. In my opinion, it was.

It is contended that the facts of this case do not come within the rule laid down in *Wilson* v. *Strugnell* (1) and *Herman* v. *Jeuchner* (2), and that although those cases decide that an accused person cannot himself legally give security to his bail, the rule does not apply where the security is given by a third person. For that contention there appears no authority. The exact case does not appear to have arisen; there is no such case in the books. I asked the defendant's counsel whether there was a statement in any text-book in favour of the distinction they set up. I was referred to two text-books; but the passages in them do not contain any such statement, but both correctly represent the decisions in the two cases I have mentioned. In POLLOCK ON CONTRACTS (6th Edn.) p. 316, it is stated:

> "An agreement by an accused person with his bail to indemnify him against liability on his recognisances is illegal, as depriving the public of the security of the bail."

LEAKE, in his valuable work on the same subject (3rd Edn.) p. 626, puts the matter thus:

> "Any contract or engagement having a tendency, however slight, to affect the administration of public justice would be illegal and void."

One of the instances he gives is

> "an indemnity given by a defendant in a criminal case to his bail because in effect it deprives the public of the intended security for the conduct of the defendant."

This corresponds with what SIR BALIOL BRETT, M.R., says in *Herman* v. *Jeuchner* (2). After defining a contract he says (15 Q.B.D. at p. 563):

> "When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced.

In the present case the defendant required the plaintiff to deposit £49 for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become a surety for him; the plaintiff on his part undertook to deposit the £49. That is the substance of the contract; is it illegal? To my mind it is illegal because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court—at least this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognisance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality."

Upon Mr. Musgrave becoming bail he undertook duties and had given to him corresponding powers of enforcing those duties, which powers no third person who became responsible for the bail could have. What these powers are and the reasons for investing bail with them in criminal cases are stated in PETERSDORFF ON BAIL, p. 514:

"It is essential for the security of the bail that the principal should be compelled to appear at the time and place specified in the recognisance. To enable the bail to effectuate this purpose they are invested with the same unrestricted authority over the person of the defendant as we have already seen is conferred upon them in civil cases. Indeed, in criminal proceedings the power possessed by the bail in obliging the accused to fulfil the terms of the recognisance should be even more unlimited, as by not rendering him they not only forfeit to the public the penalties imposed by law, but perhaps create, in crimes of a flagrant nature, an impossibilty of the ends of justice being accomplished. Hence they may seize his person at any time (as on a Sunday) or at any place to carry him to a justice to find new sureties, or be committed in their discharge, and in surrendering the principal they may command the co-operation of the sheriff and any of his officers."

A person who is not himself bail does not possess these powers. Therefore, it is essential that the person giving bail should be interested in looking after and, if necessary, using the powers he has to prevent the accused from escaping. This is necessary for the protection of the public, and anything tending to prevent or hinder his so doing is illegal.

Why is it not illegal for the bill to be indemnified by a third person, it being admittedly illegal for him to be indemnified by the prisoner? The reason for the illegality is the same in each case. It is argued that the public have in the third person who gives the indemnity the same security of one whose interest it is to produce the prisoner. But that is not so, for he has not the powers of the bail. I think, therefore, that the security given by Ainsworth to Musgrave is illegal and void.

It is said that the plaintiff company cannot recover the shares from Musgrave, but I do not see why. If Ainsworth were suing Musgrave there would be a difficulty in his way; but it appears that the shares do not belong to Ainsworth, but to the plaintiff company, who have not participated in the illegality. I must declare that the security is illegal and void, and order the re-transfer of the shares to the plaintiff company.

Solicitors: *Ralph Raphael & Co.; Ashurst, Morris, Crisp & Co.; Nash, Field & Co.*

[*Reported by* J. TRUSTRAM, ESQ., *Barrister-at-Law.*]

A

HOBSON *v.* GORRINGE

[Court of Appeal (Lord Russell of Killowen, C.J., Lindley and A. L. Smith, L.JJ.), December 10, 11, 19, 1896]

B [Reported [1897] 1 Ch. 182; 66 L.J.Ch. 114; 75 L.T. 610; 45 W.R. 356; 13 T.L.R. 139; 41 Sol. Jo. 154]

Hire-Purchase—Fixture annexed to freehold—Mortgage of freehold—Default of hirer in payment of instalments—Right of mortgagee in possession as against owner.

C By a hire-purchase agreement in writing, dated Jan. 7, 1895, the owner let a gas engine to the hirer to be fixed in his saw-mill on land of which he was owner in fee simple, the hirer to pay the owner £18 before delivery and £3 10s. per month thereafter for ten months, at the end of which time the engine was to become the property of the hirer. If the hirer defaulted in the instalments, the owner was to be at liberty to retake and remove the engine, the hirer having D no claim for any money paid, and it was provided that the contract should not operate as a contract for the sale of the engine, but only as an arrangement for its hire, unless and until the hirer should have paid all the instalments. The engine was annexed by screws and bolts to a concrete base level with the soil of the saw-mill. The hirer defaulted in the instalments. On July 24, 1895, he mortgaged his land, together with the saw-mill and fixtures, subject to E a proviso for redemption, and on Jan. 17, 1896, he was adjudicated bankrupt. In March, 1896, the mortgagee took possession of the premises together with the engine. In an action by the owner against the mortgagee for the return of the engine,

Held: on the true construction of the agreement coupled with the annexation of the engine to the soil, the engine became a fixture, subject as between the F owner and the hirer to the owner's right to unfix it and retake possession if the hirer failed to pay the instalments; this right imposed no legal obligation on any grantee of the land from the hirer, nor could it be enforced in equity against any purchaser of the land without notice of the right, namely, the mortgagee; and, therefore, the owner's remedy was by action against the hirer personally and the action failed.

G **Notes.** Distinguished: *Lyon & Co.* v. *London, City and Midland Bank*, [1900-3] All E.R. Rep. 598. Approved: *Reynolds* v. *Ashby & Son*, [1904-7] All E.R. Rep. 401. Considered and Distinguished: *Re Samuel Allen & Sons, Ltd.*, [1904-7] All E.R. Rep. 785. Followed: *Crossley Bros., Ltd.* v. *Lee*, [1904-7] All E.R. Rep. 1042. Distinguished: *Ellis* v. *Glover and Hobson*, [1908] 1 K.B. 388. Considered: *Becker* v. *Riebold* (1913), 30 T.L.R. 142. Applied: *Horwich* v. *Symond* (1914), H 110 L.T. 1016. Considered: *Re Morrison, Jones and Taylor, Cookes* v. *Morrison, Jones and Taylor*, [1914] 1 Ch. 50. Referred to: *Vaudeville Electric Cinema* v. *Muriset*, [1923] 2 Ch. 74; *Hulme* v. *Brigham*, [1943] 1 All E.R. 204; *L.C.C.* v. *Wilkins*, [1956] 3 All E.R. 38.

As to the test to determine fixtures, see 23 Halsbury's Laws (3rd Edn.) 491-493; and for cases see 31 Digest (Repl.) 205-206. As to a mortgagee's rights in fixtures I acquired under a hire-purchase agreement, see 19 Halsbury's Laws (3nd Edn.) 558; and for cases see 35 Digest 309-310.

Cases referred to:

(1) *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co., Re Maryport Hematite Iron and Steel Co.*, [1892] 1 Ch. 415; 61 L.J.Ch. 415; 61 L.J.Ch. 227; 66 L.T. 108; 40 W.R. 280; 31 Digest (Repl.) 223, *3599*.

(2) *Gough* v. *Wood & Co.*, [1894] 1 Q.B. 713; 63 L.J.Q.B. 564; 70 L.T. 297; 42 W.R. 469; 10 T.L.R. 318; 9 R. 509, C.A.; 31 Digest (Repl.) 231, *3670*.

(3) *Huddersfield Banking Co., Ltd.* v. *Henry Lister & Son, Ltd.*, ante p. 868; [1895] 2 Ch. 273; 64 L.J.Ch. 523; 72 L.T. 703; 43 W.R. 567; 39 Sol. Jo. 448; 12 R. 331, C.A.; 35 Digest 320, *645.*

(4) *Wiltshear* v. *Cottrell* (1853), 1 E. & B. 674; 22 L.J.Q.B. 177; 20 L.T.O.S. 259; 17 Jur. 758; 118 E.R. 589; 31 Digest (Repl.) 202, *3333.*

(5) *Mather* v. *Fraser* (1856), 2 K. & J. 536; 25 L.J.Ch. 361; 27 L.T.O.S. 41; 2 Jur.N.S. 900; 4 W.R. 387; 69 E.R. 895; 31 Digest (Repl.) 201, *3320.*

(6) *Walmsley* v. *Milne* (1859), 7 C.B.N.S. 115; 29 L.J.C.P. 97; 1 L.T. 62; 6 Jur.N.S. 125; 8 W.R. 138; 141 E.R. 759; 31 Digest (Repl.) 209, *3406.*

(7) *Climie* v. *Wood* (1868), L.R. 3 Exch. 257; 37 L.J.Ex. 158; 18 L.T. 609; 32 J.P. 712; affirmed (1869), L.R. 4 Exch. 328; 38 L.J.Ex. 223; 20 L.T. 1012, Ex. Ch.; 31 Digest (Repl.) 200, *3314.*

(8) *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123; 10 B. & S. 852; 39 L.J.Q.B. 37; 22 L.T. 385; 31 Digest (Repl.) 209, *3410.*

(9) *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; 41 L.J.C.P. 146; 26 L.T. 709; 20 W.R. 990, Ex. Ch.; 31 Digest (Repl.) 206, *3376.*

(10) *Bain* v. *Brand* (1876), 1 App. Cas. 762, H.L.; 31 Digest (Repl.) 200, *3315.*

(11) *Wood* v. *Hewett* (1846), 8 Q.B. 913; 15 L.J.Q.B. 247; 7 L.T.O.S. 109; 10 J.P. 664; 10 Jur. 390; 115 E.R. 1118; 31 Digest (Repl.) 203, *3337.*

(12) *Lancaster* v. *Eve* (1859), 5 C.B.N.S. 717; 28 L.J.C.P. 235; 32 L.T.O.S. 278; 5 Jur.N.S. 683; 7 W.R. 260; 141 E.R. 288; 31 Digest (Repl.) 205, *3369.*

Also referred to in argument:

Sanders v. *Davis* (1885), 15 Q.B.D. 218; 54 L.J.Q.B. 576; 33 W.R. 655; sub nom. *Saunders* v. *Davis*, 1 T.L.R. 499; 31 Digest (Repl.) 310, *569.*

McEntire v. *Crossley Brothers*, ante p. 829; [1895] A.C. 457; 64 L.J.P.C. 129; 72 L.T. 731; 2 Mans. 334; 11 R. 207, H.L.; 39 Digest 483, *1033.*

Wake v. *Hall* (1883), 8 App. Cas. 195; 52 L.J.Q.B. 494; 48 L.T. 834; 47 J.P. 548; 31 W.R. 585, H.L.; 31 Digest (Repl.) 225, *3621.*

Lee v. *Butler*, [1893] 2 Q.B. 318; 62 L.J.Q.B. 591; 69 L.T. 370; 42 W.R. 88; 9 T.L.R. 631; 4 R. 563, C.A.; 26 Digest (Repl.) 659, *5.*

Helby v. *Matthews*, ante p. 821; [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 26 Digest (Repl.) 660, *14.*

Appeal from a decision of KEKEWICH, J., on a motion to restrain the defendant from disposing of a gas engine to anyone other than the plaintiff.

By an indenture, dated Mar. 26, 1894, John George King, a builder, mortgaged to George Jonathan Mills, as security for a loan of £325, a piece of land situate at Worthing, Sussex, on the south side of Southcourt Road, of which he was seised in fee simple in possession. King afterwards erected a saw-mill and other buildings on the land. By an agreement in writing dated Jan. 7, 1895, and made between the plaintiff, Wilfred Hobson, and King, Hobson agreed to let to King one eleven-horse effective power Stockport gas engine complete, for the purpose of being fixed in the saw-mill on the land. It was agreed that King was to pay Hobson for the engine £18 in cash before delivery and the sum of £3 10s. per month after delivery for the period of ten months, at the expiration of which time the engine was to become the absolute property of King; if during the continuance of the hiring King should fail to pay the hire or any part thereof, Hobson should be at liberty to re-possess himself of and to remove the engine and King should have no claim against Hobson either for money he had paid for use of the engine or for any damage sustained by reason of the retaking; the contract should not be construed to operate in any way as a contract for the sale of the engine, but only as an arrangement for its hire, unless and until King should have paid the instalments. A hire plate with words thereon stating that the engine was the property of Hobson was affixed to the engine.

The engine was received by King, and erected and fitted by him personally on

the ground floor of his saw-mill. A concrete foundation was built beneath the engine, flush or level with the floor, with four upright bolts let in, one at each corner of such foundation, and projecting upwards. The engine had beneath it a cast-iron hollow base plate (like a large dish cover) fitted with four holes, one at each corner, the bottom rim only of the hollow base plate resting on the floor level of the concrete foundation when the engine was in position. The engine and base plate were placed on the concrete foundation, so that the bolts projected through the holes in the base plate. Nuts were then screwed down on to the bolts, and the engine thus kept in position and prevented from rocking or shifting, as it would have done if merely placed upon the foundation without the aid of the projecting bolts. If it were desired to remove the engine, it would only be necessary to unscrew the nuts at the tops of the four bolts, disconnect the piping by unscrewing the same, whereupon the engine could be raised and lifted off the bolts, and in that way no injury or damage done to the freehold. The exhaust pipe and exhaust boxes, which formed part of the engine, were fixed into the brickwork of the wall of the engine-house. The pulsometer, which also formed part of the engine, was fixed into the brickwork of another wall of the engine-house. There was evidence that the exhaust pipe, exhaust boxes and pulsometer could not be removed without damaging the brickwork of the walls; and that only a portion, therefore, of the engine could be removed by unscrewing the bed plate. Further, that it would be impossible to use the engine for the purpose of working the machinery in the saw-mill unless the engine was solidly fixed to the floor of the building; that the bottom or bed plate of the engine was so constructed for the purpose of being fixed on a solid foundation; and that the engine, moreover, could not be used without the pulsometer and exhaust pipe and boxes, which were essential parts of it, and were fixed into the brickwork of the building as aforesaid.

By an indenture of transfer of mortgage and further charge, dated July 24, 1895, and made between Mills of the first part, King of the second part, and the defendant, the Rev. Peter Rollins Gorringe, of the third part, after reciting the mortgage of Mar. 26, 1894, for £325, and a further advance of £75 to King by Mills, making together £400 then owing to Mills, and that the defendant Gorringe had agreed to pay Mills the sum of £400, and to lend to King the further sum of £200 on having a transfer of such mortgage, Mills, as mortgagee, and King as beneficial owner thereby conveyed to Gorringe the land, together with the saw-mill, engine-house, warehouses, workshops, stables, offices and other buildings erected or erecting on it, and the fixed machinery and fixtures, and together with such rights of way and other easements as were vested in King, to Gorringe in fee simple, subject to the usual proviso for redemption.

King made certain payments in respect of the hire of the engine under the agreement, but towards the end of 1895 he fell into arrear with them and in December, 1895, a trustee was appointed under a deed of arrangement for the benefit of his creditors. On Jan. 9, 1896, a receiving order was made against King, on Jan. 17, 1896, he was adjudicated bankrupt, and on Feb. 11, 1896, a trustee in bankruptcy was appointed. Application was made on behalf of the plaintiff Hobson to the trustee in bankruptcy notifying his claim to the engine, and his intention to re-possess it under the agreement, but on April 24, 1896, the trustee replied that, owing to the mortgagee of the property of King refusing to meet him in the matter, he was unable to come to terms with Hobson. On June 11, 1896, an inspection of the engine was made on behalf of Hobson, when it was discovered that the hire plate had been removed but that the screws which had attached it to the side of the engine had been left in position, indicating where it had been. King admitted that the hire plate was on the engine when delivered to him, and that he had given instructions for it not to be taken off, and that to the best of his belief it remained affixed to the engine up to the time when the premises were taken possession of by his trustee in bankruptcy. Application was subsequently made to defendant Gorringe (who as mortgagee had taken possession of

the property) for the return of the engine, as the property of the plaintiff, Hobson, but he refused to deliver it up. A

Hobson then commenced an action against Gorringe for the return of the engine, and notice of motion was given for an interlocutory injunction to restrain the defendant, his servants and agents, until the trial of the action or further order, from selling, disposing of, or creating any charge on, or delivering possession of the engine to any person except the plaintiff. In order to leave the defendant at liberty to proceed with the realisation of his security, the sum of £55, the agreed value of the engine, was deposited by him in a bank, in the joint names of the solicitors of the plaintiff and the defendant respectively, to abide the result of the trial. The motion, treated by consent as the trial of the action, came on before KEKEWICH, J., who decided that the gas engine, being affixed to the ground, was intended to be used as a part of the building; that it was immaterial whether it was so affixed before or after the mortgage; and that it, therefore, passed to the defendant Gorringe, the mortgagee. HIS LORDSHIP further decided that there was no right under the hire-purchase agreement to remove the engine. The plaintiff appealed. B C

Joseph Walton, *Q.C.*, and *Curtis Price* for the plaintiff. D

Warrington, *Q.C.*, and *Willoughby Williams* for the defendant.

Cur. adv. vult.

Dec. 19, 1896. **A. L. SMITH, L.J.**, read the following judgment of the court.— This case, though small as to the amount, raises a considerable question, which is whether a mortgagee of land in fee, when he enters upon the mortgaged premises, can take possession of an engine which is attached to the soil thereof by means of bolts and screws, although the engine did not and never had belonged to the mortgagor, but to a third party. E

[HIS LORDSHIP stated the facts and continued:] The question is whether Gorringe is entitled, under the above circumstances, to the gas engine. It is not disputed that he is entitled to the land, but the plaintiff, Hobson, denies that he is entitled to the gas engine upon the ground that it had never become King's property, and had always remained a chattel belonging to him, Hobson. F

There can be no doubt, upon a mortgage in fee of the land, that, as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. If NORTH, J., in the passage in his judgment in *Cumberland Union Banking Co.* v. *Maryport Hematite Iron Co.* (1) ([1892] 1 Ch. at p. 425), to which reference has been made, meant to hold otherwise, in our opinion he was in error, but we doubt if he intended so to hold. *Gough* v. *Wood & Co.* (2) decided in this court in no way assists the plaintiff in the case, and has no application to the present case. It was decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. For additional confirmation of the ratio decidendi of this case what was said by LINDLEY, L.J. ([1895] 2 Ch. at p. 282), and by KAY, L.J. (ibid. at p. 286), in *Huddersfield Banking Co., Ltd.*, v. *Henry Lister & Son Ltd.* (3), may be referred to. Even if in the present case a licence had been granted by the defendant Gorringe to King to remove the gas engine during the continuance of a term (no evidence of which in fact existed), Gorringe, by entering and taking possession of the land and engine, would have determined such licence. G H I

We now come to the real point made on behalf of the plaintiff. It is this: it is said that this gas engine never was a fixture, but always remained a chattel, and consequently never passed to Gorringe as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage to him of "fixed machinery," for, if a chattel, it ever remained Hobson's, and never was the property of King; and unless Gorringe takes the engine as being part of the land mortgaged to him, he does not take it at all. Leaving out of consideration for the present the hire-

purchase agreement of Jan. 7, 1895, there is a sequence of authorities which establish that the gas engine, affixed as it was and for the purpose for which it was to King's freehold, ceased to be a chattel, and became part of the freehold.

Take first of all *Wiltshear* v. *Cottrell* (4), where the Court of Queen's Bench held that a threshing machine fixed by bolts and screws to posts which were let into the ground, and which machine could not be got out without disturbing some of the soil, would clearly pass under a conveyance of land and all fixtures. In *Mather* v. *Fraser* (5), which was a case between the assignee of a mortgagor and mortgagees, PAGE WOOD, V.-C., held that the machinery fixed to the land, whether by screws, solder, or other permanent means, passed to the mortgagees. Again, in *Walmsley* v. *Milne* (6), a case between a mortgagor and mortgagee in fee, the Court of Common Pleas held that a steam engine and boiler and other implements secured by bolts and nuts to the wall, though they were all capable of being removed without injury either to the machinery or to the premises, were fixtures, and passed to the mortgagee as part of the freehold.

In *Climie* v. *Wood* (7), a case between mortgagor and mortgagee in fee, the jury found that an engine and boiler which were used for sawing purposes (the engine being screwed down to planks upon the ground and the boiler being fixed to the brickwork) were trade fixtures, had been so fixed for their better use and not to improve the inheritance, and that they were removable without any appreciable damage to the freehold. The Court of Exchequer, nevertheless, held that the engine and boiler passed to the mortgagee, and this judgment was affirmed by the Court of Exchequer Chamber. WILLES, J., who delivered the judgment of the court, stated that the reasons for a tenant with a limited interest being allowed to remove trade fixtures were not applicable to the owner of the fee. In *Longbottom* v. *Berry* (8), a case between assignees of a mortgagor and mortgagees, it was also held that machinery annexed to the floor of a building in a "quasi-permanent manner" by means of bolts and screws, passed to the mortgagees, and in 1872 the Exchequer Chamber, in *Holland v. Hodgson* (9), affirmed *Mather* v. *Fraser* (5) and *Longbottom* v. *Berry* (8), and held that looms attached by means of nails driven through holes in the feet of the looms into the floors, which attachment was necessary to keep the looms steady when at work, and which nails could be drawn easily and without any serious damage to the flooring, formed part of the realty, and passed to the mortgagee in fee. If there had been in this case nothing but the existing visible degree of annexation of the gas engine to King's freehold, and the known object for which such annexation had taken place, the authorities conclusively establish that the gas engine had ceased to be a chattel, and had become part of the freehold.

But it was argued that the terms of the hire-purchase agreement caused this engine to remain a chattel, notwithstanding its annexation to the soil, for it was said that the intention of the parties who placed it where it was must be considered, and if this consideration showed that the intention was that the chattel was not to be a fixture, though actually fixed to the freehold, it still remained a chattel. In support of this argument a passage in the judgment of BLACKBURN, J., in the Exchequer Chamber in *Holland* v. *Hodgson* (9) was quoted, where he said (L.R. 7 C.P. at p. 335) when dealing with what were or were not fixtures:

> "Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

The question in each case is whether the circumstances are sufficient to satisfy

the onus. It is said on behalf of the plaintiff that the hire-purchase agreement shows an intention on Hobson's part, as also on King's part, that the gas engine should remain a chattel until King had paid the contracted instalments, which he never did. If the engine had been a trade fixture erected by King as tenant, with a limited interest, we apprehend that when affixed to the soil, as it was, it would have become a fixture— i.e., part of the soil, and would immediately have vested in the owner of the soil, subject to the right of King to remove it during his term. LORD CHELMSFORD, L.C., in *Bain* v. *Brand* (10) says (1 App. Cas. at p. 722):

> "Such is the general law. But an exception has been long established in favour of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade, and annexes it to the ground, it becomes a part of the freehold, but with a power, as between himself and his landlord, of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold it can never be revived as long as it continues so annexed."

It seems to us that the true view of the hire-purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture—i.e., part of the soil—when it was annexed to the soil by screws and bolts subject as between Hobson and King to this, that Hobson had the right by contract to unfix it and take possession of it if King failed to pay him the contracted monthly instalments. In our opinion the engine became a fixture—i.e., part of the soil—subject to this right of Hobson which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. The right, therefore, to remove the fixture imposed no legal obligation on any grantee from King of the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by King's contract. The plaintiff's remedy for the price or for damages for the loss of the chattel is by action against King, or, he being bankrupt, by proof against his estate. This, in our judgment, is sufficient to determine this case in favour of the defendant, but, as another point has been stoutly argued on behalf of the plaintiff, we will deal with it.

It is said that the intention that the gas engine was not to become a fixture might be got out of the hire-purchase agreement, and, if so, it never became a fixture and part of the soil, and it was said that *Holland* v. *Hodgson* (9) had so decided. For this point it must be assumed that such intention is manifested by the hire-purchase agreement, though, as before stated, we think it is not. In *Holland* v. *Hodgson* (9), BLACKBURN, J., when dealing with the "circumstances to show intention," was contemplating and referring to circumstances which showed the degree of annexation and the object of such annexation which were patent for all to see, and not to the circumstances of a chance agreement that might or might not exist between an owner of a chattel and a hirer thereof. This is made clear by the examples that BLACKBURN, J., alludes to to show his meaning. He takes as instances (a) blocks of stone placed in position as a dry stone wall, or stacked in a builder's yard; (b) a ship's anchor affixed to the soil, whether to hold a ship riding thereto, or to hold a suspension bridge. In each of these instances it will be seen that the circumstance to show intention is the degree and object of the annexation which is in itself apparent, and thus manifested the intention. BLACKBURN, J., in his proposed rule was not contemplating a hire-purchase agreement between the owner of a chattel and a hirer, or any other agreement unknown to either a vendee or mortgagee in fee of land, and the argument that such a consideration was to be entertained in our judgment is not well founded.

A It was further argued on behalf of the plaintiff that *Wood* v. *Hewett* (11) and *Lancaster* v. *Eve* (12) showed that the intention of the parties affixing a chattel to the soil must be ascertained when considering whether a chattel is or is not a fixture and part of the soil. In our opinion these cases do not show this, and, indeed, if they did, as before stated, if the hire-purchase agreement is considered it does not show what the plaintiff says it does. In *Wood* v. *Hewett* (11) the B plaintiff, a miller, had put up a movable hatch, which worked up and down a groove in some immovable masonry and brickwork upon the defendant's land, and had so used it for years, the complaint against the defendant being that he had pulled up and taken away the hatch. The question was whether this movable hatch remained the plaintiff's or had become the property of the defendant. The jury found that this hatch remained the property of the plaintiff, and the court in banco held, as C we read the case, that the jury were well warranted in finding that between the plaintiff and the defendant the former had become entitled to have the hatch which was his own property standing in the soil of the defendant; in other words, that it might be inferred that the plaintiff had acquired an easement of having his hatch on the defendant's land, and could, therefore, sue for interference therewith. There was no question in this case between a mortgagee and a third party.

D In *Lancaster* v. *Eve* (12) the plaintiff, who was a wharfinger, many years before the action was brought, had driven a pile into the bed of the Thames, which was the property of the Crown, for the purpose of carrying on the necessary business of his wharf, and for years and years had used this pile without interruption by anyone until the defendant's barge, by reason of the negligence of the defendant's servant, ran against it and carried it away. The point taken by the defendant E was that the pile had been affixed to and formed part of the bed of the river, which was not the property of the plaintiff, and that, therefore, he could maintain no action for injury thereto; but the court held that, as between the plaintiff and the Crown, it ought to be inferred that, although the pile had been affixed in the soil of the river, yet it was so affixed by agreement between the plaintiff and the Crown that the former should have an easement over the Crown's property so as to be F able to use the pile necessary for carrying on the business of the plaintiff's wharf. This is the point decided, though there are, and has been pointed out, some isolated passages as to the intention of persons when affixing a chattel to the soil. That the plaintiff had a cause of action in some form or other against the defendant cannot be denied, but if the case decided, as it is argued it did, that the pile remained G a chattel, we do not agree with it. That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold, upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a de facto fixture becomes not a fixture, or is not a fixture as regards a purchaser of land for value and without notice, by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced.

H The point made as to the plate on the gas engine when delivered comes to nothing, for it is no more than an indication of what the agreement was between the plaintiff and King; and as there is no evidence whatever that the defendant was ever made aware of it, it cannot affect his right as mortgagee in fee of King's land. For the reasons above given we think that the gas engine became affixed to and was part of King's freehold, and thus passed to Gorringe as mortgagee in fee of King's land. I In our judgment KEKEWICH, J., was right when he gave judgment as he did for the defendant, and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *C. W. & H. B. Taylor; Edward H. Quicke*, for *H. Montague Williams*, Brighton.

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

A

ANCTIL *v.* MANUFACTURERS' LIFE INSURANCE CO.

[PRIVY COUNCIL (Lord Watson, Lord Macnaghten and Sir Henry Strong), July 25, 28, 1899]

[Reported [1899] A.C. 604; 68 L.J.C.P. 123; 81 L.T. 279] B

Canada—Insurance—Life assurance—Insurable interest—Civil Code of Lower Canada, art. 2590.

By art. 2590 of the Civil Code of Lower Canada the assured under a policy of life assurance must have an insurable interest in the life upon which the assurance is effected, and he has an insurable interest in the life (i) of himself; (ii) of any person on whom he depends wholly or in part for support or education; (iii) of any person under legal obligation to him for the payment of money, or respecting property or services which death or illness might defeat or prevent the performance of; (iv) of any person on whose life any estate or interest in the assured depends. Under a policy of assurance by the deceased with the respondent company the amount of the assurance was made payable to the appellant. In reference to a question in the proposal for the policy as to the relation between the deceased and the appellant, the deceased stated "my protector, whenever I have need of it." A further condition in the policy was that, after the lapse of a year or upwards, the policy would be incontestable provided that the premiums had been duly paid. The appellant claimed to be entitled to the amount of the assurance. C D E

Held: (i) the appellant was not a lawful holder since he had no insurable interest under art. 2590 of the Civil Code; (ii) the condition in the policy was no answer to an objection based on the Civil Code.

Notes. Referred to: *Beresford* v. *Royal Insurance Co.*, [1937] 2 All E.R. 243.

As to insurable interest in a life insurance, see 22 HALSBURY'S LAWS (3rd Edn.) 277 et seq.; and for cases see 29 DIGEST (Repl.) 377. F

Appeal from a decision of the Supreme Court of Canada (TASCHEREAU, GWYNNE, KING, and GIROUARD, JJ., SEDGWICK, J., dissenting), reversing a decision of the Court of Queen's Bench for Lower Canada (LACOSTE, C.J., BOSSÉ, BLANCHET, WURTELE, and HALL, JJ.), reversing a decision of the Superior Court (ANDREWS and CARON, JJ., CIMON, J., dissenting), on a verdict reported to them given in the Supreme Court before CIMON, J., and a jury. G

The Solicitor-General for Canada (*Fitzpatrick, Q.C.*) and *F. Russell* for the appellant.

Chase-Casgrain, Q.C., and *Grier* (both of the Colonial Bar) for the respondents.

H

July 28, 1899. **LORD WATSON.**—This action was brought by the appellant, Joseph Napoléon Anctil, against the respondent company for recovery of the contents of a policy of assurance issued by the company on May 12, 1894, on the life of one Antoine Pettigrew. The amount of the assurance, which was for 2,000 dollars, was by the policy made payable to the appellant, his executors, administrators, and assigns, under deduction of the premium for the current year, on its being proved, I to the satisfaction of the office, that the death of the assured had taken place whilst the policy was still current. One of the conditions of the policy which has led to the present controversy was in the following terms:

> "Après que cette police aura été en vigueur une année entière, elle sera incontestable par rapport à quelque motif que ce soit, pourvu que les primes ici mentionnées aient été payées promptement, et que l'âge de l'assuré ait été admis."

It is unnecessary for the purposes of this appeal to refer to the other conditions, or bénéfices as they are termed, which are incorporated with the policy, which expressly bears that these conditions are applicable:

> "Ainsi que les dispositions au verso de cette police, font aussi complètement partie de ce contrat que s'ils étaient énumérés au-dessus des signatures ci-dessus apposées."

Antoine Pettigrew died on Oct. 6, 1895, when the policy had been current for more than a year, and the premiums had been regularly paid. The present action was raised by the appellant on Dec. 19, 1895.

In answering the proposals and queries submitted by the agent of the respondent company, which were thus referred to and made to form the basis of the contract of insurance, Antoine Pettigrew, in reply to the eighth question, which required him to give the name and address of the party who was to have the benefit of the contract, stated, "Joseph Napoléon Anctil, Rivière-du-Loup station." To the ninth question, which had reference to the relation between him and that person, he replied, "Mon protecteur, si toutefois j'en ai besoin." To the tenth question, which made the inquiry to whom he desired the benefit of the contract to accrue on the expiry of the period of dotation, which was at the end of fifteen years from the date of the policy, Antoine Pettigrew answered, "A moi-même." It was argued for the appellant that the effect of the tenth answer was to give Antoine Pettigrew a proprietary interest in the policy. That may be so, but his interest was contingent on his surviving the date of the policy for a period of fifteen years. In the event of his death at any time during that period, the sole owner of the policy was the appellant.

By art. 2590 of the Civil Code of Lower Canada it is enacted in regard to life assurance:

> "The insured must have an insurable interest in the life upon which the assurance is effected. He has an insurable interest in the life: (i) Of himself; (ii) Of any person upon whom he depends wholly or in part for support or education; (iii) Of any person under legal obligation to him for the payment of money, or respecting the property or services which death or illness might defeat or prevent the performance of; (iv) Of any person upon whose life any estate or interest in the insured depends."

The only insurable interest which the appellant had in the life of Antoine Pettigrew, as stated in the proposals for insurance, was that the appellant was the protector of Pettigrew, whenever he stood in need of protection, which, if true, was an interest the very reverse of what is required by art. 2590 of the code.

The action led to a considerable amount of litigation. It was tried in the Supreme Court before Cimon, J., and a jury, who returned a verdict in the shape of answers to no less than twenty questions submitted to them by the learned judge. The verdict was then reported to the Superior Court sitting in review, consisting of Caron, Andrews, and Cimon, JJ. The appellant moved the court for judgment in his favour, while the respondent company moved for judgment non obstante veredicto, or for a new trial. Caron and Andrews, JJ. (dissentiente Cimon, J.), refused the appellant's motion, and granted a new trial on the ground (i) that, although the "incontestable" clause of the policy was a good answer to innocent misrepresentations, nevertheless (ii) it was not a good answer to the allegation that the policy was a wager policy; and (iii) that the policy was a wager policy, in which the appellant, the payee, had no insurable interest. An appeal was taken by the appellant to the Court of Queen's Bench for Lower Canada, when five learned judges unanimously reversed the judgment of the Superior Court sitting in review, and entered judgment for the appellant, on the ground that (i) "the one year clause" was a good answer to alleged innocent misrepresentations, and (ii) the jury had found on the evidence that the policy had been taken out by Pettigrew, and not by the appellant. The respondent company then appealed to the Supreme Court of

Canada, who, on Dec. 9, 1897 (SEDGWICK, J., dissenting) reversed the order of the Queen's Bench, dismissed the appellant's action, and entered judgment for the respondent company. The learned judges of the Supreme Court were of opinion (i) that the policy was null and void, having been entered into with the appellant in his own name, for his own benefit, and he having no insurable interest in the life of Pettigrew; (ii) that "the one year clause" was contrary to public law and order; and that the respondent company were not estopped by "the one year clause," or otherwise, from disputing the validity of the policy. Their Lordships have now to determine whether the judgment of the Supreme Court of Canada ought to be affirmed simpliciter, or whether there ought to be judgment entered for the appellant, or the case sent back for a new trial.

In considering these two last questions, it is legitimate to refer to the evidence led before the jury, for the purpose of ascertaining whether, on a second trial, the facts found by the jury, bearing on the insurable interest of the appellant, are capable of substantial or any modification. Their Lordships are satisfied that, were a new trial allowed, these findings would be strengthened as against the appellant, but could not be modified in his favour. They have also arrived at the conclusion that the facts as found by the jury are, in the circumstances of this case, sufficient to show that the appellant had no insurable interest in the life of Antoine Pettigrew. In the first place, it must be observed that, although the terms of the policy, and of the proposals on which it is based, are such as to cast on him the onus of proving that he had an insurable interest, the appellant has not in his pleadings alleged, and has not attempted to establish by proof, that he possessed any such interest as is required by art. 2590 of the code. The only contribution, if it can be so called, to that inquiry made by the testimony of the appellant, consisted in the assertion that his wife's grandmother was the cousin-german of Antoine Pettigrew. That is the evidence on which the jury, in answer to question 8 (b) found that there was "distant relationship" between Pettigrew and the appellant. The jury, in answer to question 2 (a), found that all the premiums in the policy had been regularly paid up to the death of Antoine Pettigrew; in answer to question 5, that Pettigrew was, at the time of the policy, and since, a poor man without any means whatsoever; and, in answer to question 6 (d), that it was the appellant who paid all the premiums. In answer to question 3 (a) and (b), they found that Pettigrew had signed the application for the policy with his mark of a cross, in presence of Hélène Ouellet, as witness, she being the wife of the appellant.

In his evidence, the appellant explains that, at the foot of the application, he wrote the signature Antoine Pettigrew, on either side of the mark made by Pettigrew, who could not write. The most important findings of the jury are contained in their answers to question 15. These are to the effect that: (i) Before the issuing of the policy sued on, the respondent company had, on the same application, issued another payable to Antoine Pettigrew and his representatives; (ii) that Antoine Pettigrew and the appellant refused the first policy, having in lieu and place thereof exacted the policy sued on; and (iii) that it was the appellant, and not Antoine Pettigrew, who refused the first policy and exacted the second. In his evidence, the appellant thus explains his reasons for declining the first policy—"Parce qu'elle était payable à Pettigrew ou ses héritiers"; and also his reason for exacting the second—"que si la compagnie défenderesse voulait émaner une police payable à moi directment, que j'en paierais les primes, autrement que je n'en voulais pas." Their Lordships are of opinion, with the majority of the learned judges of the Supreme Court, that the findings of the jury are in themselves sufficient to establish that the appellant is not a lawful holder of the policy in question, within the meaning of art. 2590 of the code.

The question remains whether that clause of the policy which provides that the instrument shall become "incontestable" on the lapse of a period of a year or upwards, during which premiums are regularly paid, furnishes a good answer to the objection founded on the terms of the code. On that point, their Lordships

A concur in the opinion expressed by the majorities of the Supreme Court, and of the Superior Court sitting in review. The rule of the code appears to them to be one which rests on general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties. Any other view would lead to the sanction of wager policies.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judg-
B ment appealed from, and to dismiss the appeal. The appellant must pay to the respondent company their costs of this appeal.

Appeal dismissed.

Solicitors: *Charles Russell & Co.; Capel-Cure & Ball.*

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

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WILLIAMS *v.* BARMOUTH URBAN DISTRICT COUNCIL

[Court of Appeal (Sir Nathaniel Lindley, M.R., and Chitty, L.J.), October 27, 1897]

E [77 L.T. 383]

Local Authority—Contract—Need to be under seal—Compromise in settlement of dispute arising under contract made under seal.

On Jan. 14, 1890, a local authority contracted for the construction of a sewer extension. The contract was made under the common seal of the authority
F (pursuant to s. 174 of the Public Health Act, 1875) and contained the usual power for the engineer who had the control and supervision of the work to vary, alter, enlarge or diminish any of it. The engineer directed an alteration, and in August, 1893, he certified that the work had been completed. In September, 1893, the contractor presented his final account and a dispute arose over the claim for the substituted work. At a meeting of the local authority held on
G Nov. 9, 1894, the contractor offered to accept a specified sum as a compromise in full settlement of his claim. This the authority orally agreed to accept, but subsequently resisted on the ground that the settlement had not been made under seal.

Held: (i) the variation had been validly made without being under seal as it had been made under the power conferred on the engineer in pursuance of a
H contract made under seal; (ii) the compromise was not required to be made under seal within s. 174 of the Public Health Act, 1875, as a compromise made in settlement of a dispute which had arisen under a contract made under seal need not be under seal; and, therefore, the contractor's claim was valid.

Notes. Section 174 of the Public Health Act, 1875, has been repealed (and has not
I been replaced) by s. 307 of the Local Government Act, 1933. For the general provisions as to contracts entered into by local authorities see s. 266 of the Local Government Act, 1933 (14 Halsbury's Statutes (2nd Edn.) 492), and for the effect of that section see *A. R. Wright & Son, Ltd.* v. *Romford Corpn.*, [1956] 3 All E.R. 785. As to cases where contracts of local authorities need not be under seal see s. 1 of the Corporate Bodies' Contracts Act, 1960; see 40 Halsbury's Statutes (2nd Edn.) 204.

Applied: *Hunt* v. *Acton U.D.C.* (1908), 72 J.P. 345. Referred to: *Leicester Gardens* v. *Trollope* (1911), 75 J.P. 197.

As to necessity for seal where contracts entered into by corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 82 et seq.; and for cases see 13 DIGEST (Repl.) 301 et seq. A

Case referred to in argument:

A.-G. v. *Gaskell* (1882), 22 Ch.D. 537; 52 L.J.Ch. 163; 47 L.T. 566; 31 W.R. 135; 33 Digest 36, *192*.

Appeal by the defendant local authority against an order of the Divisional Court (LAWRANCE and COLLINS, JJ.), dismissing the motion of the local authority to remit or set aside the award of an arbitrator. B

In 1889, the Barmouth Local Board, the predecessors of the Barmouth Urban District Council, resolved to extend the town's outfall sewer, and having obtained the necessary authority to borrow money for the purpose of the scheme, accepted the tender of Abraham Williams, the contractor. By a contract under the common seal of the local authority, dated Jan. 14, 1890, the contractor agreed to erect, construct, build, execute, and carry out all the works required in the extension of the outfall sewer and works connected therewith, at Rô-ddu, Barmouth, in accordance with the plans, detail drawings, and specification, prepared by the engineer named, for £2,450; and he thereby further agreed to conform to and be bound by the general conditions, provisions, and stipulations of the specification. The specification provided (inter alia) as follows: C D

"1. The contract to be entered into under this specification includes all the works required in the extension out to sea for a distance of 375 yards or thereabouts, of the existing cast-iron outfall sewer at Rô-ddu, and the filling of the settling tanks with the necessary alterations to main sewers and manholes, and works connected therewith. . . . 2. The contractor must satisfy himself of the nature of the sea bottom into which piles are to be driven, of the soil and strata to be excavated, the direction and extent of the tidal currents, prevailing winds, and generally of everything which may in any way influence his tender. . . . 6. The whole of the works shall be under the control and supervision of the engineer, who shall have full power to vary, alter, enlarge, or diminish any of them. Such alterations, whether additions or deductions, shall not annul this contract, but shall be allowed for according to the rates or prices in the schedule hereto annexed, and added to or deducted from the amount of contract, as the case may be. Should any alterations be made to which the schedule of prices does not apply, the engineer shall fix their value." E F

Under the original scheme the pipes were to be secured on the bed of the sea by piles; but, owing to the hard and rocky nature of the sea bottom, it was subsequently considered advisable by the engineer that they should be secured by anchors attached to stones, and he gave directions to that effect. This variation of the contract involved the use of barges to a much larger extent than was provided for by the original arrangement. In August, 1893, the engineer certified that the works had been completed, and in September that year the contractor sent in his final accounts, in which a very large portion of the total sum claimed was for the substituted work. G H

Disputes arose between the local authority and the contractor concerning the amount to which he was entitled under the contract. On Nov. 9, 1894, at a meeting of the local authority, at which the contractor was present, he offered to accept £1,080 without interest as a compromise, and in full settlement of all claims by him against the local authority. This offer was orally accepted by the local authority, and after payment of £120 14s. 2d. part of the contractor's claim, the balance then agreed to be due by the local authority to the contractor was £959 5s. 10d., which the local authority agreed to pay within six months. Subsequently the local authority, as they alleged, discovered that the pipes under the sea were many yards short of the stipulated length, and on that ground decided to resist the contractor's claim. In November, 1895, the contractor commenced an I

action to recover £959 5s. 10d., the balance due under the compromise and settlement between him and the local authority. Alternatively he claimed the same amount as due to him under the contract of Jan. 14, 1890. The local authority denied the alleged debt and liability. By a deed, dated Nov. 6, 1896, made between the contractor and the local authority it was mutually agreed that the matters in dispute should be submitted to arbitration. The arbitrator duly made his award, in which he found that a settlement had been arrived at under which the local authority was liable to pay the contractor £959 5s. 10. The Divisonal Court having dismissed the motion of the local authority to remit or set aside the arbitrator's award, the local authority appealed.

Asquith, *Q.C.*, and *Llewelyn Williams* for the local authority.

Channell, *Q.C.*, and *Griffith Jones* for the contractor.

SIR NATHANIEL LINDLEY, M.R.—The substantial question which we have to consider in this case turns on the true construction of cll. 1 and 6 of the contract entered into in Jan. 14, 1890, under the common seal of the local authority of Barmouth. The contract related to the construction of certain works required in the extension out to sea of the existing outfall sewer at Rô-ddu, Barmouth. The precise nature of the work to be done is stated in the first article of the specification. That is the subject-matter of the contract. It appears that the work was to be executed in a particular way. Piles were to be driven into the sea bottom and the sewer was to be fastened to the piles. Clause 6 of the specification provided for supervision by the authority's engineer. That is the bargain. It was found that the sea bottom was so rocky and hard that the original scheme was considered impracticable. Accordingly, the engineer directed alterations and variations of the contract, and he said that the sewer pipes must be secured by anchors attached to stones, instead of being secured under the sea by piles as originally intended.

Is it possible to say that that is not such a variation as was contemplated and authorised by cl. 6 of the specification? I think not. It seems to me that it is quite possible that the change of object might have been so radical that it might not fairly be regarded as an alteration of the kind contemplated. But this alteration was, I think, fairly an alteration covered by cl. 6 of the specification. All that was done here was done under the power conferred on the engineer by that clause, and consequently in pursuance of a contract which was under seal. That is of the utmost importance. We have, therefore, that ground to stand on. The work having been done in accordance with the altered plan, some controversy arose between the parties as to what was owing to the contractor in respect of the work done under the contract. A verbal compromise and settlement of the disputes which had arisen was arrived at in November, 1894. It is objected that that compromise was not under the seal of the local authority.

We are all familiar with the common law doctrine by which a contract entered into by a corporation must be under the seal of the corporation. The matter has so often been thrashed out in the courts that it is not necessary to discuss it now. But it seems to me that, where disputes have arisen under a contract under seal, a compromise of those disputes need not be under seal also. There is nothing improper or wrong in the mere fact that the parties have verbally adjusted their disputes. It seems to me, therefore, that the award binds the parties to this arbitration, the arbitrator having had distinct authority to make it. There are, consequently, absolutely no grounds for referring the award back to the arbitrator. I think, therefore, that the appeal must be dismissed with costs.

CHITTY, L.J.—In this case a contract was made for the construction of certain sewerage works. It contained the usual clause conferring on the engineer who had the management of the contract the customary power to vary, alter, enlarge, or diminish any of the works, and such alterations were not to annul the contract. There was a variation directed by the engineer. The argument is, that that variation

was of such a character that it ought therefore to have been under seal. I do not think so. The works were executed in accordance with the variation made in a contract under seal. The claim of the contractor was sent in and considered by the local authority, and disputes having arisen between the parties a verbal compromise was come to. It is said that it should have been under the seal of the local authority, inasmuch as the Public Health Act, 1875, s. 174, requires that all contracts made by an urban authority, whereof the value or amount exceeds £50, shall be under the seal of such authority. There is, however, no decision to that effect in the books, and I should be very sorry to introduce any such a doctrine. I agree, therefore, that the appeal fails and must be dismissed, with costs.

Appeal dismissed.

Solicitors: *Lloyd-George, Roberts & Co.*, for *Lloyd-George & George*, Criccieth; *Hughes & Co.*, for *Hugh Hughes*, Aberystwyth.

[*Reported by* E. A. Scratchley, Esq., *Barrister-at-Law.*]

Re PITCAIRN. BRANDRETH *v.* COLVIN

[Chancery Division (North, J.), November 5, 1895]

[Reported [1896] 2 Ch. 199; 65 L.J.Ch. 120; 73 L.T. 430; 44 W.R. 200]

Will—Apportionment—Tenant for life and remainderman—Trustees' power of sale "if and when they shall consider it expedient"—Reversionary interest—Exclusion of rule in Howe v. Earl of Dartmouth.

By his will dated Nov. 3, 1876, a testator gave all his property to trustees on trust to pay the income to his mother during her life, with remainder to named persons. There was no express direction to sell or convert. The will contained powers for the trustees to manage the estate, and, if and when they thought fit, to sell. Part of the testator's estate consisted of reversionary interests under settlements of personal estate of which his mother was tenant for life. The testator died on Feb. 3, 1880, and his mother on Oct. 17, 1894, when the reversionary interests fell into possession. One of the mother's executors took out a summons to determine whether the reversion ought to have been sold at the testator's death, and whether her executors were entitled to any payment out of the trust fund in respect of the income which she would have received if the reversions had been sold.

Held: the rule in *Howe* v. *Earl of Dartmouth* (1) applied only where the testator had expressed no intention as to the time for the realisation of his estate; the discretion given to the trustees to sell if and when they thought fit was inconsistent with an intention that a reversion should be sold at the testator's death; and, therefore, the rule did not apply, and the executors were not entitled to any part of the proceeds of the reversionary interests.

Notes. Distinguished: *Re Bentham, Pearce* v. *Bentham* (1906), 94 L.T. 307. Referred to: *Re Bates, Hodgson v. Bates*, [1904-7] All E.R. Rep. 450; *Re Sherry, Sherry* v. *Sherry*, [1913] 2 Ch. 508.

As to exclusion by the trust instrument of the rule in *Howe* v. *Earl of Dartmouth*, see 38 Halsbury's Laws (3rd Edn.) 880; and for cases see 44 Digest 202-211.

A Cases referred to:

(1) *Howe* v. *Earl of Dartmouth*, *Howe* v. *Ayles* (1802), 7 Ves. 137; 32 E.R. 56, L.C.; 44 Digest 197, *265.*

(2) *Morgan* v. *Morgan* (1851), 14 Beav. 72; 51 E.R. 214; 44 Digest 202, *316.*

(3) *Johnson* v. *Johnson* (1846), 2 Coll. 441; 7 L.T.O.S. 3; 10 Jur. 279; 63 E.R. 807; 44 Digest 198, *268.*

B (4) *Hinves* v. *Hinves* (1844), 3 Hare, 609; 67 E.R. 523; 44 Digest 200, *299.*

(5) *Pickup* v. *Atkinson* (1846), 4 Hare, 624; 15 L.J.Ch. 213; 10 Jur. 303; 67 E.R. 797; 44 Digest 198, *269.*

(6) *Burton* v. *Mount* (1848), 2 De G. & Sm. 383; 11 L.T.O.S. 492; 12 Jur. 934; 64 E.R. 171; 44 Digest 205, *338.*

C (7) *Re Sewell's Estate* (1870), L.R. 11 Eq. 80; sub nom. *Re London and North Western Rail. Co.* (*Sewell's Estate*), 40 L.J.Ch. 135; 23 L.T. 835; 19 W.R. 220; 44 Digest 207, *358.*

Also referred to in argument:

Re Earl of Chesterfield's Trusts (1883), 24 Ch.D. 643; 52 L.J.Ch. 958; 49 L.T. 261; 32 W.R. 361; 20 Digest (Repl.) 389, *1110.*

D *Johnson* v. *Routh* (1857), 27 L.J.Ch. 305; 30 L.T.O.S. 111; 3 Jur.N.S. 1048; 6 W.R. 6; 44 Digest 198, *272a.*

Countess of Harrington v. *Atherton* (1864), 2 De G.J. & Sm. 352; 5 New Rep. 1; 11 L.T. 291; 10 Jur.N.S. 1088; 13 W.R. 62; 46 E.R. 411, L.JJ.; 39 Digest 150, *432.*

Alcock v. *Sloper* (1833), 2 My. & K. 699; 39 E.R. 1111; 44 Digest 197, *266.*

E *Collins* v. *Collins* (1833), 2 My. & K. 703; 39 E.R. 1113; 44 Digest 202, *317.*

Pickering v. *Pickering* (1839), 4 My. & Cr. 289; 8 L.J.Ch. 336; 3 Jur. 743; 41 E.R. 113, L.C.; 44 Digest 201, *302.*

Daniel v. *Warren* (1843), 2 Y. & C. Ch. Cas. 290; 7 Jur. 462; 63 E.R. 127; 44 Digest 203, *326.*

Re Llewellyn's Trusts (1861), 29 Beav. 171; 54 E.R. 592; 44 Digest 199, *283.*

F **Summons.**

By a trust disposition and settlement in the Scots form dated Nov. 3, 1876, Cecil Colvin Pitcairn gave all and sundry his whole means and estate, heritable and movable, real and personal, wherever situated or addebted, presently belonging or which should belong or be addebted to him at the time of his death, to three trustees in trust for the following uses and purposes: (i) from the produce of his G means and estate to pay all his just and lawful debts and funeral expenses, and the expenses of executing the trusts; (ii) to pay over to his mother in the event of her surviving him, during all the days of her life after his decease, the whole interest, dividends, and other annual produce and profits of the trust estate for her alimentary use, or otherwise to permit and empower his mother to receive the H same interests, dividends, and other annual produce and profits. The third, fourth, fifth and sixth clauses directed the trustees as soon as convenient after the testator's death, if his mother predeceased him or after her death if she survived him, to pay certain legacies amounting to £29,000 and to provide for an annuity of £50. The seventh clause directed that the trustees should pay and deliver all such other legacies, gifts, or provisions as should be contained in any codicil; that I if it should happen that after payment of his debts the expenses of the trust and certain legacies therein declared to be preferable the proceeds of his estate should on realisation prove insufficient for the full payment of the other legacies, such legacies should abate rateably, and with regard to the residue and remainder, if any, of his means and estate after implementing the foregoing purposes he directed his trustees to pay, assign, and convey it to the Bishops of Edinburgh and St. Andrews to be applied by them for the benefit of the Scottish Episcopal Church or of such charitable institutions in connection therewith as they might think proper. The testator conferred on his trustees the following powers and privileges: power

to enter into the possession and management of his estate and effects, and to call, sue for, uplight, receive, and discharge the rents and duties, interest, dividends, and annual profits arising from the same; powers to appoint factors, and for any one of the trustees who might be so appointed to charge for his services; if and when they should consider it expedient, full power to sell and dispose of all or any part of the estate and effects either by public roup or private bargain at such price as they should think proper; power to invest the trust funds in the securities therein mentioned.

The testator died on Feb. 3, 1880, domiciled in England, and the trust disposition was proved as a will in England on April 21, 1880, by two of the trustees. The testator's mother survived him, dying on Oct. 12, 1894.

At the time of the testator's death his estate consisted of personal estate of the value of about £13,000 and of certain reversionary interests expectant on the death of his mother in trust funds, amounting to about £30,000, of which she was tenant for life under a settlement made on her marriage and various wills. During the life of the testator's mother the trustees of his will paid to her the income of the property to which he was entitled in possession, but they did not sell any of the reversions.

One of the mother's executors took out a summons against the trustees of the testator's will to determine whether the mother was entitled on the death of the testator to have so much of his estate as consisted of the reversionary interests (which fell into possession on but not before her own death) sold, and the income of the proceeds paid to her for her life, and whether her executors were entitled to a payment out of the estate of the testator in respect of such income.

Everitt, *Q.C.*, and *Howard Wright* for the executor.
Haldane, *Q.C.*, and *R. Campbell* for the trustees.

NORTH, J.—The point in this case is a short one, and interesting, and not free from difficulty. [His Lordship stated the facts, and continued:] The representatives of the mother say that, the reversion having fallen in, they are entitled to so much of the proceeds of keeping the reversion, that is so much of the settled fund as represents the income that she would have received if the reversion had been realised under the son's will, the proceeds invested and the income paid to her for life. The question simply is, whether her fund is entitled to have out of the settled estate something to represent the income of the reversion during the fourteen years which she survived her son.

The rule of the court is, I think, very clearly settled; and it will be sufficient if I refer, at first at any rate, to the well-known case of *Howe* v. *Earl of Dartmouth* (1). [His Lordship read the passage from Lord Eldon's judgment, 7 Ves. at p. 148, from the words, "It is given as personal estate" . . . to . . . "the interest of its present worth."] That is dealing shortly with the case in which there is a wasting security when the tenant for life enjoying it in specie would receive more than his share, or a reversionary interest when the tenant for life would receive less than his share even if he received anything at all. In *Morgan* v. *Morgan* (2) Sir John Romilly, M.R., says (14 Beav. at pp. 81, 82):

> "Now the rule of law as applicable to these cases is not, I think, open to doubt, although the application of the rule to particular cases may be and frequently is a matter of very considerable difficulty."

He refers to the rule in *Howe* v. *Earl of Dartmouth* (1), and goes on (ibid. at pp. 82, 83):

> "The rule has been since affirmed as often as it has been referred to, and is unquestionably the law. But the testator may take the case of any particular bequest out of this rule; and the effect of the later cases has been to allow small indications of intention to prevent the application of the rule. The

question here, as in similar cases, is one of construction, whether the testator has in this will expressed his intention that this rule shall not apply to this particular case. It has been urged by the petitioners that the burden of proof does not lie upon them more than on the respondents, and that being a question of construction it is for the court to look into the will and discover the testator's real meaning. In one sense this is certainly true; but still, in my opinion, the rule of law is, that, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in *Howe* v. *Earl of Dartmouth* (1) is to prevail. It is, therefore, incumbent on the persons contesting the application of that rule, and on the court which forbids that application, to point out the words in the will that exclude it, and if this cannot be done the rule must apply. The reported decisions on the subject are useful, as they form a guide to enable the court to ascertain what directions contained in a will are properly considered to be an expression by the testator of his intention that this rule is not to apply. In no case that I have been able to find has the mere absence of any direction to convert his property been construed to mean that it should be enjoyed in specie by the legatees in succession; and the contrary must have been decided, though not expressly so stated, in *Johnson* v. *Johnson* (3). There are several cases in which the court held that the rule was excluded where the testator has fixed the period of conversion; as, for instance, where he has given the property to one for life, and after the death of that person has directed the property to be sold and divided";

and then, after referring to one or two cases I need not dwell upon, the Master of the Rolls says (ibid. at p. 84):

> "I think, therefore, that the absence of this direction [that is, a direction to convert], cannot be treated as an expression of intention on the part of the testator that his property was never to be converted; it would, I think, be unreasonable if it was so held. By law the property must be converted; a testator may not unreasonably be supposed to be cognisant of that law, and to have given no direction on the subject because he may have supposed that it would be mere surplusage so to do."

There are two cases laying down the general rule, one of which is *Hinves* v. *Hinves* (4), where Wigram, V.-C., after referring to the rule of the court in the absence of any expression of intention, used these words, which seem to be very much in point (3 Hare, at p. 611):

> "But, if the will expresses an intention that the property as it existed at the death of the testator shall be enjoyed in specie, although the property be not, in a technical sense, specifically bequeathed, to such a case the rule does not apply. The rule is settled with sufficient clearness. The difficulty only arises in its application to particular cases, where the intention of the testator is expressed with more or less distinctness."

In *Pickup* v. *Atkinson* (5) the same judge puts it very shortly. He says (4 Hare, at p. 628):

> "Cases calling for a decision on this question have arisen in each branch of the court within the last few years, and in each branch of the court the rule appears to have been stated in the same way. If the will manifests an intention that the general residue of the estate shall be enjoyed by different persons in succession, and there is nothing to qualify that simple intention, the court, in order to effectuate it, converts so much of the testator's estate as is of a perishable nature (under which head leasehold property falls) into investments of a permanent kind."

And, of course, although he does not state the alternative, it converts reversionary property on similar principles. Then he says:

"But if the intention of the testator appears to be, that the first taker shall enjoy the property in that state in which it exists at his death, the court is bound to give effect to that intention." A

I take it, therefore, that it is clear from those and numerous other cases that the question is what the testator intends, and his intention must be gathered from his will. He has a right to say what is to be done; and intention as expressed or to be deduced from the terms of his will must be followed. But if he has given no direction on the subject, then the court has a rule that it applies. Looking at the present will, the testator first of all devises and bequeaths to certain trustees all his real and personal estate, and then proceeds to declare the trusts. It is apparent that the will was prepared by someone who was more familiar with Scottish terms than English, but there is no difficulty in following it. The testator says: B C

"First, my trustees shall from the produce of my means and estate pay all my just and lawful debts and funeral expenses and the expenses of executing the trust."

His means and estate, of course, denote everything of which he died possessed. It was said that this was to be done at once, and points to an immediate conversion. But the expenses of executing the trusts could not all be disposed of in the first instance; they would continue until the estate was wound-up. Then the next is this. [His Lordship read the second clause, and proceeded.] There is a reference there to an actual receipt of what is produced by the estate as it stood. The trustees may not only pay it over to the mother, but may allow her herself to receive the income that it produces, letting her do what they might do, and she, of course, would not as tenant for life have power to convert the estate. As far as that clause goes it looks rather against there being any direction that anything not producing income was to be converted in order that the proceeds might produce income, but I thing it deserves very little weight. The third, fourth and fifth clauses direct the payment of legacies amounting together to £29,800. Then, sixthly, there is a direction to set apart a sum sufficient to provide for an annuity of £50 a year; and, seventhly: [His Lordship read the seventh clause.] At that time the testator was plainly contemplating that besides the legacies he had mentioned there might be others given by a will or equivalent instrument which would have to be paid out of the estate. D E F

He is not, therefore, dealing with this sum of £29,800, as it was suggested he is, as a sum corresponding with the value of the reversion which would fall in on his mother's death, but a sum which he contemplated might be increased by other legacies being added to it. It is plain also that at this point he is contemplating a realisation of his estate. But, in my opinion, realisation there means the conversion of the investments, of which the estate then consisted, into money for the purpose of paying legacies and paying over the residue; and the use of the word does not throw any light on the question with which I have to deal, that is, whether this reversion ought to have been converted at the testator's death. Then there is a direction to pay, assign, and convey the property to certain persons upon charitable trusts, which I need not read. The direction is not to pay over certain moneys, but to pay, assign and convey the property. Counsel for the executor says that may apply to real estate which he might acquire subsequently to the date of his will. It certainly might apply to that, but the phrase "assign and convey" seems to me to point to something which is to be the result of no conversion taking place because it could not apply to handing over the proceeds of sale. G H I

Then there are some powers for executing the trusts. The testator says:

"I hereby confer on my trustees the following powers and privileges, viz.: with power to my trustees to enter into the possession and management of my said estate and effects."

He is dealing with a trust to be exercised and executed by the trustees during the continuance of the trust, and here he uses this phrase, "of my said estate and effects," which is the same phrase which he used in the beginning of the will with reference to what it was out of which debts and funeral expenses are to be paid. Then he goes on giving power to the trustees

> "to enter into the possession of and management of my said estate and effects, and to call, sue for, uplift, receive, and discharge the rents and annual profits arising from the same,"

and to make titles, and so on, and to employ factors, agents, or cashiers "for managing my said means and estate"; that is referring to what is to take place during the continuance of the trust. Therefore, they are to manage here what was clearly an unconverted estate, the same estate which was described at the beginning of the will. Then, farther on, there is this power,

> "with full power to sell and dispose of all or any part of my said estate and effects hereby conveyed, and that either by public roup or private bargain, and at such price or prices as they may think proper."

Then, farther on, there is a direction as to the securities in which funds may be invested. That clause seems to be the clue to the meaning of the will; and I think that this power given by the testator to the trustees to sell and dispose "if and when they think it may be expedient" means that they are to have the power of selling if they think fit, and that, if they have power to do it if they think fit, they necessarily have the power not to do it unless they think fit.

It seems to me on the authorities that there are several cases that show that, where a testator has intended that a conversion is to take place at some time or other than that at which the rule of the court would make conversion necessary, he has dealt with the question of conversion, and the rule of the court has no application. I read the passage in *Morgan* v. *Morgan* (2) in which SIR JOHN ROMILLY, M.R., pointed out that the rule was excluded where the testator has fixed the period of conversion. In the present case he has not fixed it in that sense, but he has given the option of saying when the conversion is to take place to some other persons, which seems to me to be equally effective in negativing what is called the rule of the court which would require that conversion to take place immediately, or as soon as possible after the death of the testator. No doubt in the illustration given in *Morgan* v. *Morgan* (2) a time is fixed as at the death of a particular person, but there are two or three cases where the same rule has been applied where a particular time is not fixed. One of them was *Alcock* v. *Sloper*. [HIS LORDSHIP read the words of the gift in that case, and proceeded.] In his judgment, after referring to *Howe* v. *Earl of Dartmouth* (1), SIR JOHN LEACH, M.R., says (2 My. & K. at p. 702):

> "It is with a view to this principle that the present will is to be examined. The testator gives the residuary estate to trustees 'upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof for her own sole and separate use during her life.' There is here no intimation of an intention that any part of the property should be immediately converted by the trustees, but the inference rather is that the trustees during the life of the wife were to be merely passive; and the term dividends has reference to the long annuities. After the death of his wife he directs his trustees to sell his freehold house in Oxford Street, and also his leasehold houses, by auction. The leasehold houses, like the long annuities, were a wasting property, and he has plainly expressed his intention that they should not be sold during the life of his wife, and that is manifestly inconsistent with the general notion on his part that the wasting portion of his residuary estate was immediately to be converted into permanent property."

He quotes the passage in the will directing that Mr. Abbott should be employed to convert the property and to distribute the same, and says:

> "The testator could not have meant that Mr. Abbott should convert the whole of his property after the death of his wife if he had intended that any part of it should be converted during her life. The widow is, therefore, entitled to enjoy during her life"

what? Not the income of the leasehold and freehold houses only, but the income of the other wasting property, viz., the long annuities.

In *Burton* v. *Mount* (6) there was a general gift of the testator's real and personal estate, upon trust to pay the income to his son for life, and after his death for his children, and the testator empowered his trustees,

> "notwithstanding the devise and bequest of his freehold and leasehold estates, at any time or times, or from time to time at their discretion, to make sale and dispose of the freehold and leasehold estates or any of them (except as therein mentioned) by public auction or private contract,"

and so on. KNIGHT BRUCE, V.-C., came to the conclusion that, as there was this discretion given to the trustees as to the time at which they were to sell, it was inconsistent with the intention of the testator that the property should be sold under the rule of the court immediately, and he decided the point as well as to the leaseholds as to the long annuities in favour of the tenant for life. Again, *Re Sewell's Estate* (7) seems to me to be exactly in point.

These cases seem to be to show that, when the time of sale is fixed, either by reference to a given number of years after the testator's death or to the falling in of a life or anything of that kind, or when it is left to the discretion of somebody else to say when the sale is to take place, the testator has by his will provided for the sale, and therefore there is no rule of the court requiring the sale in a different way or under different circumstances to those indicated by the testator's will. I find here a direction that the trustees are to have full power, if and when they consider it expedient, to sell and dispose of all or any part of the estate and effects. It seems to me that that gives them a discretion, in the exercise of that power, to regulate the time of sale which is inconsistent with and negatives any intention that the court should realise the reversion in the way in which it would do if there had been no such direction. In my opinion, therefore, as the trustees did in fact allow the reversion to remain unsold, the estate of the tenant for life is not entitled to any part of the proceeds of this reversionary interest now that it has fallen into possession.

Order accordingly.

Solicitors: *Freshfields & Williams; Nicholl, Manisty & Co.*

[*Reported by* J. R. BROOKE, ESQ., *Barrister-at-Law.*]

A

ATTORNEY-GENERAL FOR CANADA *v.* ATTORNEYS-GENERAL FOR ONTARIO, QUEBEC AND NOVA SCOTIA. AND CROSS APPEALS

B [Privy Council (The Earl of Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand, Lord Davey and Sir Henry de Villiers), July 28, 29, 30, 1897, May 26, 1898]

[Reported [1898] A.C. 700; 67 L.J.P.C. 90; 78 L.T. 697]

C *Canada—Dominion and provincial legislation—Legislative jurisdiction and proprietary rights over waters—Rivers and lake improvements—Public harbours —Fisheries and fishing—British North America Act*, 1867 (30 & 31 *Vict.*, *c.* 3), *ss.* 91, 92, 108, *Sched.* 3.

There is no presumption that because legislative jurisdiction in respect of particular subject-matters was vested in the Dominion Parliament by the British North America Act, 1867, proprietary rights were thereby transferred to it.

D On its true construction the transfer by s. 108 and Sched. 3 of the Act of 1867 to the Dominion of "rivers and lake improvements" relates only to improvements of rivers and lakes and not to entire rivers. Such construction does no violence to the language used and is probably in accordance with the intention of the legislature.

Public harbours are vested in the Dominion, but it does not follow that, E because a foreshore on the margin of a harbour is Crown property it necessarily forms part of the harbour.

Section 91 of the British North America Act, 1867, does not convey to the Dominion of Canada any proprietary rights in relation to fisheries, although the legislative jurisdiction conferred on it by s. 91 of the Act of 1867 might enable it to affect proprietary rights to an unlimited extent, short of transferring them F to others. A tax by way of licence as a condition of the right to fish is within the power conferred on the Dominion legislature by s. 91 (4) and (12), and a similar power conferred on the provincial legislature by s. 92 cannot derogate from that power. In so far as s. 4 of the Revised Statutes of Canada, c. 95 (1886), empower the grant of exclusive fishing rights over provincial property, it is ultra vires the Dominion. Section 47 of the Revised Statutes of Ontario, G c. 24 (1860), is, with a specific exception, intra vires the province. Regulations restricting the public right of fishing are by s. 91 (12) of the Act of 1867, within the exclusive competence of the Dominion Parliament, and therefore such regulations in the Ontario Act, 1892, are ultra vires; but it does not follow that the legislation of a provincial legislature is incompetent merely because it may have relation to fisheries.

H The Dominion Parliament has jurisdiction to pass Revised Statutes of Canada, c. 92 (1886) dealing with "works constructed in or over navigable waters."

The Judicial Committee will not deal with questions affecting the rights of persons not parties to the litigation.

Notes. Applied: *McGillis* v. *Sullivan*, [1947] 4 D.L.R. 113; *Ref. Re Minimum* I *Wage Act*, [1948] S.C.R. 248. Considered: *McKie* v. *K.V.P. Co., Ltd.*, [1948] 3 D.L.R. 201; *R. ex rel. Battrick* v. *Laver et al.*, [1953] O.W.N. 501. Referred to: *Ontario Mining Co.* v. *Seybold*, [1903] A.C. 73; *A.-G. for Ontario* v. *A.-G. for Canada* (1912), 106 L.T. 916; *A.-G. for British Columbia* v. *A.-G. for Canada*, [1914] A.C. 153; *A.-G. for Canada* v. *A.-G. for Quebec*, [1921] 1 A.C. 413; *Brooks-Bidlake and Whittall* v. *A.-G. for British Columbia*, [1923] A.C. 450; *Montreal Corpn.* v. *Montreal Harbour Comrs.*, *Tetrealt* v. *Montreal Harbour Comrs.*, *A.-G. for Quebec* v. *A.-G. for Canada* (1925), 42 T.L.R. 98; *A.-G. for Quebec* v. *Nipissing Central Rail. Co. and A.-G. for Canada*, [1926] A.C. 715; *Re Aeronautics in Canada*

(*Regulation and Control of*), [1932] A.C. 54; *R.* v. *Jalbert*, *A.-G. of Quebec* v. *R.* (1938), 82 Sol. Jo. 252; *A.-G. of Alberta* v. *A.-G. of Canada*, [1943] 1 All E.R. 240; *A.-G. for New Brunswick* v. *Newcastle and Flett* (1947), 19 M.P.R. 365.

As to the interpretation of the distribution of legislative powers, see 5 HALSBURY'S LAWS (3rd Edn.) 497-498; and for cases see 8 DIGEST (Repl.) 709-710 and 780-781. For the British North America Act, 1867, ss. 91, 92, 108 and Sched. 3, see 6 HALSBURY'S STATUTES (2nd Edn.) 321-323, 326, 336.

Cases referred to :

(1) *Holman* v. *Green* (1881) 6 S.C.R. 707; 2 Cart. 147.

(2) *A.-G. of Ontario* v. *A.-G. for Dominion of Canada*, [1894] A.C. 189; 63 L.J.P.C. 59; 70 L.T. 538; 10 T.L.R. 305; 6 R. 409, P.C.; 8 Digest (Repl.) 722, *199*.

Three Appeals by the Dominion of Canada, by the province of Ontario, and by the provinces of Quebec and Nova Scotia from a decision of the Supreme Court of Canada given on Oct. 13, 1896, on certain questions referred to it by the Governor-General of Canada pursuant to the Revised Statutes of Canada, c. 35, as amended by the Canadian statute 54 & 55 Vict., c. 25.

The questions referred were as follows :

(1.) Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate, and is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, etc., and the other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, etc., and other rivers, or between waters directly and immediately connected with the sea coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation? (2.) Is the Act of the Dominion Parliament, Revised Statutes of Canada, c. 32, intituled, "An Act respecting certain works constructed in or over navigable waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part? (3.) If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river? (4.) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of confederation had been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5.) Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown? (6.) Has the Dominon Parliament jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any, and which of them? (7.) Has the Dominion Parliament exclusive jurisdiction to authorise the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any, and which of them? (8.) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces

respectively under the British North America Act, if any such are so assigned? (9.) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the dominion lessee, licensee, or other grantee to take out a provincial licence also?

(10.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled "An Act respecting fisheries and fishing," or any other of the provisions of the said Act, or any, and which of such several sections, or any, and what parts thereof respectively? (11.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled "An Act respecting fisheries and fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the dominion, and are not Indian lands? (12.) If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of fisheries, as for example, but forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like? (13.) Had the legislature of Ontario jurisdiction to enact s. 47 of the Revised Statutes of Ontario, c. 24, intituled "An Act respecting the sale and management of public lands"; and ss. 5 to 13, both inclusive, and ss. 19 to 21, both inclusive, of the Ontario Act, 1892, intituled: "An Act for the protection of the provincial fisheries," or any and which of such several sections, or any and what parts thereof respectively? (14.) Had the legislature of Quebec jurisdiction to enact ss. 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof? (15.) Had a province jurisdiction to legislate in regard to providing fish-ways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence? (16.) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work, or erection in or filling up of navigable waters? (17.) Had riparian proprietors, before confederation, an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

At the hearing of the case before the Supreme Court of Canada (Strong, C.J., and Taschereau, Gwynne, King, and Girouard, JJ.), the judges were unable to agree and delivered separate written opinions. The opinions of the majority of the judges were to the effect that the beds of all ungranted waters situate within the territorial limits of a province were the property of such province and not of the Dominion, with the exception only of public harbours, as to which the decision in *Holman* v. *Green* (1) was binding; that the provincial governments alone had power to grant leases and licences as to fishing in such waters; that the jurisdiction of the Dominion as to fisheries was limited to passing general laws which, without derogating from the property in the bed of such waters or from the rights incident to the ownership thereof might provide in the interest of the owners and the public for the regulation, protection, improvement, and preservation of fisheries, and that the provincial legislatures had jurisdiction to make regulations as to fisheries within their respective provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation. With reference to the statutes referred to in questions 2, 10, 11, 13, and 14, the majority of the judges were of opinion that the Revised Statutes of Canada, c. 92, "An Act respecting certain works constructed in or over navigable waters" was intra vires, and that the Dominion Parliament had power to declare what should be deemed an interference with navigation and

require its sanction to any work or erection in, or filling up of navigable waters, but that as regards the Revised Statutes of Canada, c. 95, "An Act respecting fisheries and fishing," s. 4, when enforced outside Dominion waters, and ss. 14 (1), 21 (1) (2) (3) and 23 were ultra vires; that s. 47 of the Revised Statutes of Ontario, c. 24, "An Act respecting the sale and management of public lands, ss. 5 to 13 and 19 to 21 of 55 & 56 Vict., c. 10, "An Act for the protection of the provincial fisheries," and ss. 1375 to 1378 of the Revised Statutes of Quebec (51 & 52 Vict., c. 17) were, intra vires, provided that an so long as they did not conflict with Dominion legislation. The Attorney-General for the Dominion, the Attorney-General for Ontario, and the Attorneys-General for Nova Scotia and Quebec obtained special leave to appeal against so much of the judgment as answered the questions adversely to their submissions and contentions.

Robinson, *Q.C.* (of the Colonial Bar), *Haldane*, *Q.C.*, *McTavish*, *Q.C.* (of the Colonial Bar), and *Loehnis* for the Attorney-General for the Dominion.

Blake, *Q.C.*, *Irving*, *Q.C.*, and *J. M. Clark* (all of the Colonial Bar) for the Attorney-General for Ontario.

The Attorney-General for Nova Scotia (*Longley*, *Q.C.*), the *Acting Attorney-General for Quebec* (*Cannon*, *Q.C.*) and *Lewis Coward* for the Attorneys-General for Quebec and Nova Scotia.

May 26, 1898. **LORD HERSCHELL.**—The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights and legislative jurisdiction of the Dominion of Canada and the provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects. The Supreme Court having answered some of the questions submitted adversely to the Dominion and some adversely to the provinces, both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view and appear to have been lost sight of in some of the arguments presented to their Lordships. It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion legislature for example affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that, because legislative jurisdiction was vested in the Dominion Parliament, proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them, except such as are by any of its express enactments transferred to the Dominion of Canada.

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is, whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces and not granted before confederation, became under the British North American Act the property of the Dominion. It is necessary to deal with the several subject-matters referred to separately, though the answer as to each of them depends mainly on the construction of the Third Schedule to the British North America Act. By s. 108 of that Act it is provided

A that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed, "Provincial public works and property to be the property of Canada," and contains an enumeration of various subjects numbered 1 to 10. The fifth of these is "rivers and lake improvements." The word "rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that, under the words quoted, the whole B of the rivers so vested were transferred from the province to the Dominion. It is contended on the other hand that nothing more was transferred than the improvements of the provincial rivers, that is to say, only public works which had been effected and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural "lakes," there could have been no doubt that the improvements only were transferred. Cogent C arguments were adduced in support of each of the rival constructions.

Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the court below was right, and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed D that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover, it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only E the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion, but every one of these reasons seems equally applicable to lakes. The F construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the legislature.

With regard to public harbours, their Lordships entertain no doubt that, whatever G is properly comprised in this term, became vested in the Dominion of Canada. The words of the enactment in the third schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour," on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion H founded their opinion on a previous decision in the same court in *Holman* v. *Green* (1), where it was held that the foreshore between high and low watermark on the margin of the harbour became the property of the Dominion as part of the harbour. Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all I cases. To do so would in their judgment be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in *Holman* v. *Green* (1) that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low watermark being also Crown property, likewise passed to the Dominion. Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a

harbour is Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If for example it had actually been used for harbour purposes such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

Their Lordships pass now to the questions relating to fisheries and fishing rights. Their Lordships are of opinion that s. 91 of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading "Sea-coast and inland fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected. If, however, the legislature purports to confer upon others proprietary rights, where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the dominion might practically transfer to itself property which has by the British North America Act been left to the provinces and not vested in it.

In addition, however, to the legislative power conferred by the twelfth item of s. 91, the fourth item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish. It is true that by virtue of s. 92 the provincial legislature may impose the obligation to obtain a licence, in order to raise a revenue for provincial purposes, but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention. Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned. It follows from what has been said that in so far as s. 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument, but the subsidiary provisions, in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the legislature of Ontario had jurisdiction to enact s. 47 of the Revised Statutes of Ontario, c. 24, except in so far as it relates to land

A in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers, and lakes were vested.

The sections of the Ontario Act of 1892, entitled "An Act for the protection of the provincial fisheries," which are in question consist almost exclusively of provisions, relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation in so far as it is not inconsistent with the Dominion legislation. By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces "and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section" it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next thereinafter enumerated." The twelfth of them is "Sea-coast and inland fisheries." The earlier part of this section read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the provincial legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a provincial legislature is, in their Lordships' opinion, incompetent.

It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although the Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91 and in particular to the word "exclusively." It would authorise for example the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think that this is consistent with the language and manifest intention of the British North America Act. It is true that this Board held, in *A.-G. of Ontario* v. *A.-G. for Dominion of Canada* (2), that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and civil rights" although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class " Bankruptcy and insolvency" in the sense in which those words were used in s. 91. For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature, and is not within the legislative powers of provincial legislatures.

But while, in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of dominion legislation only, it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relations to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the right of succession in respect of it would be properly treated as falling under the heading "Property and civil rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of and the rights which consistently with any

general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein appear proper subjects for provincial legislation, either under class 5 of s. 92, "The management and sale of public lands," or under the class "Property and civil rights." Such legislation deals directly with property, its disposal and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s. 91. The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views, however, which they have expressed, and the dividing line they have indicated, will, they apprehend, afford the means of determining upon the validity of any particular provision or the limits within which its operation may be upheld, for it is to be observed that s. 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the legislature of this province has authority to legislate for the purposes of this Act." Sections 1375, 1376, and s. 1377 (1) of the Revised Statutes of Quebec (51 & 52 Vict., c. 17) afford good illustrations of legislation such as their Lordships regard as within the functions of a provincial legislature. Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled "An Act respecting certain works constructed in or over navigable waters" (Revised Statutes of Canada, c. 92 (1886)). It is, in their opinion, clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and provincial legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors. The parties will, of course, bear their own costs of these proceedings.

Solicitors : *Day, Russell & Co.; S. V. Blake; Hill, Son & Rickards.*

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

A

Re IZOD. Ex parte OFFICIAL RECEIVER

[Court of Appeal (A. L. Smith, Henn Collins and Rigby, L.JJ.), December 10, 1897]

B [Reported [1898] 1 Q.B. 241; 67 L.J.Q.B. 111; 77 L.T. 640; 46 W.R. 304; 14 T.L.R. 115; 42 Sol. Jo. 117; 4 Mans. 343]

Bankruptcy—Receiving order—Rescission—Composition with creditors—Jurisdiction of court—Discretion—Bankruptcy Act, 1883 (46 & 47 *Vict.*, *c.* 52), *s.* 104 (1)—*Bankruptcy Act*, 1890 (53 & 54 *Vict.*, *c.* 71), *s.* 3 (6).

C A debtor, having been made bankrupt on his own petition, made a private arrangement with his creditors by which they were to receive a cash payment of ten shillings in the pound, in consideration of which they would release the debtor from his debts and withdraw their proofs in his bankruptcy. The official receiver, considering that the proposed arrangement was a proper one, did not oppose an application by the debtor to the registrar for rescission of the receiving order, and did not ask for a public examination of the debtor. The D registrar having rescinded the order,

Held (by A. L. Smith and Henn Collins, L.JJ., Rigby, L.J., dissenting): the registrar had jurisdiction at his discretion to rescind the order, and, as all the circumstances of the case had been brought to his notice, he had exercised it rightly.

E **Notes.** Section 104 of the Bankruptcy Act, 1883, and s. 3 of the Bankruptcy Act, 1890, have been repealed. See now ss. 108 and 16 respectively of the Bankruptcy Act, 1914 (2 Halsbury's Statutes (2nd Edn.) 321 et seq.).

Considered: *Re A Debtor* (*No. 446 of 1918*), *Ex parte The Debtor* v. *The Petitioning Creditors and Official Receiver*, [1918-19] All E.R. Rep. 397; *Re Debtor* (*No. 994 of 1935*), *Debtor* v. *Official Receiver*, [1936] 1 All E.R. 794.

F As to rescission of receiving order, see 2 Halsbury's Laws (3rd Edn.) 338 et seq.; and for cases see 4 Digest (Repl.) 179 et seq.

Cases referred to:

(1) *Re Leslie*, *Ex parte Leslie* (1887), 18 Q.B.D. 619; 56 L.T. 569; 35 W.R. 395; 4 Morr. 75, D.C.; 4 Digest (Repl.) 180, *1641*.

G (2) *Re Hester*, *Ex parte Hester* (1899), 22 Q.B.D. 632; 60 L.T. 943; 5 T.L.R. 326; 6 Morr. 85, C.A.; 4 Digest (Repl.) 179, *1632*.

(3) *Re Dixon and Cardus*, *Ex parte Dixon and Cardus* (1888), 37 W.R. 161; 5 Morr. 291, C.A.; 4 Digest (Repl.) 182, *1663*.

(4) *Re Flatau*, *Ex parte Official Receiver*, [1893] 2 Q.B. 219; 62 L.J.Q.B. 569; 68 L.T. 740; 41 W.R. 529; 37 Sol. Jo. 479; 10 Morr. 151; 4 R. 414, C.A.; H 4 Digest (Repl.) 180, *1635*.

(5) *Re Davidson*, *Ex parte Davidson*, [1894] W.N. 210, C.A.; 4 Digest (Repl.) 180, *1640*.

Also referred to in argument:

Re Burnett, *Ex parte Official Receiver* (1894), 63 L.J.Q.B. 423; 70 L.T. 385; 42 W.R. 368; 38 Sol. Jo. 311; 1 Mans. 89; 10 R. 159; 4 Digest (Repl.) 208, I *1884*.

Re Wemyss, *Ex parte Wemyss* (1884), 13 Q.B.D. 244; 53 L.J.Q.B. 496; 32 W.R. 1002; 1 Morr. 157, D.C.; 4 Digest (Repl.) 180, *1634*.

Appeal from an order of Mr. Registrar Hope rescinding a receiving order.

The debtor carried on business as a hosier in the City of London, and, finding himself in financial difficulties in the summer of 1897, he presented a bankruptcy petition against himself on July 22 of that year. On the same day a receiving order was made founded on the petition. On July 31 he filed a statement of his affairs,

and his preliminary examination then took place. He then entered into negotiations with his creditors for the private settlement of his affairs, with the result that a committee of three of his principal creditors was appointed to inquire into and make a report as to what had best be done in the interests of the creditors. The report of this committee was to the effect that, on the whole, it would be more advantageous to the creditors to receive an immediate cash payment of ten shillings in the pound than that the debtor's estate should be administered in bankruptcy. In October, therefore, an arrangement was completed under which the father of the debtor paid to all the creditors ten shillings in the pound in respect of their claims against the debtor, and the creditors by deed released the debtor from their claims, and withdrew their proofs in the bankruptcy. Previously to this an order had been made by the registrar, with the consent of the official receiver, that all proceedings in the bankruptcy should be stayed until Oct. 26 for the debtor to make such application as he might be advised, upon an undertaking being given by the debtor to keep an account of the business and pay over to the official receiver all moneys received, less current expenses, and an amount to be fixed by the official receiver for the maintenance of the debtor. This order was subsequently extended to Nov. 5. On the same day, upon the application of the debtor, which was in no way opposed by the official receiver, the registrar made an order rescinding the receiving order. Against this order the official receiver, on the instructions of the Board of Trade, appealed.

The Bankruptcy Act, 1883, provided:

"Section 104 (1). Every court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction."

The Bankruptcy Act, 1890, provided:

"Section 3.—(1.) Where a debtor intends to make a proposal for a composition in satisfaction of his debts or a proposal for a scheme of arrangement of his affairs, he shall within four days of submitting his statement of affairs, or within such time thereafter as the official receiver may fix, lodge with the official receiver a proposal in writing signed by him embodying the terms of the composition or scheme which he is desirous of submitting for the consideration of his creditors, and setting out particulars of any sureties or securities proposed. (2.) In such case the official receiver shall hold a meeting of creditors before the public examination of the debtor is concluded, and send to each creditor before the meeting a copy of the debtor's proposal with a report thereon; and if at that meeting a majority in number and three-fourths in value of all the creditors who have proved resolve to accept the proposal, the same shall be deemed to be duly accepted by the creditors, and when approved by the court shall be binding on all the creditors. . . . . (5.) The debtor or the official receiver may, after the proposal is accepted by the creditors, apply to the court to approve it, and notice of the time appointed for hearing the application shall be given to each creditor who has proved. (6.) The application shall not be heard until after the conclusion of the public examination of the debtor. . . ."

The Attorney-General (*Sir Richard Webster, Q.C.*), and *Muir Mackenzie* for the official receiver.

Herbert Reed, Q.C., and *Carrington* for the debtor.

A. L. SMITH, L.J.—I think that the decision of the learned registrar should be affirmed. Two questions have been raised in this case. The first is whether the registrar had jurisdiction to make the order appealed against, and the second is whether, assuming that he had jurisdiction, he has exercised his discretion rightly or wrongly in the matter. The facts we have to deal with are few, but I look upon the case as one of a very special nature.

The debtor carried on business as a hosier in the city of London, and in July one of

his creditors put in an execution. Thereupon on July 22 the debtor filed a petition in bankruptcy against himself, and upon the same day a receiving order was made on the petition. The next thing was that he induced his father to make an arrangement with the creditors under which they were all paid 10s. in the pound. The official receiver, an officer of the court, standing between a debtor and his creditors, whose duty it is to investigate the affairs of a debtor, knew that there had been no delinquency under the Bankruptcy Acts on the part of the debtor, and he also knew exactly what was the position of his affairs, and that the creditors would certainly not get more than 10s. in the pound if the bankruptcy proceedings were continued. The official receiver therefore, considering that the proposed arrangement was a very proper one under the circumstances of the case, did not oppose the application made to the registrar, and did not ask for any public examination of the debtor. This is the fact which I wish to emphasise as it distinguishes the case from the generality of the cases which come before the court. The official receiver, knowing all about the affairs of the debtor and having nothing to say in any shape or way against him, was content that the receiving order should be rescinded without any public examination of the debtor, but now the Board of Trade, whose officer the official receiver is, appeals to this court and contends that the debtor ought to be publicly examined before the receiving order is rescinded.

It is true that the first contention put before us was that the registrar had no jurisdiction to rescind until after the debtor's public examination. but, as the first case cited shewed that rescission was entirely a matter for the discretion of the court, it was then contended that the registrar had exercised his discretion wrongly. I own that when I first read s. 3 (6) of the Bankruptcy Act, 1890, I thought it was a direct legislative enactment that an application to the court to approve a proposal for a composition after it had been agreed to by the creditors, should not be heard until after the conclusion of the public examination of the debtor. That seemed like a direct enactment that the court could not approve of a scheme for composition and rescind a receiving order, until after the debtor had been publicly examined. But then it was pointed out that by s. 104 of the Bankruptcy Act, 1883, every court having jurisdiction in bankruptcy may "review, rescind, or vary any order made by it under its bankruptcy jurisdiction." On behalf of the debtor it was contended that, under those general words the registrar had jurisdiction in the present case to rescind the receiving order that had been made, and that it was entirely a matter for his discretion whether or not the order should be rescinded. Taking the cases that have been decided since the Bankruptcy Act, 1883, down to the present time, two of which have been decided since the Bankruptcy Act, 1890, I find nowhere any expression of a doubt, that in a case like this the court has a discretion to exercise whether or not the receiving order shall be rescinded. I agree with the contention put forward on behalf of the debtor that though the words of s. 3 of the Bankruptcy Act, 1890, [which replaced s. 18 of the Bankruptcy Act, 1883] are not identical with the words of s. 18 of the 1883 Act, nevertheless the effect is the same so far as the present case is concerned. In the face of the authorities I could not throw any doubt upon the subject, and I am therefore of opinion that the registrar had jurisdiction at his discretion to rescind this receiving order.

Then comes the question whether or not he has exercised that discretion rightly. It has been contended that his discretion was wrongly exercised on the ground that, according to the authorities, there are only two kinds of cases in which such an order as this could be made, viz., cases in which the debtor has paid twenty shillings in the pound and cases in which it is clear that the receiving order ought never to have been made. I do not find any such hard and fast rule as that laid down by the authorities. It is true that some judges, and especially CAVE, J., in *Re Leslie*, *Ex parte Leslie* (1) and *Re Hester*, *Ex parte Hester* (2), do seem to have thought that such was the rule, but that was not the opinion of the Court of Appeal in *Re Hester*, *Ex parte Hester* (2). In that case LORD ESHER, M.R., referring to *Re Dixon and Cardus* (3), used these words (22 Q.B.D. at p. 638):

"But I think that, in that case, the court also said that if the proposed arrangement is equivalent to a scheme under s. 18, and the court can see that it may with perfect safety be sanctioned, they would not decide that such a proposition must be at once rejected, merely because the formalities imposed by s. 18 have not been complied with."

FRY, L.J., in the same case, said this (ibid. at pp. 641, 642):

"In my judgment in *Re Dixon and Cardus* (3), I agreed with the Master of the Rolls that we should not lay down that no arrangement with creditors could have effect given to it, unless it proceeded under s. 18. I will not say that now."

It seems to me that those two learned judges not only decided that the registrar has a discretion to rescind a receiving order, but, further, they refused to say that the discretion could only be exercised in cases where the debtor has paid twenty shillings in the pound or in cases in which no receiving order ought to have been made. But, of course, as has been remarked by many judges, it is very necessary for the court to keep an eagle eye on transactions by way of compositions with creditors, because it is one of the duties of the court to protect creditors against themselves.

The next case I wish to refer to is *Re Flatau, Ex parte Official Receiver* (4). The judgment of LORD ESHER, M.R., shows clearly that the rescission of a receiving order is a matter in which the registrar must exercise his discretion, but he goes on to point out that the assent of the petitioning creditor is not of itself a fact upon which alone the registrar could act. He says ([1893] Q.B. at pp. 221, 222) that the debtor

"went before the registrar with an application to rescind the receiving order which, as it then stood, was a good and valid order. He did not produce any affidavit, but he satisfied the registrar that he had the consent of the petitioning creditor; and I think the appeal must be decided on the assumption that that fact was proved to the registrar, but that fact alone. He had the consent of the petitioning creditor; he had paid him and satisfied him. But there were, or might be, other creditors and they were not there and the circumstances were not known to the registrar. Could the registrar properly on that, and that alone, rescind the receiving order without entering upon a consideration of all the circumstances of the debtor's insolvency—how it came about; what had been the conduct of the debtor when he incurred the debts; what had been his conduct after the debts were incurred; and what was the position of things at the time? All these were things which ought to be considered, if we are of opinion that the order could not be rescinded merely upon the consent of the petitioning creditor."

That seems to me to show that, in deciding whether he ought to rescind the receiving order, many matters should be taken into consideration by the registrar besides the two classes of things suggested. In my judgment it shows that the registrar had a discretion in the present case to rescind the receiving order. The official receiver might have informed him if any offence against the bankruptcy laws was suggested against the debtor, or if anything was to be said against the debtor as to the way in which he had kept his books or carried on his business, and I think that the registrar has taken all this into consideration.

The only other case I will refer to is *Re Davidson* (5). There the Court of Appeal affirmed a refusal of the registrar to rescind a receiving order, saying that he had a discretion and must take into consideration all the circumstances of the case, and when he had exercised his discretion it would require a very strong case to authorise or to induce the Court of Appeal to interfere. Those words seem to me to be applicable to the present case, although that was a case in which the registrar refused to rescind, whereas in the present case the registrar has held

A that the receiving order ought to be rescinded. The present case is one of a very special nature, but the registrar had jurisdiction to make the order appealed against, and he made it after having had all the circumstances of the case brought before him, and after having come to the conclusion that there was nothing in the case which required further investigation. For these reasons I cannot say that the registrar has exercised his discretion wrongly, and therefore I think that the B appeal should be dismissed.

RIGBY, L.J.—I feel it my duty to dissent from the judgment that has been delivered and to do so on several grounds. I do not question for a moment the authority and discretion of the court under the Bankruptcy Acts to rescind a C receiving order under certain conditions, but I think that the present case is not one in which a recission should have been ordered. It is well known that one of the grave evils of the past which were intended to be remedied by the recent bankruptcy laws was that arising from settlements with creditors by private arrangement. I think that this has been effectually guarded against, but it seems to me that, if the court is to have a general discretion to exercise as regards the D rescinding of receiving orders, the result will be such as to detract materially from the beneficial effect of recent legislation.

I, therefore, do not quite agree in the view that has been taken by A. L. SMITH, L.J. Undoubtedly the provisions of s. 3 (6) of the Bankruptcy Act, 1890, are very much on the same lines as those of s. 18 of the Bankruptcy Act, 1883. That section did not in terms provide that no scheme of arrangement with creditors E should be submitted to the approval of the court until after the public examination of the debtor had been concluded. Several cases, of which *Re Hester* (2) is the leading one, were decided upon s. 18 of the Bankruptcy Act, 1883. But all those cases I read as simply decisions upon the question whether or not there was a scheme of arrangement within the meaning of that section. I think that the judges in those cases expressly refused to decide whether or not the court had a F discretion to rescind the receiving order. Certain sentences may no doubt be picked out of the judgments here and there, which lead towards a different conclusion. But all those cases were cases in which the court affirmed a refusal by the registrar to rescind the receiving order. The judges may have expressed opinions, but they should not be held to have been deciding a point which was not before them. I do not think that they intended to lay down that the court has a discretion to G rescind a receiving order. It seems to me that that question was carefully left open.

Then came the Bankruptcy Act, 1890, s. 3, which repealed and replaced s. 18 of the Bankruptcy Act, 1883. I think we ought to give effect to the change which was then introduced. One of the most important of the provisions of this section seems to me to be that of sub-s. (6), that no application can be made to the court H to approve a scheme of arrangement with creditors until after the public examination of the debtor. Possibly that is not exactly the effect of the words, but I think that is what was intended. There must have been some motive for the alteration in the law. The variation in language between the two Acts cannot have been merely capricious. The motive for making this change seems to me to be most probably this: A doubt had arisen, under the Act of 1883, whether or not, in view I of a scheme of arrangement with creditors, the court had a discretion to rescind a receiving order. In order to put an end to that doubt, and not to overrule any decided case, s. 3 of the Bankruptcy Act, 1890, was passed. I agree that the language of the section does not absolutely cover the case of an application to rescind; it only deals with an application to the court to approve a scheme of arrangement, but that application cannot be heard by the court until after the conclusion of the public examination of the debtor.

Considering the cases decided before 1890, I shrink from saying that the court has absolutely no jurisdiction to entertain an application to rescind a receiving

order in view of a scheme of arrangement made by the debtor with his creditors; but it seems clear to me, though I say it with diffidence out of respect to the opinions of A. L. SMITH, L.J., and HENN COLLINS, L.J., that it was never intended that the main ground, or, as it seems to be in this case, the only ground, of an application for the rescission of the receiving order should be the fact that the debtor has privately come to an arrangement with his creditors, since it was one of the principal objects of the Bankruptcy Acts, 1883 and 1890, to render such arrangements impossible after a receiving order has been made.

That being so, I come to the question, What is there special about this case? So far from there being anything special about it, it seems to me to be a kind of case which will tend to become very general. A young man in trade voluntarily presents a bankruptcy petition against himself. It may or may not be that he at one time intended that his estate should be administered under the bankruptcy laws; but, in point of fact, the filing of the petition has given him the advantage of a respite from the pressing claims of his creditors, and has enabled him to prosecute to a successful conclusion his negotiations for a private arrangement with his creditors under which his father agreed to pay them, and has paid them, not the whole amount of their debts but a composition of ten shillings in the pound. Thus the debtor has taken advantage of the bankruptcy proceedings which he instituted against himself to obtain a private settlement of his affairs. So far from this being in accordance with the law, it seems to me to be entirely contrary to the spirit and meaning of the Bankruptcy Acts. Therefore, if the registrar had any discretion to exercise as regards the application made to him which is a matter upon which I feel considerable doubt, but will give no decided opinion, I cannot conceive that he has exercised it rightly in the present case, and therefore it seems to me that we ought to reverse his decision. The only basis upon which the application to the registrar was founded was the private arrangement which the debtor had made with his creditors, and it seems to me that it would be an entire departure from the provisions of the Act to make a private arrangement like this a ground for an application for the rescission of a receiving order.

I think that there is a great deal to be said for the opinion that has been expressed by some judges that the grounds upon which an application to rescind a receiving order can be made should be similar to those upon which the court has power to annul an adjudication. Section 35 (1) of the Bankruptcy Act, 1883 [see now s. 29 (1) of the 1914 Act] provides that

> "where, in the opinion of the court, a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, by order annul the adjudication."

There are the two grounds upon which an adjudication may be annulled, and I cannot see any difference in the principles on which the court should act in annulling an adjudication and in rescinding a receiving order. One is a step further than the other, but it is a step which would naturally be taken after the other. In my opinion the court ought to look at s. 35 (1) when an application is made to rescind a receiving order. It is perfectly clear that neither of the two grounds on which an adjudication may be annulled exist in the present case. The debtor here has not been adjudicated bankrupt, but I see no reason why the court in dealing with his application to rescind the receiving order made against him should not follow the analogy of s. 35 (1) of the Bankruptcy Act, 1883. The debtor has brought himself within the scope of the bankruptcy law, and I do not think he ought to be allowed to escape from the position in which he has placed himself on the ground of his having made a private arrangement with his creditors unless the scheme of arrangement had all the safeguards which the legislature thought necessary.

In the present case I do not think that the official receiver assented to the order

which the debtor asked for, but even if he had I do not think that his assent would be any reason preventing or relieving the court from deciding the case now. What did happen was this: The official receiver consented to the postponement of the proceedings under the receiving order upon certain terms. It was said that these terms showed the reliance placed by the official receiver upon the debtor, but I cannot see much in that point. The terms which the official receiver required were that the debtor should pay into court all moneys received by him in his business beyond necessary expenses, and such allowance as might be made to him for maintenance. Those seem to me to be very reasonable terms to require in a case where the official receiver knows nothing against the debtor, but I cannot agree that they show that the official receiver has approved of the conduct of the debtor, or has represented to the registrar that the debtor's conduct has been in all respects regular. I think it would be very wrong on the part of the official receiver to make any such statement to the registrar without having previously exhausted all the means provided by the Bankruptcy Act for ascertaining whether or not a debtor's conduct has been regular. But in the present case the official receiver made no such statement. The utmost that can be said is that he did not oppose the making of the order. But he did not consent to it, and could have applied the very next day to have it set aside.

But it is said that the appellant here is really the Board of Trade, and not the official receiver. The official receiver holds a double office. He is to a certain extent the officer of the court, but he is also bound to act under the directions of the Board of Trade. If the Board of Trade thought the case so important in principle that an appeal ought to be brought against the decision of the registrar they were right in causing the appeal to be brought. I see nothing special in this case. It seems to me an ordinary case in which a debtor has invoked the assistance of the bankruptcy law, and has taken advantage of a receiving order being made against him to obtain an arrangement from his creditors under which they are not to be paid in full. Having then made this private arrangement in a way which the Bankruptcy Acts clearly meant to discourage, if not to forbid altogether, he comes to the court and makes it the ground for an application that the receiving order should be rescinded. On all these grounds I think that the appeal ought to be allowed, but as my learned brethren are of a contrary opinion it will be dismissed.

HENN COLLINS, L.J.—I agree with the judgment of A. L. Smith, L.J., but as there is a difference of opinion upon the Bench I will add a few words. The first, and the chief, point seems to me to be whether the registrar has jurisdiction to rescind the receiving order. It was contended that, by virtue of the provisions of s. 3 (6) of the Bankruptcy Act, 1890, he had no jurisdiction to do so until after the debtor had been publicly examined. But on examination of that sub-section, it appears to me that it only relates to the proposal for the scheme referred to in the preceding sub-sections. The application there referred to is an application for the approval of the scheme proposed by the debtor. The question therefore is whether a proposal of the scheme by the debtor and its approval by the court are a condition precedent to the power of the registrar to rescind the receiving order. That question seems to me to be decided by authority. Section 104 of the Bankruptcy Act, 1883, gives a general authority to the court to review, rescind, or vary any order made by it. Is the power to exercise the discretion given by that section subject to the suggested condition precedent? The head-note in the Law Reports to *Re Hester, Ex parte Hester* (2) which was decided in 1889 is as follows (22 Q.B.D. at p. 632):

> "The court has jurisdiction to rescind a receiving order, even though no scheme of arrangement or composition has been proposed by the debtor under the provisions of s. 18 of the Bankruptcy Act, 1883."

That was obviously the opinion, if not the decision, of the judges in that case. A

But then it was suggested that there is a difference on this point between the Bankruptcy Act, 1883, and the Bankruptcy Act, 1890. In my opinion they are exactly the same on this point. Under both of them the conclusion of the debtor's public examination is a condition precedent to an application for the approval of the proposed scheme of arrangement. Under the earlier Act two meetings of the creditors were held, and the public examination of the debtor took place between B them. The scheme could not be approved by the creditors until the second meeting, and therefore, a fortiori, no application to the court could be based upon it, until after the debtor's public examination had taken place. The Act of 1890 substituted one meeting in the place of the two meetings held under the earlier Act, and it also made the public examination a condition precedent to the application for the approval of the court. Therefore I think that the cases decided upon the C Act of 1883 that have been referred to, which decided that the court has a discretion in this matter notwithstanding no public examination has taken place, are still good authorities.

But the matter does not rest there. Since the passing of the Bankruptcy Act, 1890, two further cases have been decided. The head-note in the LAW REPORTS of *Re Flatau, Ex parte Official Receiver* (4) is as follows ([1893] 2 Q.B. at p. 219): D

> "When a receiving order has been made the court will not, even though the proceedings under it have been stayed, rescind the order merely upon the consent of the petitioning creditor. The court has a discretion in the matter, and will not rescind the order without a full investigation of all the circumstances, including the conduct of the debtor." E

There was no scheme in that case, and therefore no approval. That decision was followed in *Re Davidson* (5). There also there was no scheme. The court said that the registrar had a discretion and ought to take into consideration all the circumstances of the case. It therefore seems to me that it is now clear that the learned registrar had to exercise his discretion in dealing with the application made by the debtor in the present case. It was then contended that the discretion was F wrongly exercised. But in the case just cited I find that the court said that when the registrar had exercised his discretion it would require a very strong case to authorise or to induce the Court of Appeal to interfere. The registrar after full examination of the facts before him thought that he was justified in rescinding the receiving order. I quite agree that it is essential that the closest possible vigilance should be exercised over the debtor and his affairs, and also over the creditors G themselves, in the interests of the public. It has been done in the present case. The preliminary examination has taken place, and everything was carried on from July to November under the direct superintendence of the official receiver. He, with every means of information, has been an assenting party throughout these proceedings. Therefore in dismissing this appeal we are safeguarded by what has been done by the officer of the court whose function it is to watch over these H things, and by the great experience of the learned registrar who rescinded the receiving order in this very exceptional case. For these reasons I am of opinion that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Percy C. Ray; Solicitor to the Board of Trade.* I

[*Reported by* E. MANLEY SMITH, ESQ., *Barrister-at-Law.*]

A

PERTH GENERAL STATION COMMITTEE *v.* ROSS

[HOUSE OF LORDS (Lord Halsbury, L.C., Lord Watson, Lord Macnaghten, Lord Davey and Lord Morris), May 11, 17, July 27, 1897]

B [Reported [1897] A.C. 479; 66 L.J.P.C. 81; 77 L.T. 226; 13 T.L.R. 546]

Railway—Railway station—Right of railway company to exclude persons other than travellers.

A railway company have the right to exclude from their stations all persons other than those using, or desirous of using, the railway, or to admit them on C such conditions as they think fit.

Notes. Distinguished: *London and North-Eastern Rail. Co.* v. *British Trawlers Federation*, [1934] All E.R. Rep. 580. Referred to: *Spillers and Bakers, Ltd.* v. *Great Western Rail. Co.*, [1911] 1 K.B. 386.

As to the provision of reasonable facilities by the British Transport Commission, D see 31 HALSBURY'S LAWS (3rd Edn.) 626 et seq.; and for cases see 38 DIGEST (Repl.) 427, 428.

Cases referred to:

(1) *Barker* v. *Midland Rail. Co.* (1856), 18 C.B. 46; 25 L.J.C.P. 184; 20 J.P. 582; 139 E.R. 1281; sub nom. *Parker* v. *Midland Rail. Co.*, 27 L.T.O.S. 107; 8 Digest (Repl.) 206, *1301*.

E (2) *Foulger* v. *Steadman* (1872), L.R. 8 Q.B. 65; 42 L.J.M.C. 3; 26 L.T. 395; 37 J.P. 660; 38 Digest (Repl.) 393, *576*.

(3) *Jones* v. *Taylor* (1858), 1 E. & E. 20; 120 E.R. 815; 38 Digest (Repl.) 394, *581*.

Appeal by the Perth General Station Committee from a decision of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk (LORD F MACDONALD), LORDS YOUNG, TRAYNER, and MONCRIEFF) affirming a decision of the Sheriff Court of Perthshire.

The facts are set out in the opinion of LORD WATSON.

Asher, Q.C., *Balfour, Q.C.*, and *F. T. Cooper* (all of the Scottish Bar), and *F. Low* for the appellants.

G *F. Thesiger* for the respondent.

The House took time for consideration.

July 27, 1897. The following opinions were read.

H **LORD HALSBURY, L.C.**—In this case I have no doubt whatever of the power of the station committee to regulate the use of the station—"to regulate it even in the case of passengers actually going and arriving"; and these words I have quoted from the judgment of the Lord Justice-Clerk. His Lordship adds that they must be subject nevertheless to being put right if they take any steps in the regulation of the station which are not truly steps of reasonable regulation, but I steps which "they have no right to take."

So far, I do not differ, if these words point to the station committee of the railway company itself being set right by the appropriate tribunal. But I am of opinion that the station is absolutely the property of the railway company, and that the rights of the railway company are just as absolute, in the first instance, as those of any other proprietor. That by appeal to the appropriate tribunal they may be compelled to permit passengers and traffic into the station under a variety of conditions or under a proper order of the court, is true; but that against their will any member of the public has a right to force himself on the platform or into the

booking-office I cannot agree. The public has a right to enter for the purpose of making a contract with them, and the railway company may be compelled to grant proper facilities for such purpose, if they refuse to do so, either by action at suit of the complaining party or by an application to the Railway Commissioners. But I should be sorry to throw any doubt on the absolute right of the railway company in the first instance to regulate their own traffic in their own way, and to refuse access to their station under the circumstances stated in this case. Of course, it would be represented as a ludicrous exercise of authority to prescribe the dress in which persons may approach this station, but I can quite understand the inconvenience which might result to the passengers—that is to the public—if, apart from the annoyance of actual solicitation of custom for various hotels outside, the persons who rush in to solicit custom should do it by conspicuous badges describing the hotel to which they belong. I do not believe that any actual inconvenience to the public can result from the recognition of the right of the railway company to carry on their business in their own way. Their own interests are the best security that their strict legal right will not be abused.

I think that there would be some difficulty in framing an interdict in the language originally asked, but the order which your Lordships have agreed to is such that I think no inconvenience will arise; and I am of opinion that the interlocutor appealed from ought to be reversed, and the order which your Lordships have agreed on, which is as follows, substituted:

> "That the interlocutor of the Second Division appealed from, except in so far as it recalls the interlocutors of the sheriff-substitute and the sheriff of the county of Perth, be reversed, and that the respondent Alexander Ross do pay appellants their costs of this appeal; that it be declared that, subject to the terms of any order or regulations which may be hereafter made by the Railway Commissioners, the respondent Alexander Ross, as tenant of the Royal British Hotel, Leonard Street, Perth, has no right by himself or his servants to enter upon or use the Perth General Railway Station except with the leave of the appellants; and under such conditions as they may prescribe; that in respect of the preceding declaration it is unnecessary to dispose of the conclusions of the present action for interdict; that the case be remitted to the Second Division of the Court of Session, with directions to dismiss the appellants' petition, and to find the respondent liable to the appellants in the expenses of the process incurred by them both in the Court of Session and in the sheriff court."

LORD WATSON.—This appeal is from a judgment of the Second Division of the Court of Session which recalls, and in substance re-affirms, two interlocutors pronounced in the sheriff court of Perthshire by the sheriff-substitute and the sheriff. Your Lordships are, therefore, bound to treat the findings of fact contained in the interlocutors as having the force and effect of the special verdict of a jury. The effect of the findings cannot, in the present case, be fully appreciated without referring to the circumstances which gave rise to the litigation, which appear on the face of the record and are not in dispute.

The respondent, Alexander Ross, is an hotel-keeper, being tenant of the Royal British Hotel, Leonard Street, Perth, in the vicinity of the General Railway Station, the property and management of which is vested by statute in the appellants for behoof of the companies who use the station for the purposes of their traffic. Until the date of this action, the appellants, who have an hotel of their own within the limits of the station, permitted all the hotel-keepers in Perth, including the respondent, to have free access to the platforms, by themselves and their servants, for the purpose of accompanying their guests to the train by which they were departing, and of meeting them on their arrival. But that privilege was qualified by the condition that no servant should on these occasions wear a distinctive badge or livery. The respondent was dissatisfied with the condition, of which, admittedly,

A he had notice and, on July 1, 1895, he intimated by letter to the appellants' station-master that

> "I am resolved to send my 'boots' to Perth General Station, wearing the badge and uniform of my hotel, where my customers may be attended to on arrival here as they are at other railway and steamboat stations over the country."

B That intimation was followed up by the respondent sending his "boots" with badge and uniform, to the passenger platforms on numerous occasions during the month of July, 1895, and on all these occasions he refused to leave the station when requested to do so by the officials of the appellants.

On July 26, 1895, the appellants presented a petition to the sheriff court of Perthshire, at Perth, craving to have the respondent, by himself or by his "boots" or other C servants, interdicted, first, from unlawfully entering or trespassing on any part of the railway station or other works or premises of the appellants; secondly, in particular from so entering or trespassing in or on the Perth General Railway Station or other works or premises therewith connected, while wearing the uniform or badge of the respondent or of the Royal British Hotel; and, thirdly, from waiting the arrival of passenger trains therein for the purpose of obtaining customers for D said hotel. The respondent in his defence denied that he or his servants had committed any trespass, and alleged that the object of the appellants in preventing hotel servants from coming to their platforms with badges or in uniform was to give a preference to their own station hotel, to his prejudice. His fifth plea in law is to the effect that "the object of the petition being an attempt to restrict the liberty of the defender, Ross, or his servants, in the matter of wearing a uniform E or badge, is illegal, and the pursuers are not entitled to interdict."

A long proof was led before the sheriff-substitute, who, on Feb. 13, 1896, issued an interlocutor containing various findings of fact and law, by which he refused the prayer of the petition. The basis of the decision is indicated in one of the learned judge's findings in point of law, which is to the effect that the appellants

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> "as proprietors of said station, hold their said property under the condition of their not preventing its convenient use by any member of the railway travelling public, or with the presence therein of the keeper and servants of the hotel where such traveller has been staying, or which he may propose to go to, except in so far as is necessary for the proper management and control of the station, and for the securing of which the pursuers have power to make such G regulations or bye-laws as they may think necessary."

The learned judge appears to have been of opinion that, it not having been proved to his satisfaction that the presence of the respondent in the station by himself or his servants interfered with the proper control and management thereof, their exclusion would constitute an illegal interference with the convenience of the H members of the railway travelling public. The sheriff, on April 17, 1896, affirmed the judgment of his substitute, apparently in deference to these or similar considerations. On appeal to the Court of Session, the Second Division of the court on June 25, 1896, by the judgment submitted to review, recalled the interlocutors of the sheriff and his substitute, and found in fact:

I

> "First, that the defender did not by himself or his servants enter the pursuers' station except for the purpose of accompanying passengers who were leaving his hotel, or of meeting passengers who had intimated that they were to arrive at the defenders' hotel; and, secondly, that neither the defender nor his servants ever caused any obstruction to or inconvience at the pursuers' station."

Their Lordships found in law on these findings of fact that the appellants were not entitled to interdict, and they, therefore, refused the petition, with expenses in the Court of Session and in the inferior court.

The logical connection between these two findings of fact, and between them and

the conclusion of law which is deduced from them, is not supplied by any finding, and is not very apparent. The first would be a pertinent finding of fact if it could be affirmed that every hotel-keeper and his servants have, at common law or by statute, a right to enter any railway station and use its platform if they go there for the purpose of accompanying or meeting passengers who are either leaving or have intimated an intention of coming to their hotel, so long as their presence does not cause obstruction or inconvenience. In that case it would be within the competency of an ordinary court of law to enforce such legal right. It is obvious that the second finding might apply with equal truth to many persons who enter a station without having any legal right to do so. The judgment, as framed, does not deal directly with that which is the real and only question of law in the case—namely, what legal right has the respondent to use the General Station at Perth without the leave, and against the will, of its proprietors? As to the views entertained by the learned judges of the Court of Session on that point, very little information can be gleaned from the opinions which they delivered at the advising of the case.

I find that all of them lay great stress on the circumstance that it is within the power of the appellants, if they think fit, to frame regulations for the use of their station, and to submit them for the sanction of the Board of Trade, and that these regulations, if approved of by the board, will be enforceable under penalties. Some of the learned judges have expressly said, while others have plainly suggested, that the proper course for the appellants, in dealing with such claims as are advanced by the respondent, is to proceed by way of regulation, subject to the sanction of the Board of Trade, and not by interdict in a court of law. I cannot concur in that opinion. It appears to me that such regulations are only intended to govern the conduct of those persons whom the owner of the station cannot exclude, or whom he may choose to admit. When their right is permissive merely, and the permission is conditional, I can see no reason why, in order to enforce the condition, a regulation sanctioned by the Board of Trade should be required. I do not think that it was intended by the legislature that the Board of Trade, in making regulations of that kind, should interfere with the jurisdiction of the Railway Commissioners to determine what members of the public, if any, being neither travellers nor interested in goods traffic, should have the right to use a station, or what facilities are to be allowed to them.

The claim which the respondent sets up is, in substance, that he and his hotel servants have legal right to enter on and use the passenger platforms of the Perth General Station without observing the conditions which the appellants have attached to their admission. In my opinion, that is a matter beyond the cognisance of a court of law, which can only deal with legal rights as they exist, and not rights as they might possibly have existed if the Railway Commissioners had been applied to and had affirmed their existence. The learned sheriff-substitute, in affirming by his interlocutor as one of the grounds of his decision that the recognition of the respondent's claims to their full extent would be of convenience to members of what he terms the railway travelling public, does not seem to have thought that he was invading the province of the Railway Commission. Yet it hardly admits of doubt that jurisdiction to determine in the first instance whether the respondent has a statutory title to demand the privilege which he claims, and also whether his claim ought to be allowed, belongs exclusively to that body. Accordingly, these are questions with which I conceive that I have nothing to do in the present case, and on the merits of which I desire to express no opinion.

Apart from any facilities which might possibly be given him by the Railway Commissioners, whose intervention has never been invoked either by the respondent or by anyone on his behalf, has the respondent any right capable of being legally enforced to use the appellants' station at all, or on any other conditions that the appellants choose to prescribe? That is a cardinal question in this case, and one to which I cannot find that any attempt has been made to give a satisfactory reply

in the courts below. The respondent makes no claim as one of the members of the travelling public, or a person interested in goods conveyed by rail to or from the appellants' station. His counsel, in the absence of any materials for a stronger argument, very fairly and plausibly maintained that the respondent was invited to use the station, and that, when using it in response to such invitation, he could not be deprived of his natural liberty to clothe his servant with any badge or garment which he chose, and also that the adoption of an hotel badge or uniform was required in the interest and for the convenience of railway travellers who were to arrive at the station on their way to his hotel. The first of these arguments fails because it is not shown that any invitation was held out to the respondent which was not coupled with the intimation that he was not to send any servant to the station with a badge or uniform. As regards the second, it is sufficient for the purposes of this case to say that the respondent is not one of the railway travelling public who frequent his hotel. So far as it appears, none of them has complained that facilities to which they were entitled have been withheld from them by the appellants; and, even if he or they had just cause of complaint, they could have no redress except by an application to the Railway Commissioners.

It is no doubt true that, while the appellants are vested with the ownership and administration of the station, their statutory powers were conferred on them by the legislature, as in the case of railway companies, with a view to the accommodation of the public. But the legislature has not committed to the ordinary tribunals of the country the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a railway or a station has reason, or without reason thinks fit, to complain that some facility has been withheld from him, or that an undue preference has been shown to others, a court of law can give him no remedy. He must resort to the tribunal which the legislature has constituted for that purpose —the Railway Commissioners—and, until they have decided in his favour, he is not in a position to say, and no court is entitled to hold, that he stands possessed of the right which he claims. His claims to use the appellants' station, which have been maintained in defence by the respondent, appear to me to be in excess of any legal right which he possessed. In my opinion, so long as there is no decision to the contrary by the Railway Commissioners, it is within the discretion of the appellants either to exclude him and his servants from the station, or to admit them on such conditions as may be thought fit. The right of the respondent, if he can be said to have any right, must depend on the extent of the licence accorded to him by the appellants. It might have been a reasonable course, had it been adopted at an earlier stage of these proceedings, to stay the present suit until the respondent had an opportunity, either by himself or through some other person having a more direct interest, of bringing his claims, such as they are, under the consideration of the Railway Commissioners. But seeing that the respondent has persisted in relying on his supposed legal rights, with the barren result of three years' unprofitable litigation, I think that your Lordships ought now to dispose of the case as it stands.

This action, although in the form of a petition of interdict, was obviously brought for the purpose of obtaining the judgment of a court of law on the relative rights of the parties as they existed at the date of the petition, and still exist; and, although the conclusions for interdict are so framed that they might be made to square with that view of their relative rights which I have ventured to suggest, I have come to the conclusion that the more expedient course for your Lordships to follow is to make a declaration in regard to the right, or want of right, of the respondent in such terms as will not exclude him from the benefit of any order or regulation which may hereafter be made by the Railway Commissioners. I am satisfied of the competency of taking that course, and I see no reason to apprehend that the respondent will proceed to act in excess of his rights as defined by the House.

LORD MACNAGHTEN.—Their Lordships of the Court of Session all agree in thinking that the broad question—which seems to me to be the only possible question in the case—was not properly raised, but, with the exception of LORD TRAYNER, they all expressed an opinion adverse to the right claimed by the appellants. The Lord Justice-Clerk says: "This is a somewhat novel case." He adds: "Indeed, none of the cases which were referred to in the course of the argument come near to it at all." He holds that a servant of an hotel going with passengers, or going to meet passengers, is going on what is "plainly in itself perfectly lawful business." So he is, I should say. But it may be "that he is going too far when he forces his way into a place which he is forbidden by a competent authority to enter." He says that it would be "a very extraordinary thing" if an interdict should be granted against the respondent "from unlawfully entering or trespassing upon any of the railways, stations, and other works or premises of the pursuers." Why so, I should ask, if he insists on making an entry which is unlawful? His Lordship adds: "The station is a place which he has a right to enter into, and in the course of business may require to enter." That is just the question. If the station is open, can he enter it at all times and under all circumstances, or only when he is travelling, or about to travel, by the railway; or can he, as the court seems to think, give himself the right to enter by attaching himself, with or without a special invitation, to persons who have the right to enter. It can hardly be enough that, in the course of business—that is, for his own profit—he may require to enter. LORD YOUNG says that the general proposition advanced on behalf of the appellants is "not maintainable." LORD MONCRIEFF calls it "a startling proposition," which, as at present, he is, he says, not prepared to affirm.

I have the misfortune to differ from the learned judges of the Second Division on almost every point. I venture to think, with deference, that their findings in fact are not relevant. On the other hand, it seems to me that the general proposition which was advanced on behalf of the appellants, and was put forward plainly enough in argument, whatever may be said about the pleadings, is well founded in law. I think, too, that the general proposition is sufficiently raised by the claim to interdict the respondent from unlawfully entering or trespassing on the station, because I agree with the Court of Queen's Bench (*Foulger* v. *Steadman* (2)) in their view that if a man not using, or being desirous of using, the railway enters on railway premises after being forbidden to do so, or stays on the railway premises after being requested to leave, he commits a wilful trespass within the Railway Regulation Act, 1840, and none the less so because he claims some right which cannot exist at law. Nor can I agree with the Lord Justice-Clerk that the case is a novel one. It seems to me that the question of law was decided, and decided rightly, forty years ago, by the Court of Common Pleas in *Barker* v. *Midland Rail. Co.* (1), to which, unfortunately, the attention of the learned judges of the Second Division was not directed.

It was made a matter of complaint that the appellants did not avail themselves of the summary mode of proceedings given them by the Railway Regulation Act, 1840. But it must be remembered that the respondent had ample warning, and that he insisted on entering the appellants' station as a matter of right. Having regard to the view that has been taken of this case by the different courts in Scotland before whom the matter has been brought, I think that it is by no means unlikely that magistrates would have refused to convict the respondent of wilfully trespassing on the railway, and I may observe that, although according to the decision of the Court of Queen's Bench in *Foulger* v. *Steadman* (2), the respondent was a wilful trespasser within the meaning of the Railway Act, 1840, there is an earlier decision of the same court, when presided over by LORD CAMPBELL, in which it was held that the justices were not bound to find a person who came on the land of a railway under the belief that he was entitled to do so, a wilful trespasser: *Jones* v. *Taylor* (3).

If your Lordships maintain the rights asserted by the appellants, I do not think that there is any reason to apprehend that the decision will be followed by any of those painful separations between members of the same family which LORD YOUNG seems to contemplate as possible. Railway companies are not insensible to public opinion, or indifferent to motives of self-interest. They are more likely, I think, to be too lax than too rigorous in the exclusion of the public from their stations. Everyone knows that there have been occasions when railway stations have been used for purposes somewhat foreign to the accommodation of travellers. As the respondent does not claim any special or peculiar right to enter on the appellants' property, but rests his case on the supposed rights of the public, I do not think that it is necessary that he should be placed under an interdict. It will probably be sufficient that a declaration should be made in general terms. It seems to me that it would be enough to declare that the appellants are entitled to exclude from their premises all persons other than those who use, or are desirous of using, one or other of the railways served by their station.

LORD DAVEY. I so entirely agree in the opinion of LORD MACNAGHTEN, which I have read, that I have not thought it necessary to prepare an opinion of my own.

LORD MORRIS.— I am unable to concur in the judgment which has been moved by the Lord Chancellor. The action in this case is an action on a petition for interdict. The subject-matter on which the interdict is sought appears in the prayer of that petition. It is that the respondent Alexander Ross, "himself or by his 'boots'" should be restrained "from unlawfully entering or trespassing on any of the railways, stations, or other works or premises of the pursuers." Stopping there, it appears to me that that is entirely too vague standing by itself. I apprehend that it would be necessary in a petition for interdict to state the circumstances and the specific terms on which the person who is to be interdicted is to be prevented from doing that which he seeks. This is merely a general statement that the defender in the action should not unlawfully trespass on the station and premises of the pursuers. The mere use of the word "unlawfully" cannot give to it any particular validity. If it were private property absolutely, the entry on it without the assent of the owner would be unlawful, but in this case it was conceded and admitted in argument on behalf of the appellants that a passenger had a perfect right to go on the station if he intended to use the railway.

Therefore, in its generality this statement cannot, in my opinion, be sustained. And that appears to have been the idea of the pleader, because, having stated it in these general terms, he points out and particularises the matters on which the respondent should be interdicted. No. 1 is "from so entering or trespassing in or upon the Perth General Railway Station, or other works or premises therewith connected, while wearing the uniform or badge of the defender Alexander Ross." The second is, "and from awaiting the arrival of passenger trains therein for the purpose of obtaining customers for said hotel." The answer to the latter of those particular subjects for interdict is that the facts have been found against the appellants. It has been decided as a matter of fact that the respondent, or his "boots," were not there for the purpose of obtaining customers, or, as is familiarly called, touting for customers, but were there for the purpose of meeting customers who had given an intimation that they were coming. Therefore, that ground cannot be sustained, as a matter of fact it being found against the appellants.

Therefore, the whole petition subsides into that portion of it which deals with the respondent or his servants entering the station wearing a particular badge. If he had a right to enter the station he had a right to enter it wearing any sort of badge or costume he wished. I do not feel inclined to follow this subject deeper, because it has been fully and adequately dealt with by LORD TRAYNER in the Court of Session, and I entirely adopt his reasoning. I am, therefore, of opinion that this petition for an interdict could not be sustained. But it has not been dealt with in your

Lordships' House on the prayer of the petition. It has now been decided, or is about to be decided, that the appellants are not entitled to a grant of their petition of interdict, which, as I understand, would make the respondent amenable to contempt of court if he violated it, but a declaration is to be made of the rights between the parties. I am of opinion that that should be done, if at all, in a suit instituted by the appellants for that purpose, and that it should not be given as a relief on a petition of interdict which, as I understand, is an entirely different species of suit followed by entirely different consequences. There would have been nothing to prevent the appellants, if the order of the Court of Session was affirmed, from instituting, on the grounds I have stated, a suit for a declaration of right. What the course that would have been taken in that case by the present respondent would have been I cannot say. It is possible that he might resist it —it is probable that he might resist it—I do not know; but that is not the case which he came to meet. The case which he came to meet was decided in his favour by the sheriff-substitute of Perthshire, by the sheriff court, and by the unanimous judgment of the Court of Session. In this case, however, the respondent is made to pay the costs of the entire suit in a matter in which there has been, as it appears to my mind, a change of front to a certain extent, inasmuch as the petition of interdict is not persevered in, but a declaration of right is substituted for it. On these grounds, I am of opinion that the order of the Court of Session should be affirmed.

Interlocutor appealed from reversed. Cause remitted to the Court of Session with a declaration. Respondent to pay to the appellants the costs in this House and in the courts below.

Solicitors: *Loch & Co.*, for *J. Watson*, Edinburgh, and *H. B. Neave*, Glasgow; *Stibbard, Gibson & Wills*, for *J. Hay*, Edinburgh.

[*Reported by* C. E. Malden, Esq., *Barrister-at-Law.*]

A

Ex parte BARNES

[House of Lords (Lord Halsbury, L.C., Lord Watson, Lord Herschell, Lord Macnaghten, Lord Morris, Lord Shand and Lord Davey), March 2, 1896]

B [Reported [1896] A.C. 146; 65 L.J.Ch. 394; 74 L.T. 153; 44 W.R. 433; 12 T.L.R. 239]

Company—Winding-up—Public examination—Jurisdiction of court to order—Report by official receiver—Participation in fraud.

Where a court had ordered a company to be wound-up and the official receiver had made a preliminary report, the court was **held** to have no jurisdiction to C direct the public examination of a person under s. 8 (3) of the Companies (Winding-up) Act, 1890, without a further report by the official receiver under s. 8 (2) of the Act of 1890 stating that, in his opinion, a fraud had been committed in the promotion or formation of the company or by a director or other officer of the company since its formation, and that the person proposed to be examined had taken part in the promotion or formation of the company or had D been a director or officer of the company and against him a prima facie case of fraud has been disclosed in the further report.

Notes. Section 8 of the Companies (Winding-up) Act, 1890, and s. 115 of the Companies Act, 1862, have been replaced by s. 236 and s. 270, respectively, of the Companies Act, 1948: see 3 Halsbury's Statutes (2nd Edn.) 650, 671.

E Explained: *Re Civil, Naval and Military Outfitters*, [1899] 1 Ch. 215. Considered: *Re Tweddle*, [1910] 2 K.B. 697. Applied: *Re Property Insurance Co., Ltd.*, [1914-15] All E.R. Rep. 1080.

As to official receiver's preliminary report, see 6 Halsbury's Laws (3rd Edn.) 567 et seq.; and for cases see 10 Digest (Repl.) 910 et seq.

Cases referred to in argument:

F *Re Great Kruger Gold Mining Co., Ex parte Barnard*, [1892] 3 Ch. 307; 67 L.T. 770; 40 W.R. 625; 8 T.L.R. 688; 36 Sol. Jo. 644; 2 R. 11; sub nom. *Re Great Kruger Gold Mining Co., Ltd., Ex parte Barnard, Re Trust and Investment Corpn. of South Africa, Re Bertram Luipaard's Vlei Gold Mining Co., Ltd.*, 62 L.J.Ch. 22, C.A.; 10 Digest (Repl.) 911, *6204*.

G *Re Trust and Investment Corpn. of South Africa, Re Bertram Luipaard's Vlei Gold Mining Co.*, [1892] 3 Ch. 332; 67 L.T. 777; 40 W.R. 689; 8 T.L.R. 770; 36 Sol. Jo. 697; 2 R. 76; sub nom. *Re Great Kruger Gold Mining Co., Ltd., Ex parte Barnard, Re Trust and Investment Corpn. of South Africa, Ltd., Re Bertram Luipaard's Vlei Gold Mining Co., Ltd.*, 62 L.J.Ch. 22, C.A.; 10 Digest (Repl.) 910, *6203*.

H *Re General Phosphate Corpn., Re Northern Transvaal Gold Mining Co., Re Delhi Steamship Co.*, [1895] 1 Ch. 3; 64 L.J.Ch. 195; 71 L.T. 619; 43 W.R. 34; 11 T.L.R. 10; 39 Sol. Jo. 28; 1 Mans. 522; 12 R. 39, C.A.; 10 Digest (Repl.) 911, *6205*.

Appeal by the official receiver against an order, made in May, 1895, of the Court of Appeal (Lindley and Kay, L.JJ.) affirming an order, made in March, 1895, of I Vaughan Williams, J., refusing an ex parte application of the official receiver for an order that certain persons (named in the schedule to his preliminary report) be directed to attend for public examination pursuant to s. 8 of the Companies (Winding-up) Act, 1890.

On Nov. 7, 1894, the English and Scottish Mercantile Investment Trust, Ltd., was ordered to be wound up by the court. On Mar. 11, 1895, the official receiver made his preliminary report, under s. 8 (1) of the Companies (Winding-up) Act, 1890, in which he stated that in his opinion a further inquiry was desirable as to the failure of the company and the conduct of the business and for that purpose

a public examination of persons named in the schedule thereto should be held. The official receiver appealed.

The Attorney-General (Sir Richard Webster, Q.C.), Ingle Joyce, and *W. B. Lindley* for the appellant.

The respondents did not appear.

LORD HALSBURY, L.C.—I cannot help thinking, with the utmost deference to the judicial opinions that have been given, that the provisions of s. 8 of the Companies (Winding-up) Act, 1890, are reasonably plain. The legislature for very obvious reasons—obvious I mean when one looks at what the course of legislation has been with reference to the formation of companies, and the conduct and management of them—thought that there might be cases in which it would be very desirable to have persons who might be supposed to have some personal interest in the conduct and management of companies brought to the test of a public examination; and accordingly the legislature—the court in the first instance having made an order for winding-up a company—imposed upon the official receiver a duty, as soon as practicable after the receipt of a statement of the company's affairs, to submit a preliminary report to the court. That preliminary report was to contain "the amount of capital issued, subscribed, and paid-up, and the estimated amount of assets and liabilities." That was an actual duty cast upon the official receiver. If the company had failed, he was to report "as to the causes of the failure," and whether in the opinion of the official receiver "further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof." So far there seems to be no difficulty, and no necessity for further exposition of the object and meaning of the legislation that was then arrived at.

But then there came what seems to me to be an absolutely independent and separate set of provisions, and that was, that if the official receiver thought fit he was to make a further report. The expression "if he thinks fit" must of course mean if he arrives at a judicial conclusion in his own mind that such facts are before him, and in truth, that it becomes his duty. It is left to him to do it if he thinks fit. It is not made necessary for him to do it in every case, but only in such cases as in his judgment demand such a course to be pursued. Section 8 (2) of the Act of 1890 says that the official receiver may

> "if he thinks fit make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court."

The whole question turns upon s. 8 (3) of the Act of 1890 which begins with these words, "The court may after consideration of any such report."

The first question which arises is as to a point on which counsel relies; he says he relies upon the literal meaning of the words. I confess that, to my mind, reading those words as I have read them, it seems to me reasonably plain that the word "such" there refers to the last preceding provision, viz., s. 8 (2), and that what the draftsman was doing was this: After having provided for these general reports, which have reference to the status and conduct of the company and its affairs, he goes on to provide that where a specific report has been made with reference to some person who has committed a fraud (I will say a word presently as to what I mean by "some person") the court is then invested with a new jurisdiction by s. 8 (3) which provides:

> "The court may after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has

A been a director or officer of the company, shall attend before the court on a day appointed by the court for that purpose and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as a director or officer of the company."

B In the first place, it is obvious to inquire what can be the sense or meaning of those provisions unless they have reference to the report which calls attention to the fact that some person has committed a fraud in the promotion or formation of the company. Those two provisions seem to be correlative. What is the sense or meaning of them unless they are correlative? And, if they are, certain consequences are to follow. What are the consequences? At first sight, one would say C that, if the object is a public examination, and if the public examination is to be upon the subject which has been by the hypothesis called to the attention of the court by any such report, the person against whom the allegation is made is naturally the person who is to be brought before the court and examined in respect of it. I mean the broadest possible view of any such legislation would at once suggest that the person who has been reported as guilty of fraud is to be examined, D and he must answer—he is to be summoned to answer upon the subject. Certain consequences follow upon that. If he is summoned, and if he is exculpated, he is to get his costs; if not, he is to be brought there at his own expense. There are provisions whereby, before he is examined (s. 8 (7)),

". . . The person examined shall, at his own cost, prior to such examination, be furnished with a copy of the official receiver's report, and shall also, E at his own cost, be entitled to employ at such examination, a solicitor with or without counsel, who shall be at liberty to put such questions, . . ."

If all these provisions have reference to a person who is incriminated by the report, and is brought there in the position of a person against whom a suggestion is made that he has been guilty of fraud, the whole system, the whole code thereby created F is intelligible and rational, and one can understand what the meaning of each part of it is; each part of it reflects light upon the rest. But if, because A. has been found guilty—I mean found guilty in a preliminary sense, that is to say, that a preliminary case has been made against him as being guilty of fraud, if because he has been in that sense incriminated by the official receiver—B. can be summoned, and B. can be made subject to all these consequences, although no preliminary G charge of fraud has been made against him at all, the whole thing becomes irrational and unintelligible.

I confess that I entertain not the smallest doubt that the meaning of this legislation is that in order to give the court jurisdiction to make such an order, there must be a finding of fraud, and a finding of fraud against an individual who is made by that finding subject to be summoned before the court, and is compelled H to answer whether the answer incriminates him or not, but being exculpated receives his costs. I confess that I am unable, looking at the whole of the legislation on the subject, to entertain the least doubt that that was what the legislature intended, and I am a little surprised, I confess, that there should have been any doubt that fraud must be found; by which I do not mean that the particular word "fraud" must be used, but that such facts must be found by the official receiver I as suggest fraud against the person incriminated, and that therse must be an individual person incriminated; it is not that there is a general finding that fraud as suggest fraud against the person incriminated, and that there must be an individual person pointed to, and in respect of whom all these different provisions for his protection, as well as for his being made an example of, become perfectly reasonable. In the event of there being no fraud found, or in the event of there being no individual pointed out as being suggested to be guilty of fraud, I entertain no doubt that the court has no jurisdiction to make any such order for a public examination.

All the observations that have been addressed to us with reference to the necessity of an inquiry, and so forth, are disposed of by the mere existence of s. 115 of the Companies Act, 1862 [then unrepealed]. There are there ample means of inquiry; no injustice or want of investigation into the affairs of the company can possibly occur if that provision is put into force. This latter provision is of itself and by itself, a kind of penal section against a fraudulent director, officer, or promoter; and, inasmuch as it is directed to that person, and to that person alone, it seems to me that it follows as essential to the jurisdiction of the court that there should be a preliminary finding which is the foundation of that jurisdiction, namely, that fraud has been committed by the individual person who is pointed out by the report, and, in the absence of that finding, I am of opinion that the court would have no jurisdiction. Under these circumstances I move your Lordships that this appeal be dismissed.

LORD WATSON.—I am of opinion that the court has no statutory jurisdiction to direct a public examination under s. 8 (3) of the Companies (Winding-up) Act, 1890, except upon consideration of a further report made by the official receiver in terms of sub-s. (2). I am also of opinion that the power committed to the court by that sub-section has no application to any one of the persons therein mentioned who is not inculpated in this sense, that a prima facie case of fraud on his part is disclosed by the further report. I, therefore, concur in the judgment that has been moved.

LORD HERSCHELL.—I am of the same opinion. I think that the natural construction of the words "any such report," in sub-s. (3) of s. 8 of the Act of 1890 is to refer them to the report or reports which are mentioned in sub-s. (2). But, in addition to that, it seems to me that the other provisions contained in s. 8 make it clear that such must have been the meaning. Sub-section (7) applies to every case in which an order for examination is made; and I think sub-s. (7) is only reasonably applicable in the case of a person inculpated in a report of the official receiver. Of course, I do not mean for a moment to suggest that the official receiver must use any particular language in the report which he makes under sub-s. (2); it must appear from that report that in his opinion a fraud has been committed by A. or B. or C., as the case may be, in order to justify an order for the examination of A. or B. or C. Of course, no form of words would be necessary, and, although the matter is left to the discretion of the official receiver, I think none the less that it would be his duty to exercise that discretion in the particular way of making a report, if, in his opinion, there were a case of fraud established by the facts against any person or persons.

These provisions I think must be read in the light of the provisions of the Companies Act, 1862, which were left existing when the later legislation was passed. The court had the fullest power to summon before it anyone it pleased within the limits specified in s. 115 of that Act, which I think would have included any person whom it thought fit who could give information that would tend to proceedings for the recovery of money for the benefit of the company. And I think that an object, if not the only object, of sub-s. (1) of s. 8 of the Act of 1890 was to impose on the official receiver at an early period the duty of bringing before the court information upon certain matters connected with the company which would be very important in guiding the judgment of the court as to the persons who ought to be summoned under s. 115 of the Act of 1862. I think that there is a purpose amply sufficient to be served by the report under sub-s. (1) of s. 8 of the Act of 1890 without supposing that it was intended upon that report to found the proceedings referred to in sub-s. (3) and the following sub-sections.

In s. 115 of the Act of 1862, although all the persons there referred to might be summoned, they could only be summoned on a tender to them of their reasonable expenses of coming to be examined. When we deal with these provisions, which

it must be remembered are intended to operate side by side with s. 115, we find that the expense in the first instance is cast absolutely upon the person to be examined. He must bear even the expense of knowing what he is to be examined about; the official receiver's report is only to be had upon those terms; and the later provisions (as to which I will say something in a moment), about allowing him costs if he exculpates himself from the charges, show that intention clearly. That is perfectly intelligible if you suppose that the person referred to in sub-s. (3) of s. 8 of the Act of 1890 and the subsequent sub-sections is an inculpated person, otherwise it is unintelligible. If he is not a person who is prima facie to blame, why should he be put to the expense of ascertaining what the charge against him is, why should all the costs be thrown upon him, and why should he not have any expenses tendered to him? It is quite unintelligible why he should be put in that position if he is a person in no way appearing to be inculpated.

When one comes to look at sub-s. (7) it is quite clear that the court can only allow expenses to a person ordered to attend for examination if, in the opinion of the court, he is exculpated from any of the charges made or suggested against him. Both the Attorney-General and junior counsel conceded that those words were only applicable when the person was inculpated in the report of the official receiver. If their construction is right, you have this preposterous result: you have A., we will say, inculpated in the report on a charge of fraud; it is suggested that B. and C. were co-directors with him, or co-officials of some kind or other, and you have an order made, and, as they say, properly made, for the examination of A. and B. and C.; and then on the examination it turns out that none of these persons were to blame. Then A. applies for his costs—"Yes," say the court, "you are exculpated and we will give you your costs." But when B. and C. come, the answer is "No, you have not been exculpated because you were never charged, and therefore you must bear the expenses yourself." Such legislation would be nothing short of absolutely preposterous. The only construction of the legislation that can make it reasonable is that the only persons who can be ordered to be examined and attend at their own expense are those who are prima facie inculpated. It is quite reasonable that they should be required to attend at their own expense. They are saved from injustice by the provision that, if they are exculpated, the court can, and doubtless will, give them their costs. If, on the other hand, persons could be examined at their own expense who could not be allowed their costs, however clear it might be that they had done nothing whatever that could be the subject of blame, the provision would be certainly very harsh, very unjust, and very unreasonable.

Therefore, when all the provisions are regarded together, and also the enactment existing in s. 115 of the Act of 1862, it seems to me that the intention of the legislature is reasonably clear. Nor is there any mischief, that I can see, likely to arise from such a construction. If it were the case that the report of the official receiver on such a point must be made once for all, so that if there appeared a prima facie case against A. for a public examination he never afterwards could make a report which would lead to the public examination of B. or C., it might be said that mischief might arise. But it is clear that if there is not at the outset a case of fraud shown against anybody but A., then B. and C., who are officials of the company, and are supposed to know something, or may perhaps be suspected of being concerned in something, which was improper, can still be summoned for examination under s. 115 of the Act of 1862. It may well be that something which transpires in the public examination of A. will show the necessity of summoning B. or C. under s. 115. If when they are examined under s. 115, it turns out that there is no cause for believing them to have been guilty of fraud, the matter will of course end there: they will have been examined, they will have given all the information they can, and no further step will be necessary. But if that leads to a prima facie case of fraud against them, they are not to be exempted in any way from a public examination; it is still open to the official receiver to make a further report about their conduct, upon which the public examination will ensue. It seems to me, therefore,

that while the construction which your Lordships' House is putting upon this section will in many cases prevent injustice, it will in no case prevent injustice being done and the fullest inquiry being made in all legitimate cases.

LORD MACNAGHTEN.—I am entirely of the same opinion.

LORD MORRIS.—I concur.

LORD SHAND. —I also concur, and I only venture to add to what has been said by LORD HERSCHELL that it occurs to me that there might be an examination of directors other than those named originally without having recourse to s. 115 of the Act of 1862. I venture to suggest that, if it appeared upon the examination of a person, A., who had been inculpated, that B. and C. were in a somewhat similar position, then the official receiver might in that case make a second or further report without having recourse to the powers under s. 115 of the Act of 1862. In all other respects I quite agree with what my noble and learned friends have said.

LORD HERSCHELL.—In consequence of what my noble and learned friend has just said, I wish to explain that I did not intend to imply that procedure under s. 115 of the Act of 1862 would be a condition precedent to any further report justifying any further order, but merely that what came out might render an examination under s. 115 desirable, and that it might be taken notwithstanding the previous report.

LORD DAVEY.—I concur.

Appeal dismissed.

Solicitor: *W. Murton*, Solicitor to the Board of Trade.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

ANDREWS *v.* GAS METER CO., LTD.

[COURT OF APPEAL (Lindley, A. L. Smith and Rigby, L.JJ.), January 28, February 6, 1897]

[Reported [1897] 1 Ch. 361; 66 L.J.Ch. 246; 76 L.T. 132; 45 W.R. 321; 13 T.L.R. 199; 41 Sol. Jo. 255]

Company—Shares—Preference shares—Issue by alteration of articles by special resolution—Power in memorandum to increase capital as provided by articles —No provision in memorandum or articles providing for priority of any shares.

A limited company was empowered by its memorandum of association to increase its capital as provided by the articles. The articles provided that the company might increase its capital, any such increase to be considered as part of the original capital and to be subject to the same provisions. There was no provision either in the memorandum or in the articles for the priority of any shares. The company altered its articles by special resolution to authorise the issue of preference shares and subsequently increased its capital by the issue of preference shares.

Held: the company had power to alter its articles by special resolution to enable it to increase its capital by the issue of preference shares; there was no

implied condition in the memorandum that all shareholders were to be on an equality; and, therefore, the issue of the preference share was valid.

Notes. Section 50 and s. 51 of the Companies Act, 1862, have been replaced by s. 10 of the Companies Act, 1948; 3 HALSBURY'S STATUTES (2nd Edn.) 469.

Considered: *Re Welsbach Incandescent Gas Light Co.*, [1904] 1 Ch. 87; *Sidebottom* v. *Kershaw, Leese & Co.*, [1920] 1 Ch. 154; *Re Powell-Cotton's Re-Settlement, Henniker-Major* v. *Powell-Cotton*, [1957] 1 All E.R. 404. Referred to: *Re Colmer*, [1897] 1 Ch. 524; *Welton* v. *Saffery*, ante p. 567; *Allen* v. *Gold Reefs of West Africa, Ltd.*, [1900-3] All E.R. Rep. 746; *Campbell* v. *Rofe*, [1933] A.C. 91.

As to the construction of contemporaneous memorandum and articles of association, see 6 HALSBURY'S LAWS (3rd Edn.) 414; and for cases see 9 DIGEST (Repl.) 9 et seq.

Cases referred to:

(1) *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. A.* (1865), 2 Drew. & Sm. 514; 5 New Rep. 503; 12 L.T. 228; 13 W.R. 574; affirmed, 4 De G.J. & Sm. 672; 6 New Rep. 10; 34 L.J.Ch. 643; 12 L.T. 289; 11 Jur.N.S. 551; 13 W.R. 631; 46 E.R 1079, L.C.; 9 Digest (Repl.) 234, *1525*.

(2) *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (1865), 2 Drew. & Sm. 521; 13 L.T. 57; 11 Jur.N.S. 849; 13 W.R. 1059; 62 E.R. 717; sub nom. *Hutton* v. *Berry*, 6 New Rep. 376; 9 Digest (Repl.) 84, *355*.

(3) *Malleson* v. *National Insurance and Guarantee Corpn.*, [1894] 1 Ch. 200; 63 L.J.Ch. 286; 70 L.T. 157; 42 W.R. 249; 10 T.L.R. 101; 38 Sol. Jo. 80; 1 Mans. 249; 8 R. 91; 9 Digest (Repl.) 353, *2258*.

(4) *Walker* v. *London Tramways Co.* (1879), 12 Ch.D. 705; 49 L.J.Ch. 23; 28 W.R. 163; 9 Digest (Repl.) 99, *441*.

(5) *Harrison* v. *Mexican Rail. Co.* (1875), L.R. 19 Eq. 358; 44 L.J.Ch. 403; 32 L.T 82; 23 W.R. 403; 9 Digest (Repl.) 234, *1523*.

(6) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 9 Digest (Repl.) 29, *6*.

(7) *Guinness* v. *Land Corpn. of Ireland* (1882), 22 Ch.D. 349; 52 L.J.Ch. 177; 47 L.T. 517; 31 W.R. 341, C.A.; 9 Digest (Repl.) 82, *349*.

(8) *Re South Durham Brewery Co.* (1885), 31 Ch.D. 261; 55 L.J.Ch. 179; 53 L.T. 928; 34 W.R. 126; 2 T.L.R. 146, C.A.; 9 Digest (Repl.) 84, *356*.

(9) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1888), 39 Ch.D. 1; 57 L.J.Ch. 809; 58 L.T. 866; 36 W.R. 769; 4 T.L.R. 547, C.A.; reversed (1889), 14 App. Cas. 525; 59 L.J.Ch. 122; 61 L.T. 621; 38 W.R. 401; 5 T.L.R. 722; 1 Meg. 372, H.L.; 10 Digest (Repl.) 1065, *7391*.

(10) *Ashbury* v. *Watson* (1885), 30 Ch.D. 376; 54 L.J.Ch. 985; 54 L.T. 27; 33 W.R. 882; 1 T.L.R. 639, C.A.; 9 Digest (Repl.) 84, *357*.

(11) *British and American Trustee and Finance Corpn.* v. *Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 42 W.R 652; 10 T.L.R. 415; 1 Mans. 256; 6 R. 146, H.L.; 9 Digest (Repl.) 151, *883*.

Also referred to in argument:

Re Guardian Permanent Benefit Building Society (1882), 23 Ch.D. 440; 52 L.J.Ch. 857; 48 L.T. 134; 32 W.R. 73, C.A.; on appeal sub nom. *Murray* v. *Scott, Agnew* v. *Murray, Brimelow* v. *Murray* (1884), 9 App. Cas. 519; 53 L.J.Ch. 745; 51 L.T. 462; 33 W.R. 173, H.L.; 7 Digest (Repl.) 479, *4*.

Re London and New York Investment Corpn., [1895] 2 Ch. 860; 64 L.J.Ch. 729; 73 L.T. 280; 44 W.R. 137; 2 Mans. 541; 13 R. 749; 9 Digest (Repl.) 156, *911*.

Appeal by the preference shareholders of the Gas Meter Co., Ltd., from a decision of KEKEWICH, J., in an action by the ordinary shareholders against the company and the preference shareholders for declarations concerning the validity of the issue of the preference shares and as to the distribution of reserves. The pre-

ference shareholders only appealed on the question as to the validity of the preference shares and made no claim as to the reserves.

The company was formed and registered as a limited company under the Companies Act, 1856, and on Oct. 24, 1862, was registered under the Companies Act, 1862. Clause 5 of the memorandum of association provided as follows :

"The nominal capital of the company is £60,000 divided into 600 shares of £100 each, every share being subdivisible into fifths, with power to increase the capital as provided by the articles of association."

The articles of association which accompanied the memorandum and were registered with it provided (by art. 27) that the company might, with the sanction of a general meeting, increase its capital; (by art. 28) that any capital raised by the creation of new shares should be considered as part of the original capital and should be subject to the same provisions in all respects as if it had been part of the original capital. But neither in the memorandum nor in the articles was there any provision for the preference or priority of any of the shares. Shares amounting to nearly £60,000 were issued as fully paid-up.

In 1865 the company purchased a business of manufacturing meters for which the company partly paid by issuing and allotting to the vendor 100 shares of £100 each fully paid-up and having a preferential dividend of 5 per cent. These shares were issued in pursuance of a special resolution passed under s. 50 and s. 51 of the Companies Act, 1862, which added to the original articles of the company the following articles which provided (inter alia) :

"Article 98. The directors may issue by way of creation of capital 100 shares of £100 each fully paid-up, bearing in manner hereinafter mentioned from Jan. 1, 1865, a preference dividend of £5 per cent. per annum to be allotted to [the vendor of the business] in part payment of the consideration for the purchase of [the business]."

"Article 99. The preference dividend of £5 per share on . . . the 100 shares . . . shall be payable out of the profits of the company for the current year so far as such . . . shall be a charge on the profits or assets of the company in any subsequent year."

"Article 100. The . . . 100 shares shall not entitle the holder thereof to vote in the company or to any participation in . . . bonuses or any dividend beyond £5 per share per annum."

"Article 101. . . . the 100 shares shall be considered and treated as no part of the paid-up share capital for the purpose of apportioning . . . bonuses."

Dividends paid on the ordinary shares since 1862 had ranged from 6 to 17½ per cent. and there were in addition reserves, of, £35,000 representing profits available for distribution among the shareholders.

Warrington, *Q.C.*, *A. R. Kirby* and *H. E. Wright* for the preference shareholders. *P. O. Lawrence*, *Q.C.*, and *Eustace Smith* for the ordinary shareholders.

Cur. adv. vult.

Feb. 6, 1897. **LINDLEY, L.J.**, read the following judgment of the court in which after stating the facts, he continued :—The question raised by the appeal is whether certain preference shares issued by a limited company as long ago as 1865 were validly issued or not. If they were not, a further question will arise, which is—what are the rights of their present holders? The company has been prosperous, and the ordinary shareholders have for years received a higher dividend than the preference shareholders. A considerable reserve has been also accumulated, and in the action which has been brought to determine the rights of the preference shareholders to this reserve fund, the learned judge has held that the creation of the preference shares was ultra vires, and that their holders never became and are not now shareholders in the company, and that they have none of the rights of share-

holders, whether preference or ordinary. He has not, however, declared more definitely what their rights are. The preference shareholders have appealed from this decision, but on the appeal they only claimed to be preference shareholders entitled to a preferential dividend of 5 per cent. Their claim to any share of the reserve fund was dropped.

The judgment against the validity of the preference shares is based upon the well-known case of *Hutton* v. *Scarborough Cliff Hotel Co., Ltd.* (1), (2), which came twice before KINDERSLEY, V.-C., in 1865, and which KEKEWICH, J., very naturally held to be binding on him. The first decision of KINDERSLEY, V.-C. (*Hutton* v. *Scarborough Cliff Hotel Co., Ltd. A.* (1)), was that a limited company which had not issued the whole of its original capital could not issue the unallotted shares as preference shares unless authorised so to do by its memorandum of association, or by its articles of association. This decision was affirmed on appeal, and was obviously correct; and would have been correct even if the whole of the original capital had been issued, and the preference shares had been new and additional capital. The company, however, afterwards passed a special resolution altering the articles and authorising an issue of preference shares. This raised an entirely different question, and led to the second decision (*Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2)). KINDERSLEY, V.-C., granted an injunction restraining the issue of the preference shares, and he held distinctly that the resolution altering the articles was ultra vires. He did so on the ground, as we understand his judgment, that there was in the memorandum of association a condition that all the shareholders should stand on an equal footing as to the receipt of dividends, and that this condition was one which could not be got rid of by a special resolution altering the articles of association under the powers conferred by ss. 50 and 51 of the Companies Act, 1862.

The judgment of KINDERSLEY, V.-C., is a little obscure, because he treats the condition as a condition of the constitution of the company, and he may have meant by that expression either the constitution as fixed by the memorandum of association or the constitution as fixed by the memorandum of association and the original articles. But unless he had meant the constitution of the company as fixed by the memorandum of association his decision is unintelligible; for, so far as the constitution depended on the articles, it clearly could be altered by special resolution under the powers conferred by s. 50 and s. 51 of that Act. A company cannot deprive itself of this power: see *Malleson* v. *National Insurance and Guarantee Corpn.* (3) and *Walker* v. *London Tramways Co.* (4). KINDERSLEY, V.-C., further seems to have been of opinion that the condition could be excluded by contemporaneous articles of association, and his decision has been so understood by succeeding judges. Accordingly, in 1875, in *Harrison* v. *Mexican Rail. Co.* (5), SIR GEORGE JESSEL, M.R., held that the condition of equality imported into the memorandum of association by the decision of KINDERSLEY, V.-C., was negatived by one of the articles of association filed with the memorandum, and which article authorised the creation of additional capital by the issue of new shares, "in such manner, to such amount, and to be with and subject to such rules, regulations, privileges, and conditions" as the company should think fit.

In our opinion, it is impossible to uphold this decision, or the view of KINDERSLEY, V.-C., himself, as to the effect of articles on the memorandum, if it is once conceded that it is a condition in the memorandum of association that there shall be equality amongst the shareholders. If the condition is really one of the conditions of the memorandum it is immaterial whether the condition is express or implied. If the memorandum of association really prescribed equality among all the shareholders, as KINDERSLEY, V.-C., held that it did, the articles of association could not override the memorandum of association in that particular: see s. 12 of the Companies Act, 1862, and *Ashbury Railway Carriage and Iron Co.* v. *Riche* (6) (L.R. 7 H.L. at p. 667), and *Guinness* v. *Land Corpn. of Ireland* (7). The departure thus made by SIR GEORGE JESSEL, M.R., from the principle on which KINDERSLEY, V.-C., based the second decision in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) was

sanctioned by the Court of Appeal in 1885 in *Re South Durham Brewery Co.* (8), and again in 1887 in *Re Bridgewater Navigation Co., Ltd.* (9), a case which, although reversed on another point, was not questioned on the point now under consideration. A

These decisions turned upon the principle that, although by s. 8 of the Companies Act, 1862, the memorandum is to state the amount of the original capital and the number of shares into which it is to be divided, yet in other respects the rights of the shareholders in respect of their shares and the terms on which additional capital may be raised are matters to be regulated by the articles of association rather than by the memorandum, and are, therefore, matters which (unless provided for by the memorandum as in *Ashbury* v. *Watson* (10)) may be determined by the company from time to time by special resolution pursuant to s. 50 of that Act. This view, however, clearly negatives the doctrine that there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shows the contrary. That proposition is, in our opinion, unsound. Its unsoundness was distinctly pointed out by LORD MACNAGHTEN in *British and American Trustee and Finance Corpn.* v. *Couper* (11). The view taken by KINDERSLEY, V.-C., cannot, in our opinion, be supported by reference to the Companies Act, 1862; and it is inconsistent with the decisions to which we have referred, and which, if wrong, can only now be set right by the House of Lords. B C D

It was, however, contended that this court, at all events, had approved and followed the decisions of KINDERSLEY, V.-C., and *Ashbury* v. *Watson* (10) was referred to on this point. In that case the memorandum of association stated that preferential shares might be created and what the preferential rights were to be; and it was held that these were conditions which could be properly introduced into the memorandum of association, and which, being introduced there, could not be afterwards departed from and be treated as articles of association capable of change. No doubt FRY, L.J., relied on *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2), to show that provisions about preference shares were conditions which could properly be inserted in the memorandum of association, but the propriety of the decision of KINDERSLEY, V.-C., in that case was not before the court, and we do not regard *Ashbury* v. *Watson* (10) as conflicting with any of the other decisions of the Court of Appeal, in which the decision of KINDERSLEY, V.-C., has been judicially considered. E F

We desire to add that we do not base our judgment in this case on the words "with power to increase the capital as provided by the articles of association," which are in the memorandum of association. That power would have existed under s. 12 of the Companies Act, 1862, if those words had not been in the memorandum. We prefer to rest our decision on the grounds above explained. But the words in the memorandum to which we are now referring certainly show that the conditions on which new capital was to be issued were not to be implied from the memorandum of association, but were to be ascertained from the articles: and as these might be changed from time to time under the powers conferred by s. 50 and s. 51 of the Companies Act, 1862, it would follow from *Harrison* v. *Mexican Rail. Co.* (5) and other cases like it that the resolutions of 1865 would be valid, even if the second decision in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) could still be regarded as good law. For the reasons, however, which we have given we are of opinion that the second decision of KINDERSLEY, V.-C., in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) was wrong, and ought not to be followed, and that the decision appealed from must be reversed and the resolutions thereby declared to be ultra vires must be declared intra vires and valid. If, by declining to follow that second decision in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) we were disturbing titles or embarrassing trade or commerce, we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case; and it is desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them, and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference G H I

shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary. We understand that there will be no dispute now as to the rights of the preference shareholders, and the costs will be provided for as arranged by the parties.

RIGBY, L.J.—There is one remark I wish to make with reference to the supposed influence of the second decision in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) during all this series of years. According to my recollection, from the very first it was looked upon as a doubtful decision, and I doubt if anyone deliberately acted upon it; but after the decision of *Harrison* v. *Mexican Rail. Co.* (5), before SIR GEORGE JESSEL, M.R., in 1875, I think it was considered extremely difficult, if not impossible, to reconcile that case with *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2). SIR GEORGE JESSEL, M.R., did not profess to overrule the principle of the earlier case, but his decision was based upon a principle which would be equally applicable in the case before KINDERSLEY, V.-C., for in *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) in the existing articles of association, a contemporaneous document with the memorandum that he was considering, were two articles, 17 and 18, one authorising an increase of capital, and the other saying, "The increased capital shall be raised from time to time in the number of shares, and of the amount and value, and, subject to these articles, on such conditions as the extraordinary general meeting shall direct." I cannot treat *Hutton* v. *Scarborough Cliff Hotel Co., Ltd. B.* (2) from the date of *Harrison* v. *Mexican Rail. Co.* (5) as being an unchallenged decision. I think it was virtually overruled from that date.

Appeal allowed.

Solicitors: *Blyth, Dutton, Hartley & Blyth.*

[*Reported by* W. C. BISS, ESQ., *Barrister-at-Law.*]

R. *v.* COX

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED (Lord Russell of Killowen, C.J., Hawkins, Mathew, Grantham and Darling, JJ.), December 11, 1897]

[Reported 77 L.T. 534; 14 T.L.R. 122; 18 Cox, C.C. 672]

Criminal Law—Indictment—Joinder—Joinder of charges against individual prisoners and charges against all the prisoners jointly.

Criminal Law—Evidence—Age—Proof—Charge of neglecting child—Need of strict proof of age.

Child—Neglect—Mens rea—Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict., c.* 41) *s.* 1.

An indictment on which several defendants are charged may contain counts charging offences against individual prisoners as well as counts charging all the prisoners jointly. If it is likely that injustice may be caused by trying all the prisoners together, the court may order them to be tried separately.

On a charge of neglecting a child under the age of sixteen years under s. 1 of the Prevention of Cruelty to Children Act, 1894 [now s. 1 of the Children and Young Persons Act, 1933], the age of the child may be proved by any lawful evidence.

Per CURIAM: The words in that section "wilfully assaults, ill-treats, neglects, abandons, or exposes" a child require that not only the assault but also the ill-treatment, neglect, etc., must be wilful.

Notes. The Prevention of Cruelty to Children Act, 1894, has been repealed. For s. 1 of that Act see now s. 1 of the Children and Young Persons Act, 1933. Presumptions as to age in any charge under that Act are contained in s. 99 thereof.

As to trial of two or more defendants, see 10 HALSBURY'S LAWS (3rd Edn.) 415; as to joinder of offences, see ibid. 392; as to neglect of children, see ibid. 760. For cases see 14 DIGEST (Repl.) 253 and 15 DIGEST (Repl.) 1036. For the Children and Young Persons Act, 1933, ss. 1, 99, see 12 HALSBURY'S STATUTES (2nd Edn.) 977, 1046.

Case referred to:

(1) *R.* v. *Kingston* (1806), 8 East, 41; 103 E.R. 259; 14 Digest (Repl.) 254, *2205*.

Also referred to in argument:

R. v. *Philips* (1731), 2 Stra. 921; 2 Barn.K.B. 80; 93 E.R. 943; 14 Digest (Repl.) 254, *2209*.

R. v. *White* (1871), L.R. 1 C.C.R. 311; 40 L.J.M.C. 134; 24 L.T. 637; 36 J.P. 134; 19 W.R. 783; 12 Cox, C.C. 83, C.C.R.; 15 Digest (Repl.) 1036, 10, 180.

R. v. *Wedge* (1832), 5 C. & P. 298; 15 Digest (Repl.) 1017, *9994*.

Case Stated by the chairman of the Worcestershire Quarter Sessions.

Frederic Cox and Isabella Cox were indicted for offences under the Prevention of Cruelty to Children Act, 1894. The indictment contained nine counts. The second charged that both the defendants,

> "being persons over the age of sixteen years respectively, and having the custody and charge of a certain child, to wit, Thomas Enoch Cox, a boy under the age of sixteen years, did unlawfully and wilfully neglect such child in a manner likely to cause such child unnecessary suffering."

The third count charged the defendants with wilfully neglecting the child in a manner likely to cause injury to his health; while the sixth, seventh, eighth, and ninth counts also charged the defendants jointly with these offences in respect of other children. The fourth and fifth counts charged the offences against Isabella Cox with respect to another child.

The defendants were husband and wife living together, but one of the children was the man's illegitimate child and another the illegitimate child of the woman. The other children were issue of the marriage. The man was a labourer, and was absent from home all day. Evidence was given at the trial by persons who had seen the children that they were in a filthy condition and infested with vermin, and that the room in which they slept and their bedding were filthy. One of the children, an infant in arms, was produced in court. With regard to the others, witnesses stated that they had seen the children and believed them to be under sixteen years of age, and the mistress of a public elementary school stated that the eldest children attended the school, and that she believed them to be within the statutory age limit for such schools. This age is "not less than five years nor more than thirteen years" (33 & 34 Vict., c. 75), s. 74 (1) [repealed]. The jury acquitted Frederic Cox, but convicted Isabella Cox. The questions for the court were (inter alia): (i) Was the indictment bad for including separate charges against each prisoner as well as joint charges against both prisoners? (ii) Was the female prisoner a person who had the custody, charge, or care of the children within the Prevention of Cruelty to Children Act, 1894, s. 1? (iii) Was there any legal evidence of the age, (a) of the children (b) of the parents, to go to the jury? Other questions were stated, but were not argued before the court.

Stamford Hutton for the prisoner.
Clarke Hall for the Crown.

LORD RUSSELL OF KILLOWEN, C.J.—This case comes before us on a Case stated by the chairman of the Worcestershire Quarter Sessions, and we have only to deal with the points on which we are asked to express our opinion. But I think

A it right to observe that it was at least open to question whether the direction given by the learned chairman to the jury which is set out in para. 11 of the Case is the proper direction. That direction was as follows:

> "I told the jury that, if they were of opinion on the evidence that the prisoners knew that the children were infested by vermin, that the presence of
B such vermin was the result of neglect or absence of reasonable care in looking after the children, and that the presence of such vermin caused the children unnecessary suffering that reasonable care would have prevented, they could convict the prisoners."

The proper direction is to follow the words of the statute, which are that, if any
C person "wilfully assaults, ill-treats, neglects, abandons, or exposes" a child, he shall be guilty of a misdemeanour. The assault must be wilful, and it follows that the ill-treatment or neglect must be wilful.

The first point on which we are asked to express our opinion is, whether the indictment is bad because it contains counts charging the defendants jointly as well as counts in which the defendants are charged singly. It is a well-established
D principle of law that there may be in one indictment against several defendants counts charging individual prisoners separately and counts charging all the prisoners jointly. This is clear from *R.* v. *Kingston* (1). It may in some cases work injustice, as where the evidence of one prisoner is necessary for the defence of another; and there may be cases in which there is some danger of the jury convicting a prisoner on evidence which is only admitted against another. But in
E such cases the court has power to order that the prisoners be tried separately.

The next question submitted to us is, was the female prisoner a person who had the custody, charge, or care of the children? There was ample evidence on which the jury might find that she had the custody and charge of the children, and whether she had the custody or charge is a question of fact, she was not indicted as a person having the care of the children. We are then asked whether there was any
F legal evidence of the age of the children, and of the parents. A certificate of birth coupled with evidence of identity is legal evidence of the age of the person mentioned in it; but that is not the only way in which the age of a person may be proved. It may be proved by any lawful evidence, and in this case there was the evidence of persons who had seen the children and evidence that the eldest attended a public elementary school. As to the age of the parents, to state the
G question is to answer it. The parents were in the dock, and the jury were able to judge from their appearance as to whether they respectively exceeded sixteen years in age.

HAWKINS, MATHEW, GRANTHAM, and **DARLING, JJ.,** concurred.

Conviction affirmed.

H Solicitors: *W. Morcton Phillips* for *Coleman & Whitcley*, Redditch; *Clarke & Blundell.*

[*Reported by* A. A. Bethune, Esq., *Barrister-at-Law.*]

SKINNER *v.* NORTHALLERTON COUNTY COURT JUDGE AND OTHERS

[HOUSE OF LORDS (The Earl of Halsbury, L.C., Lord Macnaghten, Lord Morris, Lord Shand and Lord Brampton), June 22, 1899]

[Reported [1899] A.C. 439; 68 L.J.Q.B. 896; 80 L.T. 814; 63 J.P. 756; 15 T.L.R. 433; 6 Mans. 274]

Bankruptcy—County court—Order—Quashing by certiorari.

A county court sitting in bankruptcy possesses all the powers and jurisdiction of the High Court. Consequently, an order of certiorari may not be issued to quash a decision of a county court exercising bankruptcy jurisdiction.

Decision of the Court of Appeal, [1898] 2 Q.B. 680, affirmed.

Notes. The Bankruptcy Act, 1883, s. 100, has been repealed and replaced in identical terms by the Bankruptcy Act, 1914, s. 103.

Applied: *R.* v. *Central Criminal Court Justices, Ex parte L.C.C.*, [1925] All E.R. Rep. 429. Considered: *Re Debtor (No. 29 of 1931), Ex parte Debtor* v. *Petitioning Creditors*, [1933] All E.R. Rep 749. Referred to: *Savill* v. *Dalton*, [1914-15] All E.R. Rep. 313.

As to the jurisdiction of county courts in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 253, and for cases see 4 DIGEST (Repl.) 41. For the Bankruptcy Act, 1914, s. 103, see 2 HALSBURY'S STATUTES (2nd Edn.) 415.

Appeal by the debtor, Skinner, from the decision of the Court of Appeal (A. L. SMITH, RIGBY, and VAUGHAN WILLIAMS, L.JJ.), reported [1898] 2 Q.B. 680, affirming an order of the Divisional Court (WRIGHT and DARLING, JJ.), discharging a rule nisi for a writ of certiorari.

The appellant was in embarrassed circumstances in April, 1898, and on April 12, he left his home. On April 23 a petition in Bankruptcy was presented against him in the county court of Northallerton, and evidence was given that before the presentation of the petition he had departed from his dwelling-house for the purpose of delaying his creditors, and escaping payment of his debts. On May 9 a receiving order was made, and a meeting of creditors was held on May 11 to which the debtor was summoned, but he did not attend. Application was then made to the county court judge for a warrant for the arrest of the debtor under s. 25 of the Bankruptcy Act, 1883, as amended by s. 7 of the Act of 1890 [see now s. 23 of the Bankruptcy Act, 1914]. The judge ordered a warrant to issue, but the order did not state that there was reason to believe that the debtor "had absconded or was about to abscond," but recited that he was avoiding examination and delaying the proceedings in his bankruptcy. On May 31 he was arrested and was afterwards discharged. He then obtained a rule nisi for an order for a writ of certiorari to bring up and quash the order of the county court judge upon the ground that it was made without jurisdiction, and was bad upon the face of it.

By the Bankruptcy Act, 1883, s. 100:

> "A county court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed."

Horridge and *Ryland Adkins* for the appellant.

The Solicitor-General (Sir Robert Finlay, Q.C.), Muir Mackenzie and *H. Erle Richards* for the respondents.

THE EARL OF HALSBURY, L.C.—It seems to me that this is a very plain case, and I am somewhat surprised that it should have been brought here, because

A it seems to me that the judgments below are perfectly satisfactory, and depend upon very plain principles. The county court in question is a county court which has bankruptcy jurisdiction, and had it at the moment when the order was made; although no bankrupt was there at the time, nor for some time afterwards, still it had a bankruptcy jurisdiction. Then this particular bankrupt had a bankruptcy petition presented against him, and the court, having bankruptcy jurisdiction, was B seised of that bankruptcy proceeding. Thereupon, what is done is within the jurisdiction of that court, and not within the jurisdiction of any other court.

If it were a county court proceeding properly so called, there is a section in the County Courts Act, 1888 [s. 124, now s. 107 of the County Courts Act, 1959: 39 HALSBURY'S STATUTES (2nd Edn.) 182] which, even in respect of those county courts, which have not a bankruptcy jurisdiction, prohibits the issue of a certiorari C in terms except as mentioned in the Act. I am not for the moment concerned with that, although that would dispose of it by another process. But, as a matter of fact, in respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to a county court sitting in Bankruptcy.

This county court judge was sitting in Bankruptcy, and the confusion which is imported into the case is that because, as I will assume for the moment, the judge D issued a warrant which in form was wrong, but could have been put right, therefore it should have been put right, not in the court in which it was issued, but in the High Court. The absurdity of that is that the statute itself has made the county court the High Court for this purpose. You might just as well argue that a warrant defective in form issued by the Court of Queen's Bench could be set right by certiorari. Of course that is absurd.

E This is the High Court for this purpose. If the warrant was ever so bad, it was issued by a Bankruptcy judge in respect of bankruptcy proceedings which were before him, of which he was seised, a warrant which he had perfect jurisdiction to issue. If there was any irregularity or inaccuracy in point of form in the warrant that did issue, that could be put right by proper proceedings; but the proper proceedings would be in that court itself, and not proceedings by certiorari in the F Court of Queen's Bench. That appears to me abundantly clear, and it would be wasting time to proceed further than to say that the judgment of A. L. SMITH, L.J., seems to me to put the matter perfectly clearly, and I have no desire to add anything to what he said.

G **LORD MACNAGHTEN, LORD MORRIS, LORD SHAND** and **LORD BRAMPTON** concurred.

Appeal dismissed.

Solicitors: *Sismey & Sismey*, for *Skinner, Son & Church*, Sunderland; *Sir Walter Murton*, Solicitor to the Board of Trade.

[*Reported by* C. E. MALDEN, ESQ., *Barrister-at-Law.*]

Re MACKENZIE. Ex parte SHERIFF OF HERTFORDSHIRE

[COURT OF APPEAL (Sir Nathaniel Lindley, M.R., Sir Francis Jeune, P., and Romer, L.J.), July 28, August, 4, 1899]

[Reported [1899] 2 Q.B. 566; 68 L.J.Q.B. 1003; 81 L.T. 214; 15 T.L.R. 526; 43 Sol. Jo. 704; 6 Mans. 413]

Bankruptcy—Property available for distribution—Execution by sheriff under fi. fa.—Notice to sheriff of bankruptcy petition—Payment by sheriff to landlord of arrears of rent—Landlord and Tenant Act, 1709 (8 *Anne*, *c.* 18), *s.* 1—*Bankruptcy Act*, 1890 (53 & 54 *Vict.*, *c.* 71), *s.* 11 (2).

A sheriff, who held the proceeds of a valid sale of the debtor's goods seized under a writ of fieri facias, received a notice within 14 days of the sale under s. 11 of the Bankruptcy Act, 1890, to the effect that a bankruptcy petition had been presented against the debtor. After receiving the notice he paid out of the proceeds of execution a claim by the debtor's landlord for one quarter's rent owed to the landlord by the debtor.

Held: s. 11 (2) of the Bankruptcy Act, 1890, did not take away the rights given to a landlord by s. 1 of the Landlord and Tenant Act, 1709, and, therefore, the sheriff was entitled to pay the debtor's arrears of rent to the landlord out of the proceeds of the execution before handing them over to the official receiver.

Per CURIAM: The Bankruptcy Acts deprive the landlord of these rights in one case only, viz., where the execution is itself overridden and rendered void by the bankruptcy.

Notes. Section 11 (2) of the Bankruptcy Act, 1890, was replaced by s. 41 (2) of the Bankruptcy Act, 1914.

Considered: *Re Craig, Ex parte Hinchcliffe*, [1916] 2 K.B. 497; *Re British Salicylates*, [1919] 2 Ch. 155. Referred to: *Re Driver, Ex parte Official Receiver* (1899), 80 L.T. 840; *Re Eastcheap Alimentary Products, Ltd.*, [1936] 3 All E.R. 276; *Potts* v. *Hickman*, [1940] 4 All E.R. 49.

As to restrictions on removal of goods by sheriff and as to payment of rent, rates and taxes by sheriff, see 16 HALSBURY'S LAWS (3rd Edn.) 53 et seq.; for cases see 18 Digest (Repl.) 333, 334, and 21 Digest (Repl.) 614. For the Bankruptcy Act, 1914, s. 41 (2), see 2 HALSBURY'S STATUTES (2nd Edn.) 378, and for the Landlord and Tenant Act, 1709, s. 1, see 13 HALSBURY'S STATUTES (2nd Edn.) 846.

Cases referred to:

(1) *Re McCarthy* (1881), 7 L.R.Ir. 473; 21 Digest (Repl.) 616, **771.*
(2) *Anon* (1740), 1 Atk. 102; 26 E.R. 67, L.C.; 4 Digest (Repl.) 515, *4531.*
(3) *Briggs* v. *Sowry* (1841), 8 M. & W. 729; 11 L.J.Ex. 193; 151 E.R. 1234; 5 Digest (Repl.) 1029, *8321.*
(4) *Wharton* v. *Naylor* (1848), 6 Dow. & L. 136; 12 Q.B. 673; 17 L.J.Q.B. 278; 12 L.T.O.S. 43; 12 Jur. 894; 116 E.R. 1023; 18 Digest (Repl.) 332, *791.*
(5) *Waring* v. *Dewberry* (1718), 1 Stra. 97; Fortes. Rep. 360; 93 E.R. 408; 18 Digest (Repl.) 336, *833.*
(6) *Palgrave* v. *Windham* (1719), 1 Stra. 212; 93 E.R. 478; 18 Digest (Repl.) 335, *814.*
(7) *Arnitt* v. *Garnett* (1820), 3 B. & Ald. 440; 106 E.R. 724; 18 Digest (Repl.) 336, *835.*
(8) *Riseley* v. *Ryle* (1843), 11 M. & W. 16; 12 L.J.Ex. 322; 152 E.R. 697; 18 Digest (Repl.) 338, *858.*
(9) *Andrews* v. *Dixon* (1820), 3 B. & Ald. 645; 160 E.R. 797; 18 Digest (Repl.) 336, *836.*

(10) *Colyer* v. *Speer* (1820), 2 Brod. & Bing. 67; 4 Moo. C.P. 473; 129 E.R. 882; 18 Digest (Repl.) 336, *826.*

(11) *Green* v. *Austin* (1812), 3 Camp. 260, N.P.; 18 Digest (Repl.) 336, *830.*

(12) *Thomas* v. *Mirehouse* (1887), 19 Q.B.D. 563; 56 L.J.Q.B. 653; 36 W.R. 104; 3 T.L.R. 804, D.C.; 18 Digest (Repl.) 333, *801.*

(13) *Cocker* v. *Musgrove* (1846), 9 Q.B. 223; 1 New Pract. Cas. 419; 15 L.J.Q.B. 365; 7 L.T.O.S. 254; 10 Jur. 922; 18 Digest (Repl.) 334, *804.*

(14) *Wintle* v. *Freeman* (1841), 11 Ad. & El. 539; 1 Gal. & Dav. 93; 10 L.J.Q.B. 161; 5 Jur. 960; 113 E.R. 520; 21 Digest (Repl.) 626, *1138.*

(15) *Henchett* v. *Kimpson* (1762), 2 Wils. 140; 95 E.R. 731; 21 Digest (Repl.) 615, *1021.*

(16) *Yates* v. *Rutledge* (1860), 5 H. & N. 249; 29 L.J.Ex. 117; 18 Digest (Repl.) 335, *813.*

(17) *Lee* v. *Lopes* (1812), 15 East, 230; 1 Rose, 342; 104 E.R. 831; 5 Digest (Repl.) 885, *7370.*

(18) *Gethin* v. *Wilks*, *Gale* v. *Wilks* (1833), 2 Dowl. 189; 5 Digest (Repl.) 1031, *8339.*

(19) *Duck* v. *Braddyll* (1824), 13 Price, 455; M'Cle. 217; 147 E.R. 1047; 18 Digest (Repl.) 284, *317.*

Also referred to in argument:

Re Hudson (1877), 1 L.R.Ir. 6; 5 Digest (Repl.) 889, **3579.*

Re Wells, Ex parte Sheriff of Kent (1893), 68 L.T. 231; 9 T.L.R. 228; 37 Sol. Jo. 288; 10 Morr. 69; 5 R. 226; 5 Digest (Repl.) 892, *7417.*

Appeal by the sheriff of Hertfordshire from an order of the Divisional Court (WRIGHT and BIGHAM, JJ.), affirming the decision of the Edmonton County Court.

On Aug. 19, 1898, the sheriff seized the goods of the debtor, Neil Mackenzie, under a writ of fieri facias, and sold them on Sept. 14, 1898. On Sept. 15 the debtor committed an act of bankruptcy. On Sept. 16 notice of the presentation of a bankruptcy petition against the debtor was given to the sheriff. On Oct. 6 the debtor's landlord gave notice to the sheriff that he claimed a sum of £32 10s., being one quarter's rent due at Michaelmas, 1898, of the premises on which the execution had taken place. On Oct. 12 the official receiver, in accordance with s. 11 of the Bankruptcy Act, 1890, served the sheriff with a formal notice of the petition and receiving order, and a demand for delivery-up of the goods seized or payment of the proceeds of the sale. On Oct. 22 the sheriff out of the proceeds of the execution, and notwithstanding the notice from the official receiver, paid the landlord his quarter's rent, £32 10s., and the rest of the proceeds to the trustee in the bankruptcy. On Feb. 14, 1899, the County Court judge made an order declaring that the sheriff was liable to pay to the trustee the £32 10s. and directing him to pay the same personally. On the appeal of the sheriff to the Divisional Court on June 15, 1899, the decision of the County Court judge was affirmed, and the appeal was dismissed with costs. The sheriff appealed.

By the Landlord and Tenant Act, 1709, s. 1:

"No goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking of such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judg-

ment as he might have done before the making of this Act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money."

By the Bankruptcy Act, 1890, s. 11 (2):

"Where under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of the sale or money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, the trustee, who shall be entitled to retain the same as against the execution creditor."

Danckwerts and *R. D. Muir* for the sheriff.
Muir Mackenzie and *H. Lynn* for the trustee in bankruptcy.

Cur. adv. vult.

Aug. 4, 1899. **SIR NATHANIEL LINDLEY, M.R.,** read the following judgment of the court.—It will be convenient to consider (i) the rights of a landlord as against his tenant's trustee in bankruptcy where there is no execution against the tenant; (ii) the rights of a landlord against a sheriff who has seized the tenant's goods where there is no bankruptcy; (iii) the rights of a landlord and of the sheriff where the goods of the tenant have been seized by the sheriff under an execution and the tenant has afterwards become bankrupt.

(i) The bankruptcy of a tenant does not prevent a distress by the landlord. It was long ago decided that a commission of bankruptcy and possession by the assignees or the messenger did not place the tenant's goods in custodia legis so as to protect them from distress: GILBERT ON DISTRESS (3rd Edn.) 44; *Anon* (2); and *Briggs* v. *Sowry* (3). If the landlord, having power to distrain, did not distrain and the goods were removed by the assignees, he could prove for his rent, and that was his only remedy: (ibid.). Modern Bankruptcy Acts have not altered the law in this respect except that they have limited the right to distrain after bankruptcy to rent accruing six months or less before the date of the order of adjudication: Bankruptcy Act, 1883, s. 42, as amended by the Bankruptcy Act, 1890, s. 28 [see now s. 35 of the Bankruptcy Act, 1914]. Nothing in the present case turns on this limitation.

(ii) Next as to executions. A tenant's goods, seized by a sheriff under writ of execution, could not be distrained for rent. They were said to be in custodia legis and protected from seizure by the landlord: GILBERT ON DISTRESS (3rd Edn.) 40; *Wharton* v. *Naylor* (4). Nor could he, before the Landlord and Tenant Act, 1709, by giving the sheriff notice or otherwise, obtain payment by the sheriff out of the moneys realised by him by the sale of the goods seized. The law in this respect was, however, altered by the Landlord and Tenant Act. 1709, s. 1. This statute did not give the landlord a right to distrain, but it prohibited the removal of the goods seized by the sheriff until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditor. The Act was so worded as to raise the question whether it imposed upon the sheriff the duty of ascertaining whether any rent was in arrear or not before allowing the goods seized to be removed; but it was early decided that it was not the sheriff's duty to inquire, and that he was under no liability to the landlord for not keeping the goods unless informed that rent was due: GILBERT ON DISTRESS (3rd Edn.) 41; *Waring* v. *Dewberry* (5); *Palgrave* v. *Windham* (6); *Arnitt* v. *Garnett* (7).

But if the sheriff had notice before the goods were removed that rent was due to the landlord, and the sheriff, nevertheless, did not keep the goods on the premises, but sold them without paying the landlord, the sheriff was liable to an action by

A the landlord for the wrongful removal: *Riseley* v. *Ryle* (8); *Andrews* v. *Dixon* (9); *Colyer* v. *Speer* (10). The Act in effect impounded the goods for the landlord's benefit; they could not be removed until he was paid. To this extent the Act in terms gave him a right to have them preserved as a security for one year's arrears due to him. He could not, however, require them to be sold for his benefit; and
B if they were sold he could not maintain an action against the sheriff for money had and received: *Green* v. *Austin* (11). His remedy was by an action on the statute for wrongful removal without paying him: see a form of declaration, 2 Chitty on Pleading, 629. If the execution creditor chose to pay the landlord, the goods were sold by the sheriff and he applied the proceeds in paying his own expenses and the judgment debt and the amount paid by the execution creditor to the land-
C lord for the rent in arrear. The Act itself authorised this. But unless the execution creditor or the tenant paid the landlord his rent in arrear (not exceeding one year's arrears), the Act might produce a deadlock. If the sheriff sold the goods and they were removed, he was liable to an action by the landlord: see as to the damages recoverable *Thomas* v. *Mirehouse* (12). So long as the landlord was unpaid, the sheriff could not be compelled to sell the goods; and an action by an execution
D creditor for not selling could not be sustained against him: *Cocker* v. *Musgrove* (13). The sheriff might retain possession; but when it became plain that no one would pay the landlord, the sheriff could withdraw and return nulla bona to the writ: see *Thomas* v. *Mirehouse* (12) and *Wintle* v. *Freeman* (14). As soon as he withdrew the landlord could distrain for his whole rent in arrear. Such were the strict rights of the parties.

E But now, suppose the sheriff sold and deprived the landlord of what was practically his lien on the goods, and then, to save himself from an action by the landlord, paid him out of the proceeds of the sale or handed the proceeds of the sale to him in part discharge of the rent due to him. Strictly speaking, this would be irregular unless the landlord consented; but, even if he did not, still no one would be damnified if the sale was fairly conducted. The landlord would have
F nothing to complain of, for he would get his money, so far at all events as the goods seized could be made available for his payment. The execution debtor would not be damnified, for he owed the rent and he could not get his goods without paying it. The execution creditor would not be damnified, for he could not get paid without satisfying the landlord. Hence it became the practice for the sheriff to sell and to pay the landlord; and it was held that, if the sheriff sold without paying the
G landlord, the landlord, instead of bringing an action against the sheriff on the statute, might apply to the court for and obtain a rule—i.e., an order for payment out of the proceeds of sale—*Henchett* v. *Kimpson* (15); *Arnitt* v. *Garnett* (7). This mode of procedure became the common practice, and if the sheriff had notice of the landlord's claim before the proceeds of sale were parted with the landlord could, if in time, obtain payment out of the proceeds (*Yates* v. *Ratledge* (16)); and
H if too late he could sue the sheriff for removing the goods without paying him: *Andrews* v. *Dixon* (9). The right of the landlord to be paid out of the proceeds of the sale thus became recognised and established where no bankruptcy intervened.

(iii) Do the Bankruptcy Acts deprive the landlord of the right acquired in the manner above described? In one case we think they do, but only in one, viz., where the execution is itself overridden and rendered void by the bankruptcy and
I the landlord has not distrained: see *Lee* v. *Lopes* (17); *Gethin* v. *Wilks* (18). In the present case the execution is not overridden so as to make it and the sale under it invalid. Section 1 of the Bankruptcy Act, 1890, is qualified by s. 46 (3) of the Bankruptcy Act, 1883 [see now s. 1 (1) (e) of the Bankruptcy Act, 1914], and the landlord was prevented by the execution from distraining. There is no provision in the Bankruptcy Acts which can deprive the sheriff of his right or the landlord of his unless it be s. 11 of the Bankruptcy Act, 1890. Sub-section (1) of that section does not apply, for the sale preceded the notice of the receiving order. But we are by no means satisfied that s. 11 (1), which is a general enactment, repeals the

Landlord and Tenant Act, 1709, which is a special enactment applicable to a particular case. Section 11 (2), is the enactment which is relied upon in this case against the sheriff. But this section has not, in our opinion, rendered it wrong for him to pay the landlord that which the sheriff had a right to pay him for his own indemnity and that which the landlord had a right to have paid him in lieu of his right to sue under the Act of 1709. There is not a word in the sub-section which shows that the special case provided for by the Act of 1709 was being dealt with, and the concluding words of the clause tend strongly to show that it was not. The expression "goods of a debtor" is used, but there is nothing to show that the enactment applies to goods of a debtor which are subject to the rights of persons other than the execution debtor and execution creditor, and to override such rights.

The section deals with the rights of the execution creditor, the execution debtor, and the sheriff, when he has no legal duties to third parties; but the section is limited to ordinary cases of execution. Goods which belong to a judgment debtor, and are seized by the sheriff, but which are impounded by the Landlord and Tenant Act, 1709, until the landlord is paid, are not "goods of a debtor" which have to be handed over by the sheriff to the trustee in bankruptcy under s. 11 of the Bankruptcy Act, 1890. Nor are the proceeds of sale of such goods to be handed over free from the rights of the landlord or of the sheriff for his own indemnity. Even if the trustee in bankruptcy can require the sheriff to hand over the goods or proceeds, we see nothing to displace the right of the landlord under the Act of 1709 to have those goods kept unremoved or his right sanctioned by long practice to be paid out of the proceeds if they have been removed and sold contrary to the statute.

This was the conclusion arrived at by the Court of Appeal in Ireland in *Re M'Carthy* (1), and is in accordance with *Duck* v. *Braddyll* (19), if we understand that case rightly. The judgment in *Re M'Carthy* (1) really concludes this case, so far as an Irish decision can conclude an English one on similar Acts of Parliament. But as *Re M'Carthy* (1) is not technically binding on this court, we have thought it necessary to look into the authorities, and, having done so, we have come to the conclusion that that decision is in accordance with the English Bankruptcy Acts, and we follow it accordingly. It is said that *Gethin* v. *Wilks* (18) is opposed to this view. We can understand that case if the execution was over-reached by the bankruptcy so that the landlord could distrain, but it is unintelligible unless this were the case. The execution was clearly treated as void, and that is the explanation of the case. *Lee* v. *Lopes* (17) is open to the same observation, but, in addition, the landlord was the execution creditor, and had by issuing execution lost his right to distrain and the benefit of the statute.

The conclusion thus arrived at is in accordance with common sense. The trustee in bankruptcy claims the proceeds of the sale of the goods which have been properly sold only if the landlord is to be paid out of the proceeds—the trustee can only claim the benefit of the sale subject to those rights. The sheriff has paid the landlord, and is entitled to deduct the amount before he pays over the balance to the trustee. The appeal must be allowed with costs here and below.

Solicitors: *Paterson, Snow & Bloxham; Wetherfield, Son & Baines.*

[*Reported by* W. C. Biss, Esq., *Barrister-at-Law.*]

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